CHAPTER ELEVEN

(U) THE DRAFT FISA APPLICATION: JUNE 1997 TO AUGUST 1997

(U) Questions Presented:

Question One: (U) Did OIPR properly conclude that the information provided by the FBI in support of its request for a FISA order was legally insufficient?

Question Two: (U) Did the FBI have in its possession additional information which, had it been incorporated into the FISA application, would have rendered the application legally sufficient?

Question Three: (U) Could the FBI have readily acquired additional information which would have materially advanced its request for a FISA order?

Question Four: (U) Was the FBI's submission to OIPR accurate?

Question Five: (U) Did the FBI fairly and properly advise OIPR of information in its possession which did not support, or which undermined, its request for a FISA order?

Question Six: (U) Did OIPR internally process the FBI's request for a FISA order with professional skill and dispatch?

Question Seven: (U) Did OIPR apply an unduly high standard for evaluating the legal sufficiency of the FISA application?

Question Eight: (U) Did OIPR advise the Attorney General of its determination that the FISA application was legally insufficient and, if not, should it have done so?

Question Nine: (U) Should OIPR have destroyed its files?

PFIAB Questions:

Question #2: (U) Whether the DOJ Office of Intelligence Policy Review (OIPR) applied an inappropriately high standard to the FBI's request for electronic surveillance under the Foreign Intelligence Surveillance Act (FISA).

Question #3: (U) Whether the FBI provided to DOJ OIPR all U.S. Government information relevant to an appropriate evaluation of the FBI's FISA request.

Question #8: (U) Whether the DOJ OIPR maintained appropriate records concerning FISA requests that were declined.

A. (U) Introduction

(U) The AGRT concludes the following:

(1) (U) The final draft FISA application ("Draft #3"), on its face, established probable cause to believe that Wen Ho Lee was an agent of a foreign power, that is to say, a United States person currently engaged in clandestine intelligence gathering activities for or on behalf of the PRC which activities involved or might involve violations of the criminal laws of the United States, and that his wife, Sylvia Lee, aided, abetted or conspired in such activities. Given what the FBI and OIPR knew at the time, it should have resulted in the submission of a FISA application, and the issuance of a FISA order.

(2) (S/NF/RD) Given what is known today, however, it is clear that the draft FISA application contains serious misrepresentations of fact concerning the predicate for the investigation. DOE made critical misrepresentations to the FBI on this matter. See Chapters 6 and 7. The FBI, for its part, failed properly to investigate the predicate for itself. See Chapters 4 and 8. Instead, it unconditionally accepted DOE's

misrepresentations and it then transmitted those misrepresentations intact to OIPR, where they proceeded to infect the FISA application. Moreover, Draft #3 [redacted] As Chapter 7 demonstrates, the FBI's confidence in that analysis was completely misplaced. In short, given what the FBI and OIPR knew in *1997*, Draft #3 should have been submitted to the FISA Court. But, given what we know *today*, Draft #3 could never be submitted to any court.

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(3) (U) There is no indication that the FBI withheld exculpatory evidence from OIPR in connection with its letterhead memorandum seeking a FISA order ("the June 5, 1997 LHM"). In fact, the contrary is clear: the FBI conscientiously apprised OIPR of the weaknesses in its case.

(4) (S) The FBI failed to inform OIPR of critical information *in its possession* that would have substantially strengthened probable cause. In one case, the information omitted was *so* critical that it alone might have altered OIPR's perception of probable cause.

(5) (U) Other critical information was not actually known to the FBI but was certainly *knowable*. In particular, as set forth in Chapter 9, the FBI could have gained access to information concerning Wen Ho Lee's illicit computer activities and, thereby, made a FISA order a foregone conclusion.

(6) (U) OIPR devoted immediate, serious and substantial attention to this matter.

(7) (S) A factor in OIPR's rejection of the FISA application was its unduly rigid and narrow view of what has come to be called "currency." That view, expressed by one senior OIPR attorney, is that "currency" requires activity in the past six months. This is neither required by the FISA statute, nor by its legislative history, nor is it consistent with known patterns of conduct by agents of foreign powers.

(8) (S/NF/RD) In July/August 1997, the Acting Counsel for Intelligence Policy, Gerald Schroeder, had a duty to bring to the attention of the Attorney General the

existence and resolution of this matter. [redacted] The Attorney General should have been apprised of *any* rejection of a FISA request but, in particular, she should have been apprised of the rejection of *this* FISA request. That OIPR expected a resubmission some time in the future was irrelevant. For the time being, OIPR, and OIPR alone, was blocking the submission of a FISA application in a case alleging the theft of secrets to an American nuclear weapon. That the Attorney General *needed* to know this is a point almost too obvious to note.

