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REPORT BY THE OFFICE OF THE INSPECTOR GENERAL OF THE DEPARTMENT OF JUSTICE ON THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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REPORT BY THE OFFICE OF THE INSPECTOR GENERAL OF THE DEPARTMENT OF JUSTICE ON THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS

WEDNESDAY, APRIL 14, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:09 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Johnson, Cohen, Chu, Sensenbrenner, and King.

Staff present: (Majority) David Lachmann, Subcommittee Chief of Staff; Elliot Mincberg, Counsel; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. I will begin by recognizing myself for an opening statement.

Today's hearing examines the latest report by the inspector general of the Justice Department on the use of exigent letters and other informal requests for telephone records by the Federal Bureau of Investigation. This report follows two earlier reports by the IG's office in March 2007 and March 2008 on the use of national security letters, which did not look at the use of exigent letters in depth.

This latest report does just that. The findings are disturbing. They detail hundreds of instances in which the FBI violated the law and its own internal rules concerning the collection of telephone records. The inspector general identified violations of the Electronic Communications Privacy Act, otherwise known as ECPA, as well as of the USA PATRIOT Improvement and Reauthorization Act of 2005.

Even more disturbing, this is not the first time we have had to have the inspector general and the FBI here to explain why the law was violated, why the privacy of law-abiding Americans was il-

legally invaded, and at this point why repeated assurances that the problem was solved apparently amounted to very little.

While it should be reassuring that the practice of issuing exigent letters has been stopped, the reckless disregard for the law and for the privacy rights of the American people does not bode well for the future. We have laws for a reason, and it is not reassuring to have the IG come here yet again to tell us that those responsible for enforcing the laws appear to have a problem with obeying the law. That is unacceptable.

The people who wrote our Constitution did not believe that trust and assurances were sufficient to protect our rights. The government is required under our Constitution to answer to an independent judiciary before it can invade our privacy. To the extent that the Fourth Amendment has been found not to reach certain surveillance, Congress has attempted to enact legislation to balance the needs of law enforcement with the rights of individuals. Self-regulation, however, as the founders correctly understood, provides poor protection for our rights.

In addition to examining the IG's findings and how the FBI intends to respond to those findings, the Subcommittee will be reviewing the current status of the Electronic Communications Privacy Act to determine whether technological advances over the years require that we update the act and whether we must amend the act perhaps with criminal sanctions to avoid government officials acting in total contempt of the law and of the legitimate privacy rights of law-abiding citizens. But that is a matter for another day.

For today I want to welcome our witnesses, and I look forward to your testimony.

I yield back the balance of my time, and the Chair will now recognize the distinguished Ranking Member for 5 minutes for an opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

A series of reports issued by the Department of Justice Office of Inspector General most recently this January indicate that between 2002 and 2006 consumer records held by telephone companies have been provided to the FBI through the use of exigent letters. There are other informal methods that fell outside the national security letter process embodied in statute and internal FBI processes.

The purpose of this hearing is to examine the IG's January 2010 report, which focuses on the existence and use of exigent letters, which were presented to telecommunications providers in lieu of the national security letters or Federal grand jury subpoenas.

These letters requested the production of telephone records in conjunction with an assertion that legal process would follow. This practice circumvented the law that authorizes the use of national security letters for obtaining these types of records, which I would note consist of business records and not the content of any telephone communications.

The practice of using exigent letters was stopped approximately 3½ years ago. While the inspector general faulted the FBI and specific members of the FBI management and supervisory ranks for poor managerial and supervisory oversight, there was no finding of criminal intent. While the use of these letters did circumvent the

law, the IG found no intentional criminal activity on the part of any FBI employee.

As a matter of routine, the findings of this inspector general investigation were presented to DOJ's Criminal Division for a prosecutive opinion. The DOJ declined prosecution. Now that the inspector general report has been issued, the FBI employees involved are still subject to discipline from the Office of Professional Responsibility.

Now, there is no excuse for a failure to violate either the law or internal Justice Department policy, but there is context. First, the inspector general did recognize that some, but not all, of the FBI's requests may have been made in circumstances that qualified as emergency under the applicable emergency voluntary disclosure provision. For example, exigent letters and other formal requests were used to obtain records in connection with the investigation of a terrorist plot to detonate explosives.

Second, the IG noted that inaccurate statements may have been nonmaterial to a FISA application. Third, the IG notes that after it issued its first national security letter report from March of 2007, the FBI took several appropriate actions to address the problem created by exigent letters.

The FBI ended the use of exigent letters, issued clear guidance on the proper use of NSLs and the Electronic Communications Privacy Act emergency voluntary disclosure statute and conducted an audit of NSLs issued by Field and Headquarters Division from 2003 to 2006.

The FBI also directed that its personnel be trained on NSL authority, agreed to move the communications services employees off the FBI premises, and extended significant efforts to determine whether improperly obtained records could be retained or purged from FBI databases.

The IG also found that the FBI's approach to determine which records to retain and which to purge was reasonable, and that the review process and other corrective measures issued since the issuance of the inspector general's first NSL report in March of 2007 may have been reasonable.

Finally, the inspector general made it clear that it recognized that the FBI was confronting major organizational and operational challenges during the period covered by our review. Following the September 11 attack, the FBI overhauled counterterrorism operations, expansion of its intelligence capabilities, and began to upgrade its information technology system.

Throughout the 4-year period covered by this review, the Counterterrorism Division was also responsible for resolving hundreds of threats each year, some of which, such as bomb threats, are threats to significant national events needed to be evaluated quickly. Many of these threats, whether linked to domestic or international terrorism, resulted from a large number of high-priority requests of the Communications Analysis Unit.

Members of the FBI senior leadership told us they placed great demands on the Communications Analysis Unit and other headquarters units. The FBI director stated that he placed tremendous pressure on personnel to respond to terrorism threats. Other senior FBI officials stated that there were countless days when head-

quarters personnel worked through the night and on weekends to determine whether information the FBI received from various sources presented threats to the United States.

Indeed, some of the exigent letters and other important practices we described in this report were used to obtain telephone records that the FBI used to evaluate some of the more serious terrorist plots posed to the United States in the last few years. In our view these circumstances provide important context for the inspector general's report.

I look forward to hearing from our witnesses today.

Mr. NADLER. I thank the gentleman.

I will now recognize for 5 minutes for the purpose of an opening statement the distinguished Chairman of the Judiciary Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Chairman Nadler. I want to commend you and your Ranking Member, Jim Sensenbrenner, because this is a very important hearing.

And we have an interesting situation here. The inspector general here, the Honorable Glenn Fine of the Department of Justice, has a reputation as one of the most effective inspector generalqs in the practice. And I think what we have here is something that needs further probing.

I commend Jim Sensenbrenner. Because of him we did not remove from the PATRIOT Act the provision that the inspector general report—that the inspector general's office shall review information and complaints and submit to the Committee on the Judiciary the very nature of the matters that we have before us.

I am outraged that somebody in the FBI would invent the term "indigent letters"—"exigent letters"—invent it. It is not in the PATRIOT Act. It never has been. And its use, perhaps coincidentally, began in the same month that Ms. Valerie Caproni began her work as general counsel.

It took 3 years for us to find out that this practice had been going on, and I think that what these hearings—this one, the one before—have demonstrated to me is that there must be further investigation as to who and where and how somebody in the Federal Bureau of Investigation could invent a practice and have it allowed to be going on for 3 consecutive years.

And so I propose that I hope that this Committee and its leadership will join me, because I think that there may be grounds for removal of the general counsel of the FBI. And certainly, there has obviously got to be some disciplinary action from the Office of Professional Responsibility.

What is this? How can we be listening to this kind of illegal conduct going on by the law officers of the Department of Justice, and we are talking about it as an accident, it is a mistake, it was an oversight? And this is an invented, illegal act.

And I hope that somebody else on this Committee will join us in this investigation. I have already secured the agreement of cooperation from its Chairman. I have not had the opportunity to discuss this with Mr. Sensenbrenner or Mr. Steve King, too, or anybody else on the Committee. And I intend to do that.

I yield back my time.

Mr. NADLER. I thank you, Mr. Chairman.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Congressman Henry C. "Hank" Johnson, Jr.
Statement for the Hearing on the FBI's Use of Exigent Letters and Other Informal Requests for Telephone Records
April 14, 2010

Thank you, Mr. Chairman, for holding this important hearing on the FBI's use of exigent letters and other informal requests to obtain telephone records today.

This hearing will give us the opportunity to examine how the FBI's practice of using exigent letters evolved, how widespread it became, and the management failures that allowed this practice to allegedly circumvent the requirements of the Electronic Communications Privacy Act.

The use of exigent letters at the FBI began shortly after the terrorist attacks of September 11, 2001, in connection with the FBI's criminal investigation of those attacks. No one will disagree that national security is a top priority for our nation. Although it may be challenging, we must find the proper balance of constitutional rights and national security.

Exigent letters have been used by the FBI to obtain information on American citizens from American corporations. Through exigent letters, companies such as AT&T, Verizon, and MCI have provided the FBI with telephone records on American citizens. These records included the date, time, duration, and recipient of the phone call.

I am deeply concerned about the assertions that have been made. It has been alleged that the FBI's practice of using exigent letters circumvented the requirements of the Electronic Communications Privacy Act statute, and also violated Attorney General Guidelines and FBI policy.

There is also concern that the use of so-called exigent letters may be unconstitutional in violation of the Fourth Amendment. All of the 700 plus exigent letters the FBI issued between 2003 and 2006 stated that there were exigent circumstances, but did not describe the exigency. In some circumstances, there was no emergency.

Many of the letters stated that federal grand jury subpoenas had been requested for the records. In fact, no such request for grand jury subpoenas had been made, and no one intended that such a request would be made. This worries me.

According to the January 2010 report, the Office of the Inspector General found that the FBI obtained telephone records by email, face to face, on post-it notes, and by telephone without legal process. If this is indeed true, Congress should act to show that such conduct cannot, and will not, be tolerated.

While these letters could have been important investigative tools for the FBI to carry out its counterterrorism mission, they should have been used lawfully. It is important to ensure that any future process to obtain information on American citizens be used in compliance with applicable statutes, Attorney General Guidelines, and FBI policies.

I am eager to hear how the FBI plans to conduct oversight in the future. I am also anxious to hear how the FBI thinks Congress should proceed in exercising its own oversight role. I also look forward to hearing about the relation to accuracy procedures for the Foreign Intelligence Surveillance Act applications.

I thank the Chairman for holding this hearing today, and I hope our witnesses will be able to illuminate us on these and other questions related to this subject.

Mr. NADLER. We will now turn to our witnesses. As we ask questions of our witnesses, the Chair will recognize Members in order of their seniority in the Subcommittee and alternating between majority and minority, provided that the Member is present when his or her turn arrives. Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

We have only two witnesses today. First is Glenn Fine, who was confirmed as the inspector general for the Department of Justice on December 15, 2000. Mr. Fine had worked at the Department of Justice Office of the Inspector General since January 1995, initially as special counsel to the IG. In 1996 he became the director of the OIG Special Investigations and Review Unit.

