

## **Lack of FBI taping issue in Nichols' trial**

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McALESTER-The FBI rarely tape-records interviews of suspects despite facing widespread criticism for years, including after Terry Nichols' 1997 federal trial.

"Recording is permissible on a limited, highly selective basis and only when authorized by the special agent in charge," FBI officials said.

The issue is coming up again at Nichols' state murder trial.

FBI agents interrogated Nichols for more than nine hours in the basement of the Herington, Kan., Public Safety Department in the days after the 1995 Oklahoma City bombing.

"I'd like to say there was a tape recording of it, but there isn't," Nichols' lead attorney, Brian Hermanson, said in his opening statement last week.

Jurors at the state trial were told they will hear more later about the FBI's long-standing reluctance to record suspect interviews.

"It seems arrogant to me on the part of the FBI to say, you know, 'We have good recall, and you can take what we have said,'" the jury forewoman in Nichols' federal trial said in 1998.

"That would have made a difference to us as a jury," forewoman Niki Deutchman said of a tape recording. "We regretted that every single day."

The federal jury found Nichols guilty of the bombing conspiracy, but acquitted him of any direct blame for the attack. That jury also found him guilty of involuntary manslaughter instead of murder for the deaths of eight federal agents.

His state murder case focuses on the 160 others who died as a result of the explosion plus the loss of a fetus.

Issue for defense

Defense attorneys and legal experts do not expect the FBI to change its practice anytime soon even though many police departments routinely record suspect interviews.

"I've been dealing with this for years," said Mack Martin, a prominent Oklahoma City defense attorney.

"The FBI comes to see you," he said. "You're a target of an investigation. There's going to be two agents. One of them will take notes. Either one of them can testify so it's two against one. They can say whatever they want.

"You've got good agents out there. I'm not saying they're all bad ... but there are times they can tweak their testimony a little bit. Who's going to contradict it? There is sure as hell no tape there to contradict it."

At his Senate confirmation hearings in 2001, FBI Director Robert Mueller said there was no "hard and fast rule" against recording interviews.

"We will continue to look at it, particularly in an instance where it is important that a confession or critical evidence relating to a terrorist attack needs to be deciphered accurately with no room for error," he said then.

Still, the FBI's official position today is tape recording, while not prohibited, must be done sparingly.

"It can inhibit full and frank discussion or can end an interview entirely" if done "precipitously" or when a witness opposes it, the FBI said.

"It would unduly burden ongoing criminal investigations and impede law enforcement responses to fast-breaking criminal events to require that all witness statements be recorded."

The FBI practice has been upheld in courts.

In one case, a San Diego attorney argued a bank robber's due process rights were violated because the FBI didn't record his confession.

"We are now at a time where electronic recording devices have become commonplace and are being utilized in every facet of our personal and professional lives - except for the interrogation room; a place where such devices are readily available," attorney Matthew Winter argued. "There is no excuse."

The 9th U.S. Circuit Court of Appeals last year found "no legal basis for imposing such a requirement" even though it called forceful the argument that it would be wise policy.

Letter to McVeigh

The issue is key in the Nichols' case because FBI agents insist he had no explanation when they confronted him with his letter to Timothy McVeigh.

In the 1994 letter, Nichols wrote: "Your (sic) On Your Own. Go For IT!!" and "As Far As Heat - None That I Know."

At the federal trial, defense attorney Ron Woods suggested FBI agents hadn't really asked Nichols about what he meant by the letter.

Caption:

Photo 1: Relatives of the bombing victims pause on the courthouse steps. From left are Doris Jones of Norman, Darlene Welch of Guthrie and Rosie and Roy Sells of Oklahoma City. - ASSOCIATED PRESS

Photo 2 (Drive edition): Terry Nichols, left, and his lead defense attorney, Brian Hermanson, listen to testimony Tuesday at the Pittsburg County Courthouse in McAlester. Nichols is on trial in the April 19, 1995, bombing of the Alfred P. Murrah Federal Building. - ARTIST'S SKETCH