(9) (U) OIPR should never have destroyed the records and computer files pertinent to this matter until it was firmly and finally concluded. OIPR representatives told the AGRT it was their view that the matter was in "intermission" when it left OIPR in August 1997. Given that awareness, OIPR had a professional responsibility to preserve and maintain its records until it was determined that the matter was truly *finished*. It is no answer to say that the FBI maintained similar records. By virtue of the FBI's FISA submission, this had become an *OIPR* case, involving *OIPR* decisions, by *OIPR* attorneys, on a matter of grave consequence. OIPR could not know, for certain, *what* the FBI would choose to retain. (Obviously, we now know, for example, that its retention did not include FISA Draft #2.) Whatever policy OIPR might choose to apply to *closed* matters, this matter was *not* closed (as OIPR Attorney David Ryan was to discover on December 22, 1998.) OIPR's records should have been retained.

B. (U) A brief chronology

(U) On June 5, 1997, SSA [redacted] sent the FISA LHM from NSD to NSLU where, according to SSA [redacted] it landed in [redacted] in box.[“] [redacted] 7/23/99)

[“] (U) [redacted] has no recollection of having any involvement in the FISA LHM. He told the AGRT he was "not involved in [the] Lee LHM at all." [redacted] 7/16/99)

(U) On June 13, 1997, FBI-AQ inquired as to the status of the application and SSA [redacted] told SA [redacted] that it had left his desk a week earlier. He said it may still be in the "bowels of HQ or [it] may be at Justice." (AQI 5343)

(U) On June 19, 1997, FBI-AQ received the FISA LHM from FBI-HQ and SA [redacted] began reviewing it. (AQI 5215)

(U)

(S) On June 30, 1997, SSA [redacted] went hunting for the application and found it still in [redacted] box. [redacted] 7/23/99) He removed it and gave it to [redacted] a detailee to the NSLU. According to SSA [redacted] she approved it and it left the FBI for OIPR the same day.[687] SSA [redacted] and UC [redacted] personally walked the application over to OIPR, where they met with Alan Kornblum, who was then OIPR's Deputy Counsel for Operations. [redacted] 7/23/99) They emphasized to Kornblum the importance of the matter and Kornblum immediately assigned it to David Ryan, an OIPR Attorney Advisor, to draft a FISA application. [redacted] 7/23/99; Kornblum 7/15/99; AGO 133) Also on June 30, 1997, SSA [redacted] SSA [redacted] and SA [redacted] talked by telephone and reviewed the LHM. (AQI 5234, 5190) Also that same day, UC [redacted] was asked to come to DOE with SSA [redacted] and brief Notra Trulock "on the current investigative status of the KINDRED SPIRIT case."[688] (FBI 1029)

(U) By July 4, 1997, Ryan had prepared a first draft and Kornblum came in on the holiday to review it. (Kornblum 7/15/99) He made numerous comments in the draft and it went back to Ryan for revision the same day. (FBI 3512)

(SAIF) On July 11, 1997, Ryan and SSA [redacted] met to discuss the application. (FBI 6844) Ryan sought additional information on a number of matters, including the following: (1) [redacted]

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[687] (U) [redacted] had no recollection of approving the FISA LHM for submission to OIPR. [redacted] 7/8/99)

[688] (S) That briefing took place on July 3, 1997. (FBI 1029) Present from DOE were Trulock; [redacted] and [redacted] The FBI advised the DOE representatives of the status of the FISA application. (Id.)

[redacted][689] (FBI 11072); (2) the interrogation of Wen Ho Lee arising [redacted][690]; and (3) the source reporting associated with [redacted] (AQI 5341)[691] After he returned from his meeting with Ryan, SSA [redacted] apparently contacted SA [redacted] of the San Francisco Division of the FBI ("FBI-SF") and had him fax a copy of a

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[689] (S) [redacted] (FBI 11072) [redacted] (SF 154)

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[690] (U) (S) In 1983 and 1984, Lee was interviewed repeatedly by the FBI. These interviews were all summarized in several FD-302's as follows:

November 9, 1983	(FD-302 of interview of Lee)	(FBI 2117-2119),
December 20, 1983	(FD-302 of interview of Lee)	(FBI 2120-2122),
December 20, 1983	(FD-302 of interview of Lee)	(FBI 2123-2125),
December 21, 1983	(FD-302 of Lee)	(FBI 2126-2127),
January 3, 1984	(FD-302 of Lee)	(FBI 2128-2129),
January 24, 1984	(FD-302 re polygraph of Lee)	(FBI 2130-2132),
March 12, 1984	(cover LHM)	(FBI 2115-2116).