Before joining the OIG, Mr. Fine was an attorney specializing in labor and employment law at a law firm in Washington, D.C. Prior to that, in 1986 to 1989, Mr. Fine served as an assistant U.S. attorney in the Washington, D.C., U.S. Attorney's Office.

Mr. Fine graduated magna cum laude from Harvard College, was a Rhodes scholar, earning a BA and MA degree from Oxford University, and received his law degree magna cum laude from Harvard Law School.

Valerie Caproni has been the general counsel for the FBI since 2003. In 1985 Ms. Caproni became an assistant U.S. attorney in the Criminal Division of the United States Attorney's Office Eastern District of New York, where she would subsequently serve as chief of special prosecutions and chief of the organized crime and racketeering section before becoming chief of the criminal division in 1994.

In 1998 she became the regional director of the Pacific Regional Office of the Securities and Exchange Commission. She served there until 2001, when she joined the firm of Simpson Thacher & Bartlett, where she worked until her appointment as general counsel by Director Mueller.

She graduated magna cum laude from Newcomb College of Tulane University and received her JD summa cum laude from the University of Georgia.

I am pleased to welcome both of you. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at the table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses, if you would please stand and raise your right hand to take the oath.

Let the record reflect that the witnesses answered in the affirmative.

You may be seated.

Our first witness, whom I will recognize for an opening statement, will be Inspector General Fine.

TESTIMONY OF THE HONORABLE GLENN FINE, INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE; MS. VALERIE CAPRONI, GENERAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION

Mr. FINE. Mr. Chairman, Ranking Member Sensenbrenner, Members of the Committee——

Mr. NADLER. Could you use your mic a little closer? Thank you.

Mr. FINE. Thank you for inviting me to testify about the OIG's recent report examining the FBI's use of exigent letters and other informal requests to obtain telephone records. The OIG completed two previous reports in 2007 and 2008 which described the FBI's misuse of national security letters and which also noted the FBI's practice of issuing exigent letters.

In our most recent report that was issued in January 2010 and that is the subject of this hearing, we examined in depth the use of exigent letters, which requested telephone records based on alleged exigent circumstances. We also identified other informal ways by which the FBI obtains telephone records. In my testimony today I will briefly summarize the findings of our report, our recommendations, and the FBI's response to them.

Our report found that from March 2003 to November 2006, FBI personnel in the Communications Analysis Unit (CAU), issued at least 722 exigent letters for more than 2,000 telephone records to the three telecommunications service providers located at the FBI.

We found that, contrary to the statements in the letters, emergency circumstances were not present when many of the letters were issued. Also contrary to the letters, in most cases subpoenas had not been sought for the records. In addition, our investigation found widespread use of even more informal requests for telephone records in lieu of appropriate legal process or qualifying emergency.

For example, rather than using national security letters, other legal process, or even exigent letters, FBI personnel frequently sought and received telephone records based on informal requests they made to the onsite telecommunication employees by e-mail, by telephone, face to face, and even on Post-it notes. FBI personnel made these kinds of informal requests for records associated with at least 3,500 telephone numbers, although we could not determine the full scope of this practice because of the FBI's inadequate record-keeping.

The FBI also received information about telephone records from so-called "sneak peeks," whereby the company employees would check their records and give the FBI a preview of the available information for phone numbers or a synopsis of the records without any legal process or documentation of the request.

Our investigation identified other troubling practices related to FBI requests for telephone records, such as community of interest requests, requests on hot numbers without any legal process, and misuse of administrative subpoenas.

Our report also details three FBI media leak investigations in which the FBI sought telephone toll billing records or other calling activity information for telephone numbers assigned to reporters without first obtaining the approvals from the Attorney General that are required by Federal regulation and Department of Justice policy.

Our report concluded that the exigent letters and other informal requests for telephone records represented a significant breakdown in the FBI's responsibility to comply with the law, Attorney General guidelines, and FBI policy.

Our report also analyzed the attempts made by the FBI from 2003 through March 2007, when we issued our first NFL report, to address these practices. We concluded that during this time period, the FBI's corrective actions were seriously deficient, ill-conceived, and poorly executed. For example, the FBI issued legally deficient blanket national security letters in an attempt to cover or validate prior telephone records requests.

By contrast, we concluded that after our first report was issued in 2007, the FBI took appropriate and reasonable steps to address the problems that its deficient practices had created, and we believe that the FBI should be credited for these actions. For example, the FBI ended the use of exigent letters, issued clear guidance on the use of national security letters and on the proper procedures for requesting records in emergency circumstances, and provided training on this guidance.

In addition, the FBI moved the three service providers out of the FBI offices. The FBI also expended significant efforts to determine whether improperly obtained records should be kept or should be purged from the FBI databases.

Our report also assesses the accountability of FBI employees for these practices. We concluded that every level of the FBI, from the most senior FBI employees to the FBI's Office of General Counsel to managers in the Counterterrorism Division to supervisors in the CAU to the CAU agents and analysts who repeatedly signed the letters, were responsible in some part for these failures.

Finally, our report made additional recommendations to the FBI and the Department to ensure that FBI personnel comply with the law and FBI policy when obtaining telephone records. We recently received the FBI's response to these additional recommendations, and we believe that the FBI is taking them seriously.

In sum, the national security letters and other authorities that are the subject of our report are important investigative tools for the FBI to carry out its counterterrorism mission. However, it is essential that they be used in full compliance with applicable statutes, Attorney General guidelines, and FBI policies. The FBI needs to be vigilant in ensuring that it does so, and the OIG will continue to monitor the FBI's exercise of these important authorities.

That concludes my prepared statement, and I would be pleased to answer any questions.

[The prepared statement of Mr. Fine follows:]

PREPARED STATEMENT OF THE HONORABLE GLENN A. FINE

Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice,

before the
House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights
and Civil Liberties

on
The Report by the Office of the Inspector General
on the Federal Bureau of Investigation's
Use of Exigent Letters and Other Informal Requests
for Telephone Records

April 14, 2010

Mr. Chairman, Ranking Member Sensenbrenner, and Committee Members:

Thank you for inviting me to testify about the Office of the Inspector General's (OIG) recent report examining the Federal Bureau of Investigation's (FBI) use of exigent letters and other informal requests to obtain telephone records.

The OIG's review was initiated based on findings we made in two previous reports, issued in March 2007 and March 2008, describing the FBI's use of national security letters (NSLs). In those two reports, which focused on misuse of national security letters, we noted the FBI's practice of issuing exigent letters, instead of national security letters or other legal process, to obtain telephone records from three communications service providers.

However, the two prior reports did not investigate the FBI's exigent letter practices in detail. These exigent letters requested telephone records based on alleged "exigent circumstances," and inaccurately stated that grand jury subpoenas already had been sought for the records. The FBI's practice of using exigent letters circumvented the requirements of the Electronic Communications Privacy Act (ECPA) statute governing national security letters, and also violated Attorney General Guidelines and FBI policy.

In the report issued in January 2010 that is the subject of this hearing, we examined in depth the use of exigent letters. The report detailed how the FBI's practice of using exigent letters evolved, how widespread it became, and the management failures that allowed it to occur.

In addition, our report identified other informal ways, in addition to exigent letters, by which the FBI obtained telephone records without legal process. For example, we identified requests made by e-mail, face-to-face, on post-it notes, and by telephone, as well as a practice referred to by the FBI and the providers as "sneak peeks."

We also describe in our report other improper practices related to the FBI's obtaining of telephone records, such as obtaining records on hot numbers without any legal process, the improper use of administrative subpoenas in certain cases, inaccurate statements to the Foreign Intelligence Surveillance Court, and improper requests for reporters' telephone records without required approvals.

Our report also assesses the accountability of FBI officials and employees for these actions. In addition, we describe the FBI's corrective actions regarding these practices.

In my testimony today, I will briefly summarize the findings of our report, our recommendations, and the FBI's response.

I. The FBI's Use of Exigent Letters and Other Informal Requests for Telephone Records

A. Exigent letters

Our report detailed widespread use of exigent letters that did not comply with legal requirements or FBI policies governing acquisition of these records. In particular, many exigent letters did not comply with the ECPA NSL provisions, 18 U.S.C. §§ 2709(a) and 2709(c), and did not satisfy the ECPA provisions authorizing a provider to voluntarily release toll records information to a governmental entity under certain emergency circumstances. 18 U.S.C. § 2702(c)(4) (Supp. 2002) and *USA PATRIOT Improvement and Reauthorization Act of 2005*, Pub. L. No. 109-177, § 119(a), 120 Stat. 192 (2006).

We determined that the use of exigent letters at the FBI began shortly after the terrorist attacks of September 11, 2001, in connection with the FBI's criminal investigation of the attacks. The FBI arranged to have a fraud detection analyst of a telephone service provider located on-site at the FBI's New York Field Division to assist in providing and analyzing telephone records associated with the September 11 hijackers and their associates. At first, the FBI in New York obtained telephone records from this analyst in response to grand jury subpoenas, but eventually the FBI began issuing exigent letters that promised future grand jury subpoenas as "placeholders" to enable the FBI to secure the records promptly.

In April 2003, several New York Field Division employees who participated in the exigent letter practice were assigned to FBI Headquarters to help set up the Communications Analysis Unit (CAU) as a new unit in the FBI's Counterterrorism Division (CTD). The purpose of the CAU was to obtain and analyze telephone communications and provide support to the appropriate operational units in the FBI.

Shortly after creation of the CAU in FBI Headquarters, the exigent letter practice migrated to CAU. Employees from three communications service providers moved into the CAU's office space, and the providers' employees had access to their companies' databases so they could immediately service FBI requests for telephone records.

The first exigent letter from the CAU was issued in March 2003, and the CAU's use of exigent letters expanded rapidly. We found that from March 2003 to November 2006, CAU personnel issued at least 722 exigent letters for telephone records to the three communications service providers at the FBI.

The 722 exigent letters issued by CAU sought records on more than 2,000 different telephone numbers. Most of the exigent letters stated:

> Due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided. Subpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally to [the communications service provider] as expeditiously as possible.

In some cases, the exigent letters issued by the CAU were used in urgent investigations. But our review found that, contrary to the letters, emergency circumstances were not present when many of the letters were issued. Also contrary to the claims made in the letters, in most cases subpoenas had not been sought for the records.

When we asked FBI supervisors and employees why they issued exigent letters when they knew that no subpoena had been requested, they could not satisfactorily explain their actions. The explanations we received included that they thought someone else had reviewed or approved the letters, that they had inherited the practice and were not in a position to change it, that the communications service providers accepted the letters, or that it was not their responsibility to follow up with appropriate legal process.