[691] (S) This citation is to a handwritten note by SA [redacted] concerning a telephone conversation he had on Monday, July 14, 1997, with SSA [redacted] and SSA [redacted] SSA [redacted] told the FBI-AQ agents about his meeting with Ryan and noted that "possibly" the FBI does not "have [a] lead pipe cinch." (AQI 5341) As to the three items for which Ryan requested additional information, SA [redacted] wrote a note that suggested that SSA [redacted] had actually *given* Ryan copies of the three items. The note reads: "As a result of mtg [,] CS [redacted] furnished these items to DOJ this morning." (Id.) The AGRT has interviewed Kornblum, Ryan and [redacted] on this matter and each indicated no recollection that these documents were actually "furnished" to Ryan. [redacted] 12/15/99; Ryan 11/23/99; and Kornblum 11/23/99). Kornblum said he was "certain" he never saw the source reporting [redacted] and never saw the Lee FD-302's and he was "reasonably certain" he never saw [redacted] (Kornblum 11/23/99) It is almost certain that what SA [redacted] was referring to as having been "furnished" to OIPR on July 14, 1997 were eight inserts, further described below.

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March 3, 1994 teletype from FBI-SF to FBI-HQ concerning the February 23, 1994 incident. (FBI 1038)

(U) (S) Between July 4, 1997 and the end of July, several events occurred: (1) Kornblum advised the Acting Counsel for Intelligence Policy, Gerald Schroeder, of the existence of the matter and told him "you probably need to look at it." (Schroeder 7/7/99); (2) SSA [redacted] drafted eight inserts for inclusion in the FISA application;[692] (FBI 7474-7484) (3) A second draft of the FISA application was prepared by Ryan;[693] and (4) The last draft – marked "Draft #3" – was prepared by Ryan, reflecting Kornblum's edits, and incorporating, with some stylistic changes, the eight inserts. In this time period as well, Kornblum and Ryan came to the judgment that the application did not meet the probable cause standard and that conclusion was communicated to Schroeder. (Schroeder 7/7/99) Schroeder read the draft application "cover to cover" and "didn't think it was close." (Id.)

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(U) (S) On July 24, 1997, while one set of attorneys within OIPR were concluding that the FISA application was insufficient to establish probable cause to believe the Lees were agents of a foreign power, another attorney within OIPR [redacted] was issuing [redacted] approval of the Annual LHM for the Lee investigation.[694] (AGO 127)

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[692] (U) (S) One FBI document attributes the inserts to FBI-AQ. (FBI 7263) That is incorrect. SSA [redacted] drafted the inserts. [redacted] 4/27/00)

[693] (U) This is somewhat speculative because no Draft #2 has ever been located. Ryan told the AGRT that he would have had a hard copy of Draft #2 in his file but, six months to a year after the events of July/August 1997, he destroyed the contents of the file. (Ryan 7/8/99)

[694] (U) (S) The point here is not that the right hand did not know what the left hand was doing, nor is it that OIPR was taking inconsistent positions. The standard for approving an Annual LHM ("reason to believe") is lower than the standard for approving a FISA application ("probable cause") and, therefore, it is certainly possible that an Annual LHM can be approved while the FISA application in the same matter be denied. The point here is how *narrow* was the range of ultimate disagreement: it began at "reason to believe" and ended, a few increments later, at "probable cause."

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(U) (S) On August 11, 1997, SSA [redacted] talked to SA [redacted] and told him he would be meeting with DOJ lawyers in the morning to convince them there was enough "to go forward." (AQI 5331)

(U) (S/NF/RD) On August 12, 1997, UC [redacted] SSA [redacted] NSLU attorney [redacted] Komblum, Ryan and Schroeder met to discuss the FISA application.[695] OIPR advised the FBI that there was insufficient information in the application to support a finding of probable cause. OIPR's representatives said the following:[696]

- (U) (S) The application had been reviewed two or three times, including by Schroeder, and it "doesn't meet test."
- (S/NF/RD) One principal concern of OIPR was as to the question [redacted] OIPR said there was "some probability" of this but "not enough to say it is more probable than not." A second principal concern of OIPR was the lack of evidence to demonstrate that the Lees were "now" engaged in clandestine activity. b1
- (U) (S/NF) OIPR also expressed concern about the FBI's failure to eliminate the other individuals listed in the DOE Administrative Inquiry as having had access to W-88 information and having traveled to China. OIPR noted that, while Lee and his wife were ethnic Chinese, so were two others on the list. And, while Lee and his wife had traveled to the PRC for conferences, so too had all the others on the list.

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[695] (U) The AGRT has two sets of notes of this meeting, one made by SSA [redacted] (FBI 9414-9416) and one made by UC [redacted] (FBI 12475-12476).

[696] (U) Ryan told the AGRT that Komblum ran the meeting. (Ryan 7/8/99)

- (U) ~~(S)~~ OIPR noted that Lee did not attempt to hide the fact that he had visited a nuclear weapons facility while in the PRC and had, in fact, reported it in his travel report. According to OIPR, it "cuts both ways." SSA [redacted] notes read: "Alan says why did [Lee] report visit if [there is] clandestine relationships."

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- ~~(SANF/RD)~~ OIPR noted that the FBI "would need to eliminate" the others on the DOE list "to make this *more* probative" and cited other cases presented by the FBI to OIPR that involved a "matrix." [697] SSA [redacted] notes read: "If we could say nobody else went to IAPCM – 1st part [redacted] might be accomplished." [698]

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- ~~(SANF)~~ As to [redacted] OIPR described it as "unique" but "stale," [redacted] It did not establish that they were *currently* engaged in such activities. SSA [redacted] notes read: [redacted]

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- ~~(SANF)~~ As to [redacted] OIPR acknowledged [redacted]

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[697] (U) ~~(S)~~ A "matrix" analysis is an analytical device used in espionage investigations to narrow a list of suspects by comparing known factors of the offense (e.g., a classified document was compromise in Moscow on a certain date) with known factors of the pool of suspects (e.g., travel records showing which of the individuals who had access to the classified document was in Moscow on that certain date). As the known factors grow, the list of suspects narrows, ideally to one candidate.

[698] (U) IAPCM is the PRC's Institute of Applied Physics and Computational Mathematics, which is the nuclear weapons design facility of the CAEP, the Chinese Academy of Engineering Physics.

- (S) As to the PRC student [redacted] OIPR did not view it as probative. SSA [redacted] notes read: [redacted] b1

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(U) (S) The August 12, 1997 meeting between the FBI and OIPR was not confrontational. SSA [redacted] said OIPR was "pulling with us" on this matter. [redacted] 7/23/99) Schroeder said it was "cordial, no acrimony" and "no hard feelings." (Schroeder 7/7/99) Although it was UC [redacted] view that "OIPR was wide of the mark," and it was SSA [redacted] view that the PRC student "put them over the top," the agents, according to Kornblum, "didn't argue vociferously" at the meeting. [redacted] 7/19/99, [redacted] 7/23/99, Kornblum 7/15/99) The FBI "accepted [the] fact that we believed case wasn't sufficient." (Ryan 7/8/99)

(U) (S) Three weeks later, UC [redacted] would send an e-mail to SSA [redacted] reporting on a telephone conversation with Ryan who was conveying some questions posed by Schroeder in reference to an anticipated September 5, 1997 FBI briefing to the NSC. One of the questions asked was this: "Will the FISA turn down be mentioned?" UC [redacted] answer made it clear that the FBI, though it disagreed with OIPR's decision, thought it had gotten a fair hearing: The "turn down" should be mentioned "[o]nly if brought up – but in a non-hostile fashion given full review given the request by OIPR staff." (FBI 12434) AD Lewis expressed the same message in a note to Director Freeh: "[Kornblum] had apparently made a real effort to find a way for an application to go forward." As DAD Sheila Horan said, OIPR's rejection of the FISA application was not "malevolent." (Horan 7/29/99) "Everyone acted in good faith." (Parkinson 8/11/99)

(U) On August 20, 1997, the FBI would make one more effort to obtain a FISA order. It, too, would be unsuccessful. See Chapter 12.