We also found that when FBI personnel issued these exigent letters or made other types of informal requests for records and information from the on-site providers that are discussed below, they did not document the

authority for their requests or explain the investigative reasons why the records were needed. Moreover, the exigent letter requests were not subject to any supervisory or legal review. Specifically, unlike properly-issued NSLs, exigent letters were *not*: (1) accompanied by approvals documenting the predication for the requests; (2) reviewed and approved by FBI attorneys; (3) approved by FBI supervisors; or (4) signed by one of the limited number of senior FBI personnel authorized to sign national security letters.

Our report also noted that training on the legal and internal FBI requirements for issuing national security letters or requesting telephone records in emergency circumstances was severely lacking in the unit that issued the exigent letters. All but 2 of the 29 FBI employees we interviewed who were assigned to work in the CAU said they had limited or no prior experience working with NSLs, and none of the Supervisory Special Agents we interviewed said that the FBI provided them training on these matters until after the OIG's first NSL report was issued in March 2007.

Our investigation concluded that the close relationship between the FBI's CAU and the three communications service providers facilitated the casual culture surrounding the use of exigent letters and other informal requests for telephone records at the FBI. Employees of one or more of these service providers were physically located on-site in the FBI's CAU from April 2003 to January 2008. These employees, who were capable of querying company databases on request, were regarded by FBI personnel as members of the communications analysis "team."

In fact, we found that the FBI's use of exigent letters became so casual, routine, and unsupervised that employees of all three communications service providers sometimes generated exigent letters for FBI personnel to sign and return to them. Although co-locating the service providers' employees at the FBI was originally an attempt to facilitate efficient and effective cooperation between the FBI and the service providers, the proximity fostered close relationships that blurred the line between the FBI and the service providers. We concluded that this co-location, in combination with poor supervision and ineffective oversight, contributed to the serious abuses we described in our report.

B. Other informal requests for telephone records

The use of exigent letters was just one of several improper practices described in our report. The OIG's investigation also found widespread use of even more informal requests for telephone records in lieu of appropriate legal process or a qualifying emergency. The scope and variety of these informal requests was startling.

For example, rather than using national security letters, other legal process, or even exigent letters, FBI personnel frequently sought and received telephone records based on informal requests they made to the on-site telecommunication service provider employees by e-mail, by telephone, face-to-face, and even on post-it notes. CAU personnel made these kinds of informal requests for records associated with at least 3,500 telephone numbers, although we could not determine the full scope of this practice because of the FBI's inadequate record-keeping.

Among the informal requests the FBI used to receive information about telephone records were so-called "sneak peeks," whereby the on-site communications service providers' employees would check their records and provide to the FBI a preview of the available information for a targeted phone number, without documentation of any justification for the request from the FBI and often without documentation of the fact of the request. In addition to confirming whether the provider had records on an identified telephone number, the providers' employees would sometimes provide to the FBI information such as whether the telephone number belonged to a particular subscriber, or a synopsis of the call records that included the number of calls to and from a specific telephone number within certain date parameters, the area codes called, and call duration.

In fact, at times the service providers' employees simply invited FBI personnel to view the telephone records on their computer screens. One senior FBI counterterrorism official described the culture of casual requests for telephone records by observing, "It [was] like having the ATM in your living room."

This sneak peek practice did not comply with the ECPA or its emergency voluntary disclosure provision for several reasons. The practice was a routine occurrence in the CAU and not limited to exigent or emergency circumstances. In addition, some of the specific instances where the sneak peek practice was used included media leak and fugitive investigations that did not satisfy the requirements for an ECPA emergency voluntary disclosure. The FBI's lack of controls over the sneak peek practice also made it impossible to reliably determine how many or in what circumstances sneak peek requests were made, and what the providers were told or believed about the reasons for these requests.

As noted above, virtually none of these FBI requests for telephone records – either the exigent letters or the other informal requests – was accompanied by documentation explaining the authority for the requests or the investigative reasons why the records were needed. Many of the requests lacked information as basic as date ranges. This resulted in the FBI obtaining substantially more telephone records covering longer periods of time than it would have obtained had it complied with the NSL process,

including records that were not relevant to the underlying investigations. Many of these records were uploaded into FBI databases, where the records were available to employees throughout the government who were authorized to access the database.

C. Other practices relating to requests for telephone records

In addition to exigent letters and informal requests for telephone records, our investigation also identified other troubling practices relating to FBI requests for telephone records.

One such FBI practice is commonly referred to as "community of interest" requests. While we cannot discuss the details of this practice in an unclassified setting, we believe this practice resulted in a significant number of improper requests for telephone records. The FBI's lack of documentation made it difficult to determine under what circumstances and how often community of interest requests were made. However, we determined that FBI personnel issued at least 52 exigent letters containing "community of interest" requests. Additionally, we identified over 250 NSLs and 350 grand jury subpoenas containing such requests. When issuing the NSLs, FBI personnel did not consistently assess the relevance of the numbers before making the requests. Instead, the FBI often just included these requests in boilerplate attachments to NSLs. The classified versions of our report discuss community of interest requests in substantial detail.

Our investigation also revealed other troubling practices relating to requests for telephone information. For instance, without serving any legal process or exigent letters, the FBI sought calling activity information on approximately 152 so-called "hot" telephone numbers from two of the service providers and was provided information on approximately 40 of those numbers. One of the service providers told the FBI whether there were calls made to or from the hot numbers identified by the FBI. We also found evidence that one of the companies may have provided additional information, such as call originating and termination information, on the hot numbers. These requests required legal process under the ECPA, but none was provided by the FBI.

We also examined whether information obtained in response to exigent letters or other informal requests was used in applications for electronic surveillance filed with the Foreign Intelligence Surveillance Court (FISA Court). In a limited review of 37 FISA Court applications that related to telephone numbers associated with exigent letters and informal requests, there were five misstatements in four declarations filed under oath by FBI personnel. The declarations inaccurately stated that the FBI had acquired subscriber or calling activity information from NSLs when in fact the

information was acquired through other means, such as an exigent letter or a verbal request.

The Department of Justice (Department) concluded that the inaccurate statements made in the FBI declarations were non-material, but the Department nevertheless notified the FISA Court of the inaccurate statements. Even though the inaccurate statements may have been non-material to the FISA application, the Department agreed that any inaccurate statements to the FISA Court are serious.

Our investigation also uncovered FBI misuse of administrative subpoenas to obtain telephone records. For example, the FBI served administrative subpoenas for toll billing records as part of a fugitive investigation, which were an improper use of these administrative subpoenas. In addition, we found administrative subpoenas signed by a CAU official who was not authorized to sign them, as well as subpoenas that were issued weeks after the telephone records were already obtained by an informal request or an exigent letter.

Among the more troubling incidents detailed in our report are three FBI media leak investigations in which the FBI sought, and in two cases received, telephone toll billing records or other calling activity information for telephone numbers assigned to reporters without first obtaining the approvals from the Attorney General that are required by federal regulation and FBI policy. In one of these cases, the FBI loaded the reporters' records that it obtained in response to an exigent letter into a database, where the records stayed for over 3 years until OIG investigators determined that the records had been improperly obtained. Our report concluded that serious lapses in training, supervision, and oversight led to the FBI and the Department issuing these requests for the reporters' records without following legal requirements and their own policies.

Our report concluded that these and other informal requests for telephone records represented a significant breakdown in the FBI's responsibility to comply with the ECPA, the Attorney General Guidelines, and FBI policy.

II. FBI Corrective Actions

Our report also analyzed the various attempts made by the FBI from 2003 through March 2007, when the OIG issued our first NSL report, to address issues arising from the CAU's use of exigent letters and other informal means to obtain telephone records. We concluded that during this time period the FBI's actions were seriously deficient and that the FBI repeatedly failed to ensure that it complied with the law, Attorney General

Guidelines, and FBI policy when obtaining telephone records from the on-site communications service providers.

For example, from 2003 through 2006 FBI officials repeatedly failed to take steps to ensure that the FBI's requests for telephone records were consistent with the ECPA, the Attorney General Guidelines, and FBI policy. For three and a half years, as the CAU issued hundreds of exigent letters, FBI officials and employees failed to object even to letters that contained inaccurate statements on their face, and FBI supervisors failed to develop, implement, or maintain a system for tracking their many requests for records or other information from the on-site providers. Moreover, after issuing the exigent letters, the CAU failed to take appropriate and effective steps to ensure that the timely legal process promised in the letters was actually obtained, thus leading to a significant backlog of records requests for which there was no legal process.

The exigent letters practice began at CAU without any input from the FBI's lawyers, and this was undoubtedly ill-advised. But even in late 2004, when FBI attorneys became aware of the practice of using exigent letters, they not only failed to stop it, they ultimately became involved in issuing after-the-fact NSLs and provided legal advice that was inconsistent with the ECPA. For instance, approximately three years after the CAU began using exigent letters, the FBI's Office of the General Counsel (OGC) directed the CAU to revise the exigent letters, but approved their continued use.

In 2006, shortly after the OIG began questioning the FBI about exigent letters, the CAU and the FBI Counterterrorism Division – without consulting OGC – issued three legally deficient "blanket" NSLs to "cover" or "validate" prior telephone record requests. The ECPA, however, does not authorize the FBI to issue retroactive legal process for ECPA-protected records, and these blanket NSLs did not cure prior violations of the ECPA. In addition, all three blanket NSLs contained other serious defects. The blanket NSLs were used to cover many telephone numbers not relevant to national security investigations, they were not accompanied by documents describing their relevance to an authorized investigation, they lacked required statutory certifications regarding non-disclosure, and they did not state that they related to records that had already been provided to the FBI.

In subsequent months, the FBI issued eight additional improper blanket NSLs to attempt to cover its previous requests to the communications service providers for calling records and other information on over 1,500 telephone numbers. These eight NSLs were also served after-the-fact and were issued without the approval documents required under FBI policy. Five of them also failed to comply with the ECPA certification requirement for NSLs imposing confidentiality and non-disclosure obligations on the recipients. None of the 11 blanket NSLs stated that the

FBI had already acquired the records, in some instances more than 3 years earlier.

In sum, we concluded that the FBI's initial attempts to cover the improperly obtained records were deficient, ill-conceived, and poorly executed.

By contrast, after the OIG issued our first NSL report in March 2007 we concluded that the FBI took appropriate steps to address the difficult problems that the deficient exigent letters practice had created. For example, the FBI ended the use of exigent letters, issued clear guidance on the use of national security letters and on the proper procedures for requesting records in circumstances qualifying as emergencies under the ECPA, and provided training on this guidance. In addition, the FBI moved the three service providers out of FBI offices.

The FBI also expended significant efforts to determine whether improperly obtained records should be retained or purged from FBI databases, and ultimately purged records relating to nearly 20 percent of the telephone numbers listed in exigent letters or the 11 blanket NSLs. We believe the FBI's review process and other corrective measures since issuance of our first NSL report in March 2007 have been reasonable, given the difficult and inexcusable circumstances that its deficient practices had created.

In sum, after the issuance of our report in 2007 the FBI has taken significant steps to correct past deficiencies in the use of exigent letters and other informal requests for telephone records, and the FBI should be credited for these actions.