C. (U) Draft #3 met the "probable cause" standard

1. (U) Introduction

(U)
(S) The Attorney General and the Director of the FBI are the two individuals who, for the past several years, have had the most to do with whether a particular FISA application went forward to the FISA Court. In the Wen Ho Lee investigation, however, *neither* the Attorney General nor the Director had *any* involvement in the initial[699] determination that the Lee application would not go to the FISA Court. Nevertheless, both have formed firm opinions as to the merits of Draft #3. It is the Attorney General's view that it did not meet the probable cause standard. (Reno 11/30/99) Director Freeh believes it did.[700] (Freeh 11/11/99) The AGRT also believes it did and, *given what was known at the time*, it should have gone to the FISA Court.

(U) Three points should be made at the outset of this discussion:

(U)
(S) First, even within the FBI, there is a recognition that the Wen Ho Lee FISA application was something less than overwhelming: Deputy Director Bryant described it as not "the strongest" he had ever seen. (Bryant 11/15/99) SSA [redacted] himself, described it as a "borderline case" and "not an easy call." [redacted] 7/23/99) Parkinson described it as 'somewhat close."[701] (Parkinson 8/11/99) Even before the FISA application was submitted, the FBI understood that it would be close. See an FBI

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[699] (U) The Attorney General would have some involvement in the "appeal" of that determination. See Chapter 12.

[700] (U) (S) Director Freeh's view of the FISA application was generally shared by other FBI officials. SC Dillard said that the application was "sufficient" and that he had seen other applications that had gone to the court with "less." (Dillard 8/6/99) Deputy Director Bryant said the same thing: he had "seen other [FISA applications] approved on less information." (Bryant 11/15/99) FBI General Counsel Larry Parkinson described Draft #3 as "a pretty good package." (Parkinson 8/11/99) DAD Horan said: "It should have gone the other way." (Horan 7/29/99)

[701] (U) (S) "But," he added, "not that close." (Parkinson 8/11/99)

briefing memorandum written in April 1997: "Although we do not have as strong a case as we wish, we are immediately seeking ELSUR [electronic surveillance] authority." (FBI 13034)

(U)
(S) Second, in many interviews the AGRT has done with FBI personnel, a consistent theme that has emerged has been the FBI's substantial frustration with what it perceives to be OIPR's general lack of aggressiveness in the handling of FISA applications. Director Freeh told the AGRT that it was his view that OIPR was "too conservative" and "too worried" about what the FISA Court will say.[702] (Freeh 11/11/99) Various FBI officials pointed to OIPR's unblemished success rate with the FISA Court as evidence of its undue conservatism in the evaluation of applications. As SC Dillard said, "never being turned down" by the FISA Court should be "nothing to brag about." (Dillard 8/6/99) SSA [redacted] a former chief of the NSLU, told the AGRT that it was his impression that "there was a real reluctance [at DOJ] to present [to the FISA Court] close question cases" and that OIPR was "too timid" in processing FISAs. [redacted] 8/5/99) General Counsel Parkinson's view was that OIPR was "too concerned about maintaining a perfect record." (Parkinson 8/11/99) Parkinson added that he "would feel better if occasionally FISAs were rejected – [it] would mean we were being aggressive." (Id.) "Almost by definition, if you never lose you are not taking enough to [the FISA] Court." (Id.)

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(U)
(S) The question of whether OIPR is "too conservative" in its *general* handling of FISA applications is beyond the scope of the AGRT's mission.[703] What we can say is

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[702] (U)
(S) This point was echoed by numerous FBI officials: "too strict" (Horan 7/29/99); "too conservative [an] approach" (Torrence 7/30/99); "too conservative" (Parkinson 8/11/99); see also NSLU Attorney [redacted] (noting the "increasing perception" that OIPR was "too conservative, too protective of its perfect record.") [redacted] 7/16/99) According to Marion "Spike" Bowman, of the FBI's Office of General Counsel, there is "absolutely no doubt at all that OIPR has set [the probable cause] standard too high." (Bowman 8/11/99)

[703] (U) That issue could never be resolved on the basis of a review, even a comprehensive review, of just *one* application. Rather, it would require an empirical

that OIPR was "too conservative" in the handling of *this particular application*. Nevertheless, there are three factors that suggest that the FBI's complaints have merit.

(U)
(S) First, there is that perfect record. While there is something almost unseemly in the use of such a remarkable track record as proof of error, rather than proof of excellence, it is nevertheless true that this record suggests the use of "PC+," an insistence on a bit more than the law requires.

(U)
(S) Second, the frequency and intensity of the complaints which the AGRT has heard is not *par for the course.* Agents and prosecutors do carp at each other, of course. After all, given the nature of this work, given its obvious high stakes and high stress, a certain amount of grumbling, and outright complaints, is expected. What the AGRT heard was more than that, and we heard it from *all* levels in the Bureau. That this included the Director – who has certified innumerable FISA applications over the years – indicates a real and unresolved problem.

(U)
(S) Third, although it is true that it is impossible to extrapolate from *one* application to *all* applications, the fact that OIPR did reject the Wen Ho Lee application is significant. If OIPR applies "too conservative" an approach to this application – an application in a matter of extraordinary consequence that received very careful scrutiny and attention from OIPR's senior staff – it suggests that it applies "too conservative" an approach in the routine applications as well.

(U)
(S) The final point to make is this: Although the FBI has clearly expressed the view that OIPR has set the probable cause standard too high, it has also clearly expressed the view that it *generally* has managed to work through that problem. SSA [redacted] said the FBI "did battle" with OIPR "every day" but that it solved "99.99%" of the problems.

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examination of hundreds of applications, i.e., those that were approved for submission to the FISA Court, those that were rejected for submission to the FISA Court, and those that were postponed pending the receipt of more information.

FBI b6 b7C [redacted] 8/5/99) Parkinson agreed that there have been "very few" unresolved disagreements.[704] (Parkinson 8/11/99)

(U)
(S) A principal reason that the FBI and OIPR have been able to resolve their differences is that when OIPR sent the FBI back for more evidence, the FBI was able to put more evidence on the table. Most assuredly, the FBI could have done that here as well. Indeed, as is described below, the FBI had to look no farther than SSA [redacted] own "in box" for that evidence. Unfortunately, the FBI did not appreciate what it had or what it could readily acquire.

(U)
(S) If it is true, as SSA [redacted] said, that 99.99% of the FBI's problems with OIPR get resolved, the Wen Ho Lee case was the one that got away.

2. (U) The governing law

(U) So far as is relevant to this chapter, to obtain a FISA order, it was necessary to persuade the Foreign Intelligence Surveillance Court ("FISA Court") that there was "probable cause" to believe that Wen Ho Lee was an "agent of a foreign power." 50 U.S.C. § 1805(a)(3)(A).

a. (U) Probable cause

(U) The FISA statute does not define "probable cause," although it is clear from the legislative history that Congress intended for this term to have a meaning analogous to that typically used in criminal contexts.[705] The Supreme Court has said that it is not

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[704] (U)
(S) Thus, the overwhelming majority of FISA applications/renewals have been approved by OIPR and submitted to the FISA Court. That is no insignificant accomplishment. According to DOJ records, there were 11,201 FISA applications from 1979 through 1998, including 749 in 1997, the year OIPR handled the Wen Ho Lee application. (FBI 11174)

[705] (U) See, e.g., S. Rep. No. 95-604, pt. 1, at 47 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3948 ("In determining whether probable cause exists [under what became 50 U.S.C. § 1805(a)(3)] the court must consider the same requisite elements

possible to articulate precisely what the term "probable cause" means. Ornelas v. United States, 517 U.S. 690, 695 (1996).[706] "We have described . . . probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Id. at 696. "In dealing with probable cause . . . , as the very name implies, we deal with *probabilities*." Brinegar v. United States, 338 U.S. 160, 175 (1949) (emphasis added).[707]

(U) Probable cause means "more than bare suspicion." Id.[708] Instead, as the Supreme Court described the role of the judicial officer asked to issue a warrant:

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which govern such determinations in the traditional criminal context.").

[706] (U) It is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Ornelas, 517 U.S. at 695 (quotation marks and citations omitted).

[707] (U) "While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that . . . the *probability* . . . of criminal activity is the standard of probable cause." Illinois v. Gates, 462 U.S. 213, 235 (1982) (emphasis added, quotation marks and citation omitted). "Probable cause exists where the facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar, 338 U.S. at 175 (quotations marks and citation omitted). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of *probability*." Id. at 176 (emphasis added).

[708] (U) See S. Rep. No. 95-604, pt. 1, at 28, 1978 U.S.C.C.A.N. 3929 ("[i]t is clear . . . that the circumstances must not be merely suspicious, but must be sufficient support for a finding of probable cause").

> (U) The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . , there is a *fair probability* that contraband or evidence of a crime will be found in a particular place.