III. OIG Findings on Individual Accountability and OIG Recommendations

In our report, we also assessed the accountability of FBI employees, their supervisors, and the FBI's senior leadership for the use of exigent letters and the other improper practices we described in this report.

We concluded that numerous, repeated, and significant management failures led to the FBI's use of exigent letters and other improper requests for telephone transactional records over an extended period of time. These failures began shortly after the CAU was established in 2002, and they continued until March 2007 when the OIG issued its first NSL report describing the use of exigent letters.

We concluded that every level of the FBI – from the most senior FBI officials, to the FBI's Office of the General Counsel, to managers in the

Counterterrorism Division, to supervisors in the CAU, to the CAU agents and analysts who repeatedly signed the letters – were responsible in some part for these failures.

In particular, FBI officials at all levels failed to develop a plan and implement procedures to ensure that telephone records were properly obtained from the on-site communications service providers. FBI managers failed to ensure that CAU personnel were properly trained to request telephone subscriber and toll billing records information from the on-site providers in national security investigations only in response to legal process or under limited emergency situations defined in the ECPA. They also did not ensure that CAU personnel were trained to comply with the Attorney General's Guidelines and internal FBI policies governing the acquisition of these records.

In reviewing the FBI's responsibility for exigent letters and other improper requests for telephone records and the performance of FBI personnel involved in the practices covered in this review, we recognized that the FBI was confronting major organizational and operational challenges during the period covered by our review. Following the September 11 attacks, the FBI had overhauled its counterterrorism operations, expanded its intelligence capabilities, and had begun to upgrade its information technology systems. Throughout the period covered by this review, the FBI was responsible for resolving hundreds of threats each year, some of which, such as bomb threats or threats to significant national events, needed to be evaluated quickly. Many of these threats, whether linked to domestic or international terrorism, resulted in a large number of high priority requests to the CAU for analysis of telephone communications associated with the threats, which was the CAU's core mission.

Indeed, some of the exigent letters and other improper practices we describe in this report were used to obtain telephone records that the FBI used to evaluate some of the most serious terrorist threats posed to the United States in the last few years. In our view, while these circumstances do not excuse the management and performance failures we describe in this report, they provide an important context to the events that led to the serious abuses we found in this review.

Our report also examined in detail the role of individual FBI employees in these failures. Our report recommended that the FBI should assess this report and the information we developed in this review to determine whether administrative or other personnel action is appropriate for the individuals involved in the use of exigent letters and other improper requests for telephone records. We understand that the FBI is now engaged in that process.

As discussed above, after we issued our first NSL report in March 2007 the FBI ended the use of exigent letters and took other corrective actions to address their use. However, our report concluded that the FBI and the Department should take additional action to ensure that FBI personnel comply with the statutes, guidelines, regulations, and policies governing the FBI's authority to request and obtain telephone records. We therefore made additional recommendations to the FBI and the Department regarding the use of exigent letters and other informal requests for telephone records.

For example, we recommended that the FBI conduct periodic training of FBI personnel engaged in national security investigations about the ECPA and other relevant legal authorities; review existing and proposed contracts between the FBI and private entities that provide for the FBI's acquisition of telephone, e-mail, financial, or consumer credit records to ensure that the FBI's methods and procedures for requesting, obtaining, storing, and retaining these records is in conformity with applicable law, Attorney General Guidelines, and FBI policy; issue written FBI guidance and conduct training to ensure that if FBI employees are placed in the same work space as communications service providers, all methods and procedures used to obtain records from the providers conform to applicable law, Attorney General Guidelines, and FBI policy; and issue written guidance proscribing certain practices used to obtain calling activity information and clarifying the circumstances under which it is appropriate to issue requests for community of interest information.

The OIG report also recommended that the FBI take steps to address the potential consequences of its improper practices with respect to the past use of exigent letters and other informal requests for telephone records. These actions include reviewing the circumstances in which FBI personnel asked for and obtained certain calling activity information on "hot numbers" so the Department can determine whether discovery or other legal obligations in any criminal investigations or prosecutions have been triggered. We also recommended that the Department determine whether it has issued any grand jury subpoenas in media leak investigations, other than those identified by the OIG, that included a request for community of interest information, and if so whether the Department obtained toll billing records of news reporters in compliance with Department regulations, including notification requirements.

The OIG recently received the FBI's responses to these additional recommendations. The FBI provided a description of the steps it has taken, or will be taking, to address the recommendations. We believe that the FBI is taking the recommendations seriously, and we will continue to monitor its corrective actions.

Finally, our last recommendation relates to the FBI's potential use of a certain legal authority to obtain certain telephone records without relying on the NSL provisions of the ECPA. Due to the classified nature of this issue, we cannot identify or discuss the specific legal authority in this forum.

This issue first arose after the FBI had reviewed a draft of the OIG's report. In its response to the draft report, the FBI asserted for the first time that as a matter of law the FBI could have obtained certain telephone records in national security investigations without legal process or an ECPA emergency voluntary disclosure request. However, the FBI did not rely on this legal authority when it requested and obtained the records discussed in this report. In fact, from the first exigent letter issued by the New York Field Division through the conclusion of our investigation, the FBI had never raised or relied on this legal authority when requesting the records described in our report.

The FBI requested an opinion from the Department's Office of Legal Counsel (OLC) on this issue. OLC agreed with the FBI that under certain circumstances the ECPA does not prohibit electronic communications service providers from disclosing certain call detail records to the FBI on a voluntary basis without legal process or a qualifying emergency under Section 2702.

The OIG report noted that the FBI's possible use of this authority had important legal and policy implications, and stated that the FBI, the Department, and Congress should consider how the FBI would use this legal authority when seeking telephone records. We further recommended that the Department inform Congress of the FBI's potential use of this legal authority and of the OLC opinion interpreting the scope of this authority.

The FBI has stated that it does not currently intend to exercise the full scope of this authority and that it will fully brief the Congressional oversight committees before implementing any changes to its policy concerning the use of its national security letter authorities in light of the OLC opinion. The FBI also has stated that any such policy would include administrative recordkeeping requirements, which we believe are essential for effective supervision and oversight.

We believe that the Department and Congress should carefully consider this issue and this authority, which if used would broaden the FBI's ability to request and lawfully obtain certain telephone records without legal process or a qualifying emergency. Unlike the past expansions of the FBI's NSL authority, which included carefully considered oversight and accountability provisions, this alternative legal authority does not contain similar statutory provisions to ensure that proper controls are in

place and that oversight is conducted. We therefore recommend that the Department and Congress carefully review the OLC opinion and consider its possible ramifications for the NSL statute, other ECPA authorities, and other federal statutes governing the FBI's access to certain records and other information.

IV. Conclusion

National security letters and other law enforcement authorities in the ECPA are important investigative tools for the FBI to carry out its vital counterterrorism mission, but it is critical that these authorities be used in compliance with applicable statutes and Department, Attorney General Guidelines, and FBI policies. We believe that the FBI needs to ensure that it uses these authorities in full accord with these requirements. The OIG will continue to monitor the FBI exercise of these important authorities.

That concludes my prepared statement, and I would be pleased to answer any questions.

Mr. NADLER. Thank you.
I now recognize Ms. Caproni.

TESTIMONY OF VALERIE E. CAPRONI, GENERAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION

Ms. CAPRONI. Good morning, Mr. Chairman, Ranking Member Sensenbrenner, and Members of the Subcommittee. It is my pleasure to appear before you today to discuss the recent report by the Department of Justice's Office of the Inspector General and the FBI's use of exigent letter and other informal requests for telephone records.

The 2010 report discusses the practice of one FBI headquarters unit of issuing so-called exigent letters to obtain telephone toll records, not the contents of any calls. That practice, which ended almost 3½ years ago and began well before my tenure at the FBI, reflected a failure of internal control. It was, however, a wake-up call for the FBI.

Although we cannot unring the bell, we have used the lessons learned from this situation to substantially change our internal control and compliance environment. Since 2007 when the issue of the use of exigent letters was first disclosed, the FBI has significantly improved its policies, training and procedures for requests for information protected by the Electric Communications Privacy Act, or ECPA.

The lessons learned from this experience went well beyond ECPA, national security letters, and exigent letters. Instead, we saw the exigent letters situation as emblematic of the need to systematically and carefully assess compliance risks across the FBI, but particularly in the national security arena.

That realization led to the formation of the Office of Integrity and Compliance, whose mission is to ensure FBI compliance with both the letter and spirit of all applicable laws and regulations. We have seen that program as a positive step and should help prevent future situations like the one encountered with exigent letters.

As the OIG discussed at length in this report and the 2007 NSL report, there were over 700 exigent letters that requested toll billing records for various telephone numbers. All of the numbers stated that there were—all of the letters stated that there were exigent circumstances and that either a Federal grand jury subpoena or an NSL would follow.

Sometimes there was no emergency, but even when there was—and many, many times there was an emergency—the FBI did not keep adequate records reflecting the nature of the emergency, the telephone numbers for which records were sought, and whether the promised future process, which many times was not legally required, was ever issued.

It should be emphasized that exigent letters were not and were never intended to be NSLs. Rather, they appear to have been a sort of placeholder born out of a misunderstanding of the import of the USA PATRIOT Act's amendment to ECPA. Much to our regret, in the years following that act, the FBI did not adequately educate our workforce that Congress had provided a clear mechanism to obtain records in emergency situations, and it was not the mechanism they were using.

In March 2007 the FBI formally barred the use of exigent letters to obtain telephone records and established clear policies for FBI employees to follow during emergencies. That process is in full

compliance with 18 USC Section 2702, which permits a carrier to provide subscriber and toll record information if the provider in good faith believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

The OIG's 2010 report discusses in detail 11 so-called blanket NSLs. As we briefed the full Committee in 2007, the blanket NSLs were a good faith, but ill-conceived attempt by the Counterterrorism Division to address the backlog of numbers for which the FBI believed it had unfulfilled obligations to provide legal process as they had promised through the exigent letter practice.

The FBI dedicated significant resources to researching all 4,400 of the telephone numbers that appeared on known exigent letters and on the so-called blanket NSLs to ensure that we retained only telephone records for which we had a lawful basis. We appreciate the finding of the OIG that our approach to determine which records to retain and which to purge was reasonable.

The OIG also addresses other informal requests for telephonic information, the intersection of exigent letters and FISA, and an OLC opinion. I would be happy to discuss those issues with you today, except for the OLC opinion, which can only be discussed in a classified setting. As to the OLC opinion, I can, however, say that it did not affect in any way either our actions from 2003 to 2006 or the records retention decisions made by the FBI as part of the reconciliation project I just discussed.

During prior hearings before this Committee and others, Members have asked whether employees who have participated in issuing exigent letters would be prosecuted or punished. DOJ's Public Integrity Section declined prosecution, but the FBI's Office of Professional Responsibility will review the OIG findings, and determine whether any discipline of any employee is appropriate.

To that end, we appreciate the report's recognition that FBI employees involved in this matter were attempting to advance legitimate FBI investigations. This does not excuse our failure to have in place appropriate internal controls, but it puts the actions of those employees in context. Many times they were obtaining telephone records that were necessary to evaluate some of the most serious terrorist threats posed to the United States in the last few years.

Nevertheless, we know that we can only keep the country safe if we are trusted by all segments of the American public, including Congress, to use the tools we are given responsibly. We believe that the changes we have made in the recent several years reflect just how seriously we took this breach of that trust.

I appreciate the opportunity to appear before the Subcommittee and look forward to answering your questions. Thank you.

[The prepared statement of Ms. Caproni follows:]

PREPARED STATEMENT OF VALERIE E. CAPRONI

Statement of
Valerie E. Caproni
General Counsel
Federal Bureau of Investigation
Before the
The Subcommittee on the Constitution, Civil Rights, and Civil Liberties Committee on the Judiciary
United States House of Representatives
At a Hearing Concerning
The Report of the Department of Justice Office of Inspector General Concerning the FBI's use of Exigent Letters and Other Informal Requests for Telephone Records

April 14, 2010

Good morning Mr. Chairman, Ranking Member Smith, and members of the Committee. It is my pleasure to appear before you today to discuss the recent report by Department of Justice's Office of the Inspector General (OIG) on the FBI's Use of Exigent Letters and Other Informal Requests for Telephone Records.

The 2010 OIG report is a follow-on to the OIG's 2007 report on the FBI's use of National Security Letters (NSLs). The 2010 Report discusses in detail a practice utilized between 2003 and 2006 by one FBI Headquarters unit, of issuing so-called "exigent letters" to obtain telephone toll records – i.e., the date, time, duration, and originating and terminating numbers of calls – but not the content of any calls. That practice, which ended almost 3.5 years ago, reflected a failure of internal controls at the FBI. It was, however, a wake-up call for the FBI. Although we cannot unring the bell or undo the fact that exigent letters were issued, the FBI used the lessons we learned from that event to substantially change our control and compliance environment.

The FBI has significantly improved its policies, training, and procedures for requests for information protected by the Electronic Communications Privacy Act (ECPA) . Indeed, in 2008, the OIG concluded that the FBI had made significant progress in addressing the serious problems and deficiencies identified in the 2007 report. But the lessons learned from this entire experience went well beyond ECPA and exigent letters. Instead, we saw the exigent letter situation – where a good-faith decision to co-locate telephone company employees with FBI agents and analysts to ensure rapid receipt of telephone records when responding to terrorist threats, led to an extremely negative OIG report because we did not follow that action with adequate internal controls – as emblematic of the need to systematically and carefully assess compliance risks, particularly in the national security arena. That realization has led to the formation of the Office of Integrity and Compliance, whose mission is to ensure that there are processes and procedures in place that facilitate FBI compliance with both the letter and spirit of all applicable laws, regulations, rules, and policies, as well as to assist FBI management at all levels in maintaining a culture where ethics and compliance are emphasized as paramount considerations in all decision making. We think that program is a positive step and should help prevent future situations like the one encountered with exigent letters.

The OIG makes 13 recommendations in its 2010 report, most of which have already been satisfied. The FBI is working on the few recommendations that have not been fully satisfied to date.

Exigent Letters

In 2007, the OIG found that one unit at FBI Headquarters had issued over 700 exigent letters requesting toll billing records for various telephone numbers. All of the letters stated that there were exigent circumstances but did not describe the exigency. In fact, sometimes there was no emergency. Although ECPA's emergency disclosure provision found at 18 U.S.C. § 2702(c)(4) (discussed in more detail below) does not require the FBI to provide any legal process to obtain records voluntarily from a telephone company in order to respond to a qualifying emergency, many of the letters stated that federal grand jury subpoenas had been requested for the records. In fact, no such request for grand jury subpoenas had been made, and no one intended that such a request would be made. Similarly, other exigent letters promised NSLs, which – though also legally unnecessary if there is a qualifying emergency -- the agents and analysts, in fact, intended would be sent. Unfortunately, the FBI did not keep adequate records reflecting the nature of the emergencies, the telephone numbers for which records were sought, and whether the promised future process – whether legally required or not – was ever actually issued.

It should be emphasized, however, that exigent letters were not – and were never intended to be – NSLs. Rather, they appear to have been a sort of "place-holder," borne out of a misunderstanding of the import of the USA Patriot Act's amendments to ECPA. For reasons lost in the fog of history – but no doubt partially the result of the intense pace of activity in the months following the 9/11 attacks – the FBI did not adequately educate our workforce that Congress had provided a clear mechanism to obtain records in emergency situations. Although

guidance was eventually provided in August 2005, the employees who had been using exigent letters for several years simply did not recognize the applicability of that guidance to their situation.

In its most recent report on the issue, the OIG confirmed what the FBI acknowledged to Congress and the public in 2007: exigent letters were sometimes used when there was no emergency and the FBI had inadequate internal controls to ensure that the promised legal process was provided. The 2010 report confirmed that these practices resulted in the FBI requesting telephone toll billing records associated with approximately 4,400 telephone numbers between 2003 and 2006.

In response to the OIG's 2007 report, in March 2007 the FBI formally barred the use of exigent letters to obtain telephone records and established detailed policies for obtaining toll billing records during an emergency situation. Since that time, employees who need to obtain ECPA-protected records on an emergency basis must do so in accordance with 18 U.S.C. § 2702. Section 2702(c)(4) permits a carrier to provide information regarding its customers to the government "if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." In addition to providing guidance on Section 2702 itself, we established approval and documentation requirements for requests made under this provision.

As promised by Director Mueller and me in our testimony following the OIG's first report and by me in repeated briefings of Congressional staff, beginning in 2007, the FBI commenced an effort to ensure that we retained *only* exigent letter-related telephone records for which we had a lawful basis. To that end, we dedicated significant resources to researching all of the numbers that appeared on known exigent letters and on the so-called "blanket NSLs" (discussed in more detail below). The reconciliation project team conducted a complete review, even though the disclosure of approximately half of the records at issue was not forbidden by ECPA and/or was connected to a clear emergency situation. The reconciliation project team used a conservative approach: they initially retained records for which already-existing legal process (usually an NSL or grand jury subpoena) was located. If no legal process was found, then new "corrective" NSLs were issued where ECPA allowed us to do so (*i.e.*, the national security investigation to which the telephone records were relevant was still pending). In fact, we located or issued legal process for the overwhelming majority of the 4,400 telephone numbers. If we found no previously existing legal process and we could not legally issue new process (*e.g.*, the case to which the records were relevant had since been closed), we would only then consider whether emergency circumstances existed at the time we requested the records. As to that group of telephone numbers, if we could not conclude that there had, in fact, been an emergency that would have qualified under section 2702, we purged the telephone records from our files and databases. These actions were fully briefed to the FBI's Congressional oversight committees last year, and we appreciate the finding of the OIG that our "approach to determine which records to retain and which to purge was reasonable" (Report at 276).

We are currently developing an automated system – similar in concept to the NSL system that we have briefed and demonstrated to your staffs – to generate and document emergency disclosure requests pursuant to Section 2702. Our experience with the NSL system is that it has greatly reduced non-substantive errors in NSLs, and we believe that an automated Section 2702 system would do the same.

I would now like to address a few specific matters raised by the OIG's 2010 report.

Blanket NSLs

The OIG's 2010 report discusses in detail 11 so-called "blanket NSLs." These blanket NSLs were not discussed with an FBI attorney prior to their preparation nor reviewed by an FBI attorney prior to their issuance. We continue to believe – as we briefed this Committee in 2007 – that the blanket NSLs were a good-faith but ill-conceived attempt by the Counterterrorism Division to address the backlog of numbers for which the FBI believed it had unfulfilled obligations to provide legal process as they had promised through exigent letters. The common problem with all of the blanket NSLs was that there was no electronic communication (EC) prepared describing how the information sought by the NSL was relevant to a national security investigation. Under FBI policy, such ECs are required for all NSLs. Because there was no EC, there was no documentation that connected the telephone numbers listed on the blanket NSLs to specific, pending national security investigations. As discussed above, following the 2007 report, the FBI examined each telephone number included on a blanket NSLs to determine

whether there was a legal basis to retain any records obtained for the number. If we could not confirm a legal basis for retention, we purged any records we had for the number.

As noted, none of the blanket NSLs was reviewed by an FBI attorney. In March 2007, the FBI changed its policy to require attorney approval before an NSL may be issued. That policy requirement is enforced through the NSL system that automatically routes all NSLs though an attorney prior to issuance.

Other Informal Requests

In addition to exigent letters and blanket NSLs, the 2010 report discusses other informal means by which the FBI Headquarters unit obtained information regarding telephone numbers. "Quick peeks" and "sneak peeks" are the terms used in the report to describe an FBI employee asking a telephone company employee to determine *whether* records for a telephone number existed, not what those records actually contained.

In a similar type of request, FBI employees would ask whether there was "calling activity" associated with a particular number (*i.e.*, whether the particular telephone number was being used). Such information was conveyed to the FBI for 39 telephone numbers.[1]

[1] The 2010 report states that such information was obtained for 42 telephone numbers (Report at 84). In fact, there were three duplicated numbers in the OIG's list of 42.

As the OIG noted, the mere existence of records or the fact that there is calling activity associated with a particular telephone number is protected by ECPA. Accordingly, we made clear in March 2007 that no telephone records may be acquired in advance of legal process, unless there is an emergency situation under Section 2702 and the emergency request procedures are followed. In addition, our Domestic Investigation Operational Guidelines (DIOG), which compiled all FBI operational policy into one document, provides an exclusive list of acceptable methods for obtaining telephone toll records.

Reporter Records

The OIG's 2010 report describes three situations in which the FBI might have come into contact with protected telephone toll information of reporters. In fact, in only one case were any reporter's toll records actually provided to the FBI, and that occurred over five years ago. In that one instance, neither the substantive case agent nor any member of the investigative or prosecutorial team was aware that records had been obtained, and the FBI made no use of them. Furthermore, the only FBI employees who ever accessed the records were the analyst who initially uploaded them to our telephone records databases and an analyst involved in the exigent letter reconciliation project described above. When we learned in 2008 that we had such records, we purged them from our telephone records databases.

Although we did not use the records, Department of Justice (DOJ) regulations require Attorney General approval before the issuance of grand jury subpoenas seeking toll billing records of

members of the media. While no grand jury subpoena was issued in this instance, such legal process would have been the appropriate way, if at all, to obtain the records at issue given the nature of the investigation. Accordingly, when we learned that we had reporters' toll records without advance Attorney General approval, we notified the reporters that their toll records had been obtained, and the Director personally called the editors of the newspapers to apologize.

Although this appears to have been an isolated incident, we issued guidance in 2008 making clear the requirements for obtaining toll records of members of the media. The DIOG similarly discusses the steps required to seek such records.