Gates, 462 U.S. at 238. (emphasis added).[709]

b. (U) Agent of a foreign power

(U) So far as is relevant here, the term "agent of a foreign power" is defined in the FISA statute as "any person who . . . knowingly engages in clandestine intelligence gathering activities[710] for or on behalf of a foreign power, which activities involve or may

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[709] (U) The determination of probable cause is to be based upon the "totality of the circumstances." Gates, 462 U.S. at 238. Compare S. Rep. No. 95-604, pt. 1, at 28, 1978 U.S.C.C.A.N. 3929 ("[i]n applying these various tests, the judge is expected to take all the known circumstances into account").

[710] (U) The term "clandestine intelligence gathering activities" is not defined in the statute. "The imprecision of these terms reflects an assessment of the nature and difficulty of foreign counterintelligence investigations." S. Rep. No. 95-701, at 12 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3981. According to the legislative history, the term "includes collection or transmission of information or material that is not generally available to the public, or covert contacts with an intelligence service or network by means of 'drops' or other methods characteristic of foreign intelligence operations." Id. at 21-22, 1978 U.S.C.C.A.N. 3990-91. It includes spying and activities directly related to spying that may violate the espionage statutes, as well as the collection of industrial or technological material in a manner that may violate other statutes. Id. at 22. 1978 U.S.C.C.A.N. 3991. "Whatever the nature of the information or material gathered or transmitted by the foreign agent, there must be a clandestine aspect. The bill requires that the alleged foreign agent not only be working for or on behalf of a foreign power, but also, as a separate requirement, that he be engaged in clandestine intelligence gathering activity." Id. See also H.R. Rep. No. 95-1283, pt. 1, at 38 (1978).

involve[711] a violation of the criminal statutes of the United States." 50 U.S.C. § 1801(b)(2)(A).

(U)

(S) The use of the present tense in the term "knowingly engages" has given rise to what has been called the "currency" debate. (Kornblum 7/15/99) That is, how *current* must an individual's clandestine intelligence gathering activities be in order to meet the requirements of the FISA statute? In reviewing a FISA application, Kornblum indicated that he looks for indications of activity in the last six months. (Kornblum 7/15/99) We believe that is far too rigid and cramped an interpretation of what it means to be presently engaged in clandestine intelligence gathering activities.

(U)

(S) Espionage cases *are* different and rules requiring activity within six months or a year or even longer are inappropriate. Hostile intelligence services may clandestinely insert an agent into the United States and not activate him for years. An agent may be instructed to take specific actions only after a long period of dormancy. Long periods of

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[711] (U) The use of the term "may involve" is an instance where the FISA statute's probable cause requirement differs from that used in the criminal context. The statute "adopts probable cause standards that allow surveillance at an early stage in the investigative process by not requiring that a crime be imminent or that the elements of a specific offense exist. Surveillance of clandestine intelligence gathering activities that 'may involve' a criminal violation . . . makes it possible to discover whether a person is likely to commit an offense in the foreseeable future." S. Rep. No. 95-701, at 13, 1978 U.S.C.C.A.N. 3981. However, "[t]he words 'may involve' . . . are not intended to encompass individuals whose activities clearly do not violate federal law. They are intended to encompass individuals engaged in clandestine intelligence gathering activities which may, as an integral part of those activities, involve a violation of federal law. They cover the situation where the government cannot establish probable cause that the foreign agent's activities involve a specific criminal act, but where there are sufficient specific and articulable facts to indicate that a crime may be involved." Id. at 23, 1978 U.S.C.C.A.N. 3992. Moreover, "in order to find 'probable cause' to believe the subject of the surveillance is an 'agent of a foreign power' . . . the judge must, of course, find that each and every element of that status exists." Id. at 53, 1978 U.S.C.C.A.N. 4022.

time may elapse between acts of clandestine intelligence gathering. Each of these, depending on its particular and unique facts, may or may not meet the standards of "currency."

(U) FISA's legislative history provides support for this view. According to the House Permanent Select Committee on Intelligence ("HPSCI"):

> (U) [E]vidence that a person engaged in the proscribed activities six months *or longer* ago might well, depending on the circumstances and other evidence, be sufficient to show probable cause that he is still engaged in the activities. For instance, evidence that a U.S. person was for years a spy for a power currently hostile to the United States, but who had dropped out of sight *for a few years*, would probably be sufficient to show "probable cause" that he was, having now reappeared, continued to engage in the clandestine intelligence activities.