FISA

The OIG's 2010 report examined a non-random sample of 37 applications that had been submitted to the Foreign Intelligence Surveillance Court (FISA Court). In that sample, which was selected by the OIG because the applications referenced telephone numbers that appeared on an exigent letter or on a blanket NSL, there were 5 misstatements related to telephone records that had some connection to exigent letters. There is no evidence that anyone intended to provide inaccurate information to the Court. Moreover, as the OIG and DOJ National Security Division (NSD) found, the substantive information provided in the application was entirely accurate; the misstatements pertained only to *how* the FBI obtained the information. NSD determined, and the OIG agreed, that the misstatements were non-material (meaning they did not affect the probable cause determination made by the FISA Court), but nonetheless NSD notified

the FISA Court of the misstatements. Since the time those FISA applications were prepared, the FBI has made significant changes to its FISA accuracy procedures to catch errors like these. Those procedures, which were substantially revised beginning in February 2006 independently of either the 2007 or 2010 OIG reports, have proven effective in reducing the rate and significance of errors in FISA applications.

OLC Opinion

The OIG's 2010 report discusses a January 8, 2010 opinion issued by the Department of Justice's Office of Legal Counsel (OLC), which concluded that ECPA does not forbid electronic communications service providers, in certain circumstances, from disclosing certain call detail records to the FBI on a voluntary basis without legal process or a qualifying emergency under Section 2702. Many members of Congress have asked questions about this OLC opinion, which is classified. It is my understanding that this opinion has been shared with our oversight committees, including this Committee, at the appropriate security level. Because of the classified nature of the OLC opinion, I cannot address it in this forum, but am available to discuss it in a secure setting. I can, however, state that the OLC opinion did not in any way factor into the FBI's flawed practice of using exigent letters between 2003 and 2006 nor did it affect in any way the records-retention decisions made by the FBI as part of the reconciliation project discussed above.

Accountability

The 2010 report notes that the OIG provided its findings to the Department of Justice's Public Integrity Section. The Public Integrity Section declined prosecution of any individuals relating to the exigent letters matter. Now that the OIG's report is complete, the FBI's Office of Professional Responsibility will have an opportunity to review the OIG's findings and determine whether any discipline of any employee is appropriate.

Conclusion

Finally, the FBI appreciates the 2010 report's recognition that FBI employees involved in this matter were attempting to advance legitimate FBI investigations, and that FBI personnel "typically requested the telephone records to pursue [their] critical counterterrorism mission" (Report at 214). This does not excuse our failure to have in place appropriate internal controls, but it places the practices of that one FBI Headquarters unit in context: "some of the exigent letters and other improper practices [described] in this report were used to obtain telephone records that the FBI used to evaluate some of the most serious terrorist threats posed to the United States in the last few years" (Report at 281). These employees were and many remain on the front lines of our fight against terrorists.

At the same time, as Director Mueller has repeatedly acknowledged, we can only achieve our mission of keeping the country safe if we are trusted by all segments of the American public. As

the events of the last several months demonstrate, the risk of a catastrophic attack from home-grown and foreign-based terrorists continues. Our single best defense against such an attack is the eyes and ears of all Americans – but particularly of those segments of the population in which the risk of radicalization is at its highest. We need those communities to call us when they hear or see something that seems amiss. We know that we reduce the probability of that call immeasurably if we lose the confidence of those we are responsible for protecting.

Since the OIG's 2007 report, the FBI has endeavored to be more proactive in the areas described above and others: to assure all Americans that we respect individual rights, including privacy rights, and that we use the tools that have been provided to us consistent with the rules set out by Congress.

I appreciate the opportunity to appear before the Committee and look forward to answering your questions.

Thank you.

Mr. NADLER. Thank you.

I will begin the questions. I recognize myself for 5 minutes to begin questioning.

First, Ms. Caproni, the IG report raises a potentially troubling concern relating to FBI's statements to this Committee. The IG carefully reviewed the FBI process for determining whether to keep or to purge the telephone records improperly obtained because of exigent letters or a similar method. The report concluded that the

FBI's final determinations were reasonable, even though in some cases the FBI may have kept records that were not relevant to an authorized investigation at the time they were obtained.

But in testimony before this Committee, FBI officials, including Ms. Caproni, went further. As the IG report points out, Ms. Caproni specifically testified before the full Committee in 2007 that if any records were found that were not in fact relevant to an authorized investigation, they would be "removed from our database," and "destroyed."

Accepting the IG's conclusion that the ultimate FBI decision was a reasonable one, I am troubled by the fact that the FBI apparently did not do what it told the Committee it would do and did not communicate this to us. Indeed, we first learned that it had not destroyed the information it had said it would when we first learned about this matter from the IG report. Can you explain this discrepancy, please?

Ms. CAPRONI. The process that we went through was a laborious one, and it was designed to ensure that there was in fact a legal basis for any telephone records that we retained. The first step of that analysis was to determine whether any process had already been issued, and that was frequently found to be the case.

If process had not already been issued, then we next looked to whether we could now issue process, meaning is the record relevant to an open investigation. Sometimes we couldn't do that, because the investigation had already been closed. When that happened, we dropped to the next step of the analysis, and the next step of the analysis was whether at the time we received the record, whether there was in fact an emergency that would have qualified under 2702. If there was, even though there wasn't then open an investigation to which the records were relevant, we would retain the records.

You know, we were trying to do the best we could to fix the situation that was not of our making. So in fact—I am sorry, so in fact we have no record——

Mr. NADLER. Yes, I—excuse me—excuse me a second. Granted all of this, the IG report concluded the actions taken were reasonable. I don't dispute that.

What I am asking is—and you are addressing that you took reasonable actions, and granted, no one is questioning that. What I am questioning is that the testimony at the hearing was not that reasonable action would be taken, but that if any records were found that were not in fact relevant to an authorized investigation, they would be removed from the database and destroyed.

Apparently, that was not done, and this Committee was not notified that contrary to the assurances the Committee had received that that would be done, that it was not in fact done. That is what I am asking for an explanation.

Ms. CAPRONI. Congressman, I think the issue is one of timing. So the issue is the records were relevant to an authorized investigation. The question is whether that investigation was still open at the time. So there was no evidence I have seen throughout the entire reconciliation project, no evidence that records were obtained that were simply not relevant to what the FBI was doing. The question is whether at the time we were looking at the record——

Mr. NADLER. Yes, I get that—whether it was still relevant.

Ms. CAPRONI [continuing]. There was still an open investigation.

Mr. NADLER. Okay. Mr. Fine, could you comment on that?

Mr. FINE. It was an unpalatable situation they found themselves in, inexcusable that they were in that situation. Once they were in that situation, we looked at it and said, "What would be the best thing to do, given the difficult alternatives?" And we concluded it was reasonable. It was not exactly as it was understood in the beginning, but the process evolved, and we concluded again.

Mr. NADLER. No, it was reasonable, but——

Mr. FINE. Yes.

Mr. NADLER [continuing]. Would you conclude that there were not in fact—would you agree that there were not in fact records not relevant to an investigation that were not destroyed, which would be contrary to the assurances given to this Committee?

Mr. FINE. I do agree with Ms. Caproni. It depends on what time you are talking about.

Mr. NADLER. Okay.

Mr. FINE. At the time they were looking at it, an investigation was closed, but they had to time travel back and forth to see when it was. So that is a difficult situation. We do not criticize that.

Mr. NADLER. Okay.

I am also concerned, Mr. Fine, that one conclusion that comes from this report and all three of your reports on the FBI's use of NSLs and exigent letters, all of the reports make clear that there was serious misconduct, including violations of law with respect to FBI efforts to obtain private information on Americans without a warrant or other prior approval by a judge. That is always a risk when agencies can obtain such private information without a judicial order.

What are your plans concerning oversight of the FBI in this area? And what do you think Congress should do to help make sure that such FBI authority is not abused as it was in this case? Let me just say again—let me just amplify the question.

The Ninth Circuit in a decision on a different question of state secrets said that the executive cannot be its own judge. That seems to me to encapsulate much wisdom in this area, that you cannot trust the executive—I don't care who the President is—executive per se or any particular agency to be its own judge. "Trust me" is not something that you can rely on to protect our liberties and our privacy.

So what are your plans concerning, in light of that, oversight of the FBI? And what should Congress do to help make sure that such FBI authority is not abused?

Mr. FINE. We intend to continue to monitor this, the use of these authorities. We think it is important that we do so. Initially, we are going to look at the FBI's progress on addressing the recommendations we have made in all three of our reports. We made 10 in the first one, 17 in the second one, 13 in this one. We believe they have made progress, but as the Office of the Inspector General, we need to verify, we need to review, we need to make sure they do that.

We also intend to look at their use of the authorities, and we will continue to do this in conjunction, too, with the Department's re-

view of it. The National Security Division is doing extensive reviews of it. So I think that it is very important that we continue to monitor, oversee, and assess it. I think it is very important for Congress to do so as well. I think these kinds of hearings are important to hold the FBI accountable, to hold their feet to the fire, to make sure that they follow through what they say they are going to do in terms of accountability. So I think that is very important.

I also think, as I stated in my testimony, that the issue about the Office of Legal Counsel opinion about an authority that they have raised is important for Congress to look at and make sure they are——

Mr. NADLER. To look at what?

Mr. FINE. The authority that the Office of Legal Counsel opinion said was with the FBI. We provided certain records that I can describe in an unclassified setting—it is very important for Congress to look at that to see whether there ought to be statutory accountability provisions related to that authority.

Mr. NADLER. And, finally, do you think that perhaps that aside, Congress should legislate in terms of any other way in terms of enforcement, perhaps making violations of this in any way criminal, such as was done with FISA, although that doesn't seem to have worked very well?

Mr. FINE. At this point I am not certain that I would go there and say it has to be criminal violations, but I do think that there are existing oversight mechanisms that need to be rigorously enforced to hold the FBI accountable, including disciplinary actions in the appropriate case.

Mr. NADLER. Thank you very much.

My time has expired. I will now recognize for 5 minutes the distinguished Ranking Member of the Subcommittee, the gentleman from Wisconsin.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

I guess my comments today are going to be more a discussion of my frustration. As both of you know, I was the author of the PATRIOT Act and the PATRIOT Act reauthorization of 2006, and I withstood the assaults of my friend seated to my right in both of those cases. And I am seeing a pattern that the FBI really wants to get around various restrictions that the PATRIOT Act put on their activities.

For example, with the original PATRIOT Act, the FBI and DOJ wanted to have administrative subpoena, and that got very little support from the Congress and was not included in the PATRIOT Act. The section 215 business records provisions were very controversial. And what did the FBI do? They didn't seek section 215 authority for business records, but they used the national security letter statute, which was passed in 1986 and was merely rearranged to be a part of the PATRIOT Act statute in the statute books, so this wasn't a new authority that was given.

And when the reauthorization came up for review, we found that there were all kinds of problems with that, and the PATRIOT Act reauthorization act of 2006 had a number of, in my opinion, constitutionalizing provisions in the national security letters, giving people a right to a court review similar to a motion to quash a subpoena.

So then what happens is we get these exigent letters that were never authorized by any kind of statute, and it took a big stink to stop those, and we are talking about how the material obtained according to the exigent letters were scrubbed or not scrubbed.

Now, Ms. Caproni, you were the general counsel of the FBI during most of this period of time, and I imagine that you either initiated or signed off on a lot of these procedures that were designed to do things that the FBI didn't like in the PATRIOT Act and its reauthorization, because they were not approved by Congress. And, you know, as a result, ordinarily I don't agree with going on a witch hunt, but I certainly am not unsympathetic to the comments made by my distinguished successor as Chairman of the full Committee about what is going on in your office.

You know, I have discussed these matters extensively when I was Chairman and afterwards with Director Mueller and with successive Attorneys General, and I don't think you are getting the message. Will you get the message today?

Ms. CAPRONI. Congressman, quite the contrary, (a) I have gotten the message, and I have had the message for several years. The Office of General Counsel did not sign off on the exigent letters. There was a point in time when a staff lawyer became aware of them. The fact——

Mr. SENSENBRENNER. Well, then who did sign off on the exigent letters?

Ms. CAPRONI. The Counterterrorism Division did.

Mr. SENSENBRENNER. Okay. Well, who is in charge of determining whether the FBI is following the law or not?

Ms. CAPRONI. We are. There is no doubt about it. Congressman, I have never done anything other than acknowledge to this Committee and every other Committee of Congress that this was a massive failure of internal controls. There is no doubt about that.

Mr. SENSENBRENNER. Well, you know, I am not feeling so charitable about that, because I did the fighting with the FBI. I know administrative subpoenas, section 215 authority, which I defended, and then I find out after defending it, instead of using section 215, you used national security letters, you know, where there is no right for the recipient to go to court. And I put the rights for the recipients to go to court in, and then when that happened, then the exigent letters, you know, started.

You know, all I can say is, you know, I am extremely disappointed that every time Congress has tried to plug potential civil rights and civil liberties violations in our counterterrorism activities, the FBI seems to have figured out a way to get around it. You know, I came to this whole issue as your friend, more than my Subcommittee and full Committee Chairs, and I feel betrayed.

I yield back the balance of my time.

Ms. CAPRONI. Congressman, I understand that frustration. I truly do. But I do think that the Office of General Counsel has worked very hard to make sure that we actually stay within the lines that Congress has set. It is a big organization. We work very——

Mr. SENSENBRENNER. But you haven't. That is the point.

Ms. CAPRONI. We work very hard.

Mr. SENSENBRENNER. And that is why the inspector general is making these reports. And I was concerned about this type of evasion when I put the annual inspector general's report in the PATRIOT Act, simply because I was afraid that having the fox guard the chicken coop down the street was going to result in activities that would end up embarrassing the government when they are in the middle of a sensitive counterterrorism investigation.

Ms. CAPRONI. And we welcome the oversight from the inspector general. We also welcome the oversight from the National Security Division of the Department of Justice. The Inspection Division does a great deal of work in this area. We are trying our best to maintain within a very large workforce adherence to all of the rules and policies while still giving our employees the freedom of movement so that we can stop terrorist attacks against the country.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. SENSENBRENNER. I think I will yield whatever is left of my time, since the red light went out.

Mr. NADLER. Well, it is a failure of electricity, I am sure.

I would just like to observe, agreeing with the distinguished gentleman, that despite all the efforts that you mention of the General Counsel's Office, there is a clear pattern here of deliberate evasion—deliberate on somebody's part.

First, the FBI seeks certain statutory authorities for administrative subpoenas. Congress says no. We put in section 215. They use NSLs. We put in more protections for NSLs. They invent exigent letters until we catch—or the inspector general catches up with them.

In every case it seems that the FBI is doing what it wanted to do in order to accomplish surveillance without appropriate checks and balances beyond what Congress authorized. And whenever Congress said, "Thus far, and no farther," it went farther.

So it may be that in the last couple of years since 2007, we are told by Mr. Fine, that in the second wave of change—the first wave was ineffective—the second wave may finally have begun to rein this in properly. But meanwhile, there does appear to have been for a number of years a pattern of very deliberate evasion of the law. And whether your office knew about it or not is a different question, but somebody did.

I yield back.

Ms. CAPRONI. Congressman, there is something about the chronology here that the Committee seems to be focused on that I need to correct. There was no substitution of NSLs for the power and the authority that was provided to us in 215. 215 provided very broad——

Mr. SENSENBRENNER. You know, ma'am, with all due respect, I lived in this for 6 or 7 years as I was trying to pass the Bush administration's counterterrorism legislation. And I had to defend what the Bush administration was doing against my Democratic friend. That is why I said I feel betrayed, because every time we tried to patch up a hole in what the FBI was doing, you figured out to put another hole in the dike. And this little Dutch boy has only got 10 fingers to plug holes in the dike.

Ms. CAPRONI. Again, I just want to make sure that the chronology in terms of what happened is correct. And it is not the case

that exigent letters were adopted as some sort of way to get around the advances that were put in——

Mr. NADLER. That is—that is——

Ms. CAPRONI [continuing]. The provisions that were put into the NSLs in the PATRIOT Reauthorization Act.

Mr. NADLER. The gentleman's time has expired. I will simply observe——

Ms. CAPRONI. It started before then. The two had nothing to do with each other.

Mr. NADLER. Okay. The gentleman's time has expired.

The gentleman from Georgia is recognized.

Mr. JOHNSON. Thank you, Mr. Chairman and Mr. Ranking Member, for holding this very important meeting on this issue.

I will start with the Fourth Amendment to the United States Constitution. The right of the people to be secure in their persons, houses, papers and effects under unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

And I would point out the fact that the right of the people or a person, and the U.S. Supreme Court has affirmed that a corporation is a person for many various reasons, some of which are objectionable. But I will ask you that the exigent letters, which have no basis in Federal statute or by way of the Constitution, how does the use of these exigent letters square with the Fourth Amendment?

Ms. CAPRONI. Congressman, the telephone records being held by the phone company, as to the phone company, the phone company has a right to give their records or not give their records in accordance with statute. As to the customer——

Mr. JOHNSON. Well, they——

Ms. CAPRONI [continuing]. The customer does not have what is known as interest in those records.

Mr. JOHNSON. Well, a company does not have to give up its private records without some kind of legal compulsion to do so, correct?

Ms. CAPRONI. It need not. It is their choice, because they are their records. They have to comply with the law, and in this particular case ECPA governs these records.

Mr. JOHNSON. And so in this situation, the FBI contacts an American corporation, say, AT&T, Verizon, any of the others, and says, "Look, we need these records, these telephone call records. And we will get you a subpoena for them or we will get you a national security letter to back up this request, but we are having an emergency, and we need the information now."

Ms. CAPRONI. That is correct. And that is exactly what 18 USC 2702 permits. The problem was the promise of follow-on process. If it is truly an emergency that qualifies under 18 USC 2702, the phone company is entitled to provide the records to the FBI——

Mr. JOHNSON. Well, now, where did the exigent letters somehow enter into this process as a legal means of obtaining that information?

Ms. CAPRONI. You know, Mr. Fine has just done a 300 or 350-page report on how it got in there. I think it came——

Mr. JOHNSON. Would you just capsulize, yes, please?

Ms. CAPRONI. In sort of capsulization, it was a follow on to what had been being done right immediately after 9/11 in New York as a way to get records in a true emergency. And that process got moved into a different environment it should not have. And moreover, during the interim Congress had legislated in this area and said when you have a real emergency, this is what you need to do. And that law did not get sufficiently inculcated into our workforce.

Mr. JOHNSON. Mr. Fine, how would you respond? Would you comment on that answer, please?

Mr. FINE. I would respond that exigent letters started in New York in connection with the criminal investigation after the September 11th attacks, when people from New York went into FBI headquarters to establish the Communications Analysis Unit. That practice migrated to that unit. It was inappropriate. There is no authority for them to provide exigent letters with follow-up legal process.

There is a ECPA statute that they needed to follow. They didn't follow it. They simply used this process, and when people had questions about it, they didn't adequately address the questions. They just simply went on with the process, and it was improper, it was inappropriate, and it was wrong.

Mr. JOHNSON. And then destroyed or lost records which documented the precise actions that were taken and the need for those actions, correct?

Mr. FINE. Well, they never kept the records. I mean, they would not keep adequate records of this. They wouldn't keep the exigent letters in a database. They didn't keep national security letters. It was incredibly sloppy practices that they took. And it made our job difficult even figuring out how often it occurred and when it occurred.

Mr. JOHNSON. Has there been a request made by any stakeholder for a special prosecutor to be called for or requested by the Attorney General for reasons that I think have already been stated? How can a executive investigate or be the judge of their own conduct, as Chairman Nadler put it? Has there been such a request? And if such a request was made, would you support it, Mr. Fine, and also Ms. Caproni?

Mr. FINE. I am not aware of any request. There may have been one. What I am aware of is we did a very—we believe it was a very thorough investigation of the facts and circumstances. We put it in our report, and we provided it to the Public Integrity Section of the Department of Justice.

Mr. JOHNSON. Nobody has been punished for this, have they?

Mr. FINE. Not yet. The——

Mr. JOHNSON. Not even an adverse employment decision or adverse action against any of the employees, who employed these techniques?

Mr. FINE. Well, we finished our report in January and provided it to the FBI. My understanding is the Office of Professional Responsibility is reviewing the report and determining what action is appropriate in that regard.

Mr. JOHNSON. Ms. Caproni?

Ms. CAPRONI. Mr. Fine is correct. The issue of what, if any, action will be taken against individual employees is currently pending with the Office of Professional Responsibility within the FBI.

Mr. JOHNSON. Does that office have the ability to refer to the criminal investigation side?

Ms. CAPRONI. Well, that has already been done. The IG referred it to the Public Integrity Section, who declined criminal prosecutions. We are now moving on and discussing the issue of whether there will be disciplinary action taken, and the Office of Professional Responsibility has very broad ranging authority to impose discipline, everything from a censure to discharge of the employee.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. NADLER. Do you have any more?

I am informed that we have another Member who wants to question, who will be here. I am informed we have another, so I will take advantage of the interim before she arrives to ask another question, if I may.

Let me ask you, Ms. Caproni. After reviewing your correspondence with various Department of Justice officials, the OIG report concludes that you were not on sufficient notice of the use of exigent letters before the OIG's investigation began. How could this practice have escaped legal, the notice of your office, your notice for so long? How could you not have known about this?

Ms. CAPRONI. Me personally?

Mr. NADLER. Well, you personally or your office.

Ms. CAPRONI. Again, my office had awareness. There was a line attorney who was aware of the practice. There have been some discussions. I don't think that the lawyers in fairness, and I think this is really what the inspector general concluded, that the deputy over that area of my office was not aware of the scope of the problem. Because of that, it did not get raised to my——

Mr. NADLER. But he knew that there was a problem, but he didn't think it necessary to inform you.

Ms. CAPRONI. I am sorry. Say that again?

Mr. NADLER. He was not aware of the scope of the problem, though he knew there was a problem, but because he was not aware of the scope of the problem, he did not feel it necessary to inform you.

Ms. CAPRONI. It was "her," but that is correct.

Mr. NADLER. Okay. And let me ask one other thing. The IG criticizes the corrective action taken by the FBI prior to early 2007, calling it seriously deficient. For example, it states that 3 years after the practice began, your office directed that exigent letters be revised, but nonetheless approved their continued use until March 2007. Why did this happen? Why did you allow it to continue, although albeit under revised? And why didn't you act earlier and more effectively?

Ms. CAPRONI. Again, this was not me personally, but I think that the rationale was that the attorney who provided the advice, and the report truncated the advice that she actually provided; there was more context to it in the advice that was provided. What she was telling them was you can only do this if you have got a true emergency.

That is, while she was not thinking about 2702, her advice was actually consistent with 2702 statute. Because she wasn't really focusing on that, she was allowing them to use the short form exigent letter that was then supposed to be followed with legal process.

This is actually a much more complicated issue than, I think, some would like to recognize. And part of the problem is that some carriers would actually prefer to have belts and suspenders, so even if it is an emergency, so even if they are legally authorized to give us the records based only on the emergency with no legal process, they actually would like law enforcement to provide legal process when the emergency subsides and there is time to do so.

So from the provider's perspective, there is pressure to give follow-on legal process. As we have consistently advised our employees, and this is certainly a big issue for the inspector general, the statute does not seem to anticipate that. You look at 2702 standing alone; 2702 provides the providers with legal immunity if they provide records in the case of a good faith belief that an emergency exists.

Mr. NADLER. Which they seem to have used all over the place without any subsequent provision of process or anything else.

Mr. Fine, could you comment on what Ms. Caproni just said on her answer to this question?

Mr. FINE. I believe that the Office of General Counsel did not do all they could have and should have in this practice. There were people in the office who knew about it. They didn't review the exigent letters at the time they first knew about it and did not give full and accurate legal advice. And they did not put a stop to this practice and did not ensure that people knew about the parameters of how they could use this letter.

And we do criticize the people in her office who were not adequately and accurately providing legal advice on this by reviewing the exigent letters and putting a stop to them. They were trying to reform it, but they weren't ending it, and that was a problem.

Mr. NADLER. Thank you.

The gentlelady from California is recognized.

Ms. CHU. Thank you, Mr. Chair.

I have questions about the culture at the FBI that led to the use of these exigent letters. When the OIG report said that when it asked the FBI supervisors why they used them, no one could satisfactorily—well, "Nobody could satisfactorily explain their actions. Instead, they gave a variety of unpersuasive excuses contending either that they thought someone else had reviewed or approved the letters, that they had inherited the practice, or were not in a position to change it, or that it was not their responsibility to follow up with appropriate legal process."

So what I want to know is how you are changing that culture. What procedures does the FBI have in place currently to ensure its employees understand and adhere to the law when conducting investigation?

Ms. CAPRONI. We have spent a tremendous amount of time looking at that issue and trying to figure out what are the appropriate training regimes to make sure that across the board on these high-

risk type of areas that our employees have been adequately trained.

ECPA is a particular issue that comes up in legal training regularly, and it will continue to be regularly trained on either a 1-year or 2-year cycle. We haven't quite decided that yet. But we spend a lot of time trying to figure out and in fact focusing on adequate training for our employees, and then not just training, but then auditing on the back end to make sure that the training has taken and that in fact our employees have understood the message that has been delivered, and then it is reinforced on a regular basis.

It is incredibly important to us that our employees comply. We were extremely disappointed when they discovered this and when we discover similar sorts of issues where we have got a clear disconnect between what the rules and laws are that govern our actions and what employees were doing.

Ms. CHU. Well, you said that you are training them, and then you then want to make sure that they actually ingested that information, but how do you check up on that?

Ms. CAPRONI. The Inspection Division is focusing, for example, on national security letters. The Inspection Division, which is our sort of internal audit division within the bureau, has audited the use of national security letters several times in addition to the audits that the inspector general has done.

The National Security Division looks at national security letters when they go out and do periodic what are called national security reviews. So they are looking in the files. They are looking at the letters.

We also instituted systems to make sure to correct what we view as fairly common errors, that it is all automated now so that the employee can't make the error. We ensure that documents are routed through attorneys and things like that. So we are looking systematically at issues like this to try to figure out where can we build into the system checks and balances, attorney review where appropriate, so that we can ensure before the action is taken that in fact it is being taken in accordance with all laws, regulations and policies.

Ms. CHU. What process is in place, then, for companies like the phone companies in this case to complain or confirm the use of certain investigative techniques. In other words what could these companies have done to alert you or the IG about potential abuse on behalf of FBI employees?

Ms. CAPRONI. Well, the issues with the phone companies was, I believe, and I think the inspector general would agree with this, the problem was that when their employees were relocated into our workspace was both parties, their systems and our systems of internal controls broke down.

So the phone company employees viewed themselves as part of the team, and they were fighting the fight to keep America safe. Our employees lost that professional distance that they needed between themselves and the telephone companies. So I don't think this is a matter of the phone companies feeling they should complain and not have anybody to complain to. I think they saw the same thing we did—was that putting our employees together, while

it had huge benefits in terms of speed, had an extreme downside, which was that it broke down both our sets of internal control.

Ms. CHU. In previous testimony you said that the FBI did not accurately report to Congress on the use of exigent letters. How can Congress and the IG provide better oversight to ensure this doesn't happen again?

Ms. CAPRONI. Well, certainly on reporting I think the systems that we now have in place to tally national security letters, which is an automated system which automatically snags the statistics that we need in order to report the numbers that we are required to report to Congress, has vastly improved our reporting. I can't say that it is 100 percent accurate, but I can say it is a thousand times better than it was when we were using antiquated spreadsheets to try to tabulate national security letters.

Ms. CHU. Thank you very much.

Mr. NADLER. Thank you.

I will now recognize the gentleman from Tennessee.

Mr. COHEN. Thank you, Mr. Chairman. I appreciate your holding the hearing. This is an issue that is of great importance to the American people, for the Constitution and due process are involved, and sometimes they kind of get looked over.

Let me ask Mr. Fine. You have, as I understand it, made some recommendations to the FBI, and they have responded, but they haven't taken any action, as I understand it. Is that accurate? Or can you tell us what actions they have taken and how long do you think it should take them in an expedient fashion?

Mr. FINE. Congressman, they have responded, and they have taken some actions, and they have described how they are going to take additional actions. So I do believe they are taking our recommendations seriously. They have not implemented all of our recommendations yet. There are still some policies that they need to put in place.

And in addition, it is not a one-time thing. They need to provide training and guidance, but it is not once won and done. It has to keep going and be part of the culture, part of the regular course of business, and continuous. And so I think that is the important thing here, not simply to say we concur and we have done it once, but to go on and on and make sure that they are monitoring this, they are ensuring that it is complied with, and that while policies are good, they not self-executed.

Mr. COHEN. And I may be incorrect, but I believe your testimony indicated that much of this activity occurred during the 2003 to 2006 period. Is that accurate?

Mr. FINE. Yes.

Mr. COHEN. Is there any indication that this pre-existed 2003?

Mr. FINE. Well, we looked at a particular unit, the Communications Analysis Unit, where the bulk of this activity occurred, and that unit was created in late 2002 or early 2003. So that is when this problem really became widespread, and that is where we focused our attention on.

Mr. COHEN. And you don't think there are other problems? Do you have any reason to believe there are other problems where the bureau is not abiding by its constitutional duties and requirements?

Mr. FINE. You know, can I rule that out? No. Do we have indications of it? We would have opened an investigation on that. We don't have particular examples, but I do think that this had implications all throughout the bureau. That is, without putting in systems to ensure that they are complying with the law in this area, you know, it is not as if it is solely one situation. And I think that is why our message has to be broader than fix this one problem and you are okay.

You have to fix it in terms of a process and a culture and oversight mechanism, which I think they have said they have recognized that. They have called this a wake-up call. We will be there to monitor that.

Mr. COHEN. Do you believe the FBI director at the time was aware of these activities?

Mr. FINE. No. We didn't have indications that he was until our investigation surfaced it.

Mr. COHEN. And then when it did surface, did he take adequate action?

Mr. FINE. Yes, I think he did. He took responsibility for it. He recognized he was at fault as well and that he needed to ensure that this didn't happen again and that there were processes in place for them to find and not wait for us to find them.

Mr. COHEN. Thank you, sir.

Ms. Caproni, you mentioned that the fact is the report concludes the FBI and the Department of Justice must take additional action to ensure FBI personnel comply with the statutes, guidelines, regulations and policies governing the FBI authority, et cetera. Do you have any—do you have an opinion upon when we might get compliance or affirmation from the DOJ and the FBI that they are going to change their policies?

Ms. CAPRONI. Congressman, we have changed a massive number of policies that relate to ECPA and how we get telephone records since 2007. And we have briefed this Committee's staff, and we are happy to come back up and do a full briefing on that.

There are substantial numbers of changes in policies, and probably more importantly, what we did was change systems. And so, for instance, for national security letters, which is where this all began, we now have an automated system, which routes them.

First off, it fills in all the boilerplates so that we take account of the mildly different language that is required, depending on what statute you are proceeding under. It routes it automatically so that it cannot proceed, it cannot go unless it has been approved by everybody that is required to approve it, including an attorney. That system automatically populates the letter. It automatically uploads it into the system. It automatically snags the statistics that we need for congressional reporting.

For emergency requests, not for exigent letters, but true emergency requests, we are designing a very similar system, which will pre-populate letters to the phone companies with the required statutory language so that all the agent needs to do is to actually fill in what is the emergency.

So I would say we have taken a long look at lots of different policies and also at procedures so that our agents aren't making what I would call errors or careless errors, not intentional wrongdoing,

not trying to violate people's rights, but just in a rush with their business, not dotting "I"s and crossing "T"s that we would like them to do.

So we are trying to use technology to make that easier for them so that they can focus their attention on mission-related work rather than on, you know, making sure that they have cited, you know, C4 instead of C5 in order to do what they want to do.

But we are again happy to come up and brief on all of the changes to policies that we have made in the last 3 years in response to the IG's first report, if the Committee would like.

Mr. COHEN. Thank you very much. I appreciate each of your testimonies and particularly appreciate the Chairman for bringing this important subject to the attention of the Subcommittee and the country.

Thank you.

Mr. NADLER. I thank the gentleman.

I think that concludes. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record, and we thank the witnesses and the Members. And with that, the hearing is adjourned.

[Whereupon, at 11:18 a.m., the Subcommittee was adjourned.]