H.R. Rep. No. 95-1283, pt. 1, at 37 (emphasis added). See also S. Rep. No. 95-701, at 23, 1978 U.S.C.C.A.N. 3992:

> (U) There does not have to be a current or imminent violation if there is probable cause that criminal acts may be committed.[712]

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[712] (U) But see this additional language from the same report:

> (U) The committee recognizes that an argument can be made that a person could be surveilled for an inordinate period of time. That is clearly not the intention. Indeed, even upon an assertion by the government that an informant has claimed that someone has been instructed by a foreign power to go into "deep cover" for several years before actually commencing his espionage activities, such facts would not necessarily be encompassed by the phrase "may involve." . . .

(U) (S) The "currency" issue represents one of the sharpest areas of dispute between those who evaluate FISA applications, OIPR, and those who submit them, the FBI. The FBI's view is that OIPR is too conservative and too rigid in its definition of "currency."[713] If OIPR's handling of the Wen Ho Lee FISA application is a reflection of the way in which OIPR typically handles the "currency" issue, we agree.

3. (U) The contents of Draft #3

(U) (S) It should be said at the outset that Draft #3, which represented the *fifth* attempt to set out probable cause,[714] was not a model of precise and lucid drafting. It could have, as Director Freeh told the AGRT, "better articulated" probable cause. (Freeh 11/11/99) Nevertheless, it was enough.

> Surveillance cannot be justified unless there is probable cause to believe that the person is, currently, engaged in such activities, even though the relationship of those activities to a specific law violation may be more uncertain or remote in time.

S.Rep.No. 95-701, at 23-24, 1978 U.S.C.C.A.N. 3992-93.

(U) (S) [713] The FBI's criticism of OIPR's "currency" policy ranges from an assertion that the policy is "too conservative" (Parkinson 8/11/99) to a claim that it is "stupid." (Bowman 8/11/99) DAD Torrence said the "currency" requirement "should not be applied [by OIPR] so rigorously in espionage cases." (Torrence 7/30/99) AD Lewis felt that Kornblum was too concerned about the "currency" requirement. (Lewis 7/6/99) DAD Horan stated that OIPR had "major problems" with cases involving "illegals" or "sleepers." (Horan 7/29/99) SSA [redacted] said that OIPR had rejected "a couple of good sleeper cases" for what it considered to be a lack of "currency." [redacted] 8/5/99) [redacted] saw no reason for a specific six month requirement. [redacted] 7/16/99)

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[714] (U) On April 29, 1997, SSA [redacted] faxed a first draft out to FBI-AQ. (AQI 5387). After that, there was the FISA LHM submitted to OIPR on June 30, 1997, the July 4, 1997 "Draft #1," the missing "Draft #2," and the final "Draft #3."

a. (U) The factors supporting probable cause

(S/RD/NF) First, Draft #3 clearly delineated the underlying offense: [redacted] (FBI 13312) Draft #3 states [redacted][715] (Id.)

(S/RD/NF) Second, Draft #3 identified [redacted] (FBI 13313)

(S/NF) Third, Draft #3 stated that, within LANL, [redacted]

(S) Fourth, Draft #3 identified Wen Ho Lee and Sylvia Lee [redacted] who traveled to China during the pertinent time period, noting that they made two trips, one in 1986 and one in 1988.

(U) (S) Fifth, Draft #3 identified Wen Ho Lee as having a Top Secret "Q" clearance, thereby giving him access to nuclear weapons data.[716] Moreover, although Sylvia Lee

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[715] (U) (S/NF) That the application was *wrong* in *every* material respect concerning its description of the predicate is the subject of the next section.

[716] (U) (S) Sylvia Lee is also listed as having a Top Secret "Q" clearance but, unfortunately, Draft #3 contains a typographical error that was taken verbatim from the FISA LHM. Both documents list her clearance dates as "March 12, 1991 to June 9, 1995." (FBI 13311, 8355) The correct dates are March 12, 1981 to June 9, 1995. (FBI

lost her own Top Secret "Q" clearance when she left the employment of LANL in June 1995, Wen Ho Lee retained his clearance at the time of the application.

(S/RD/NF) Sixth, Draft #3 stated that not only had Wen Ho Lee and Sylvia Lee traveled to China during the pertinent time period but on both trips he visited the IAPCM, the nuclear weapons design component of the CAEP, which is the PRC entity responsible for the design, production and testing of PRC nuclear weapons. [redacted]

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(S) Seventh, Draft #3 states that during each of these two trips to China, and while he was at the IAPCM, Wen Ho Lee presented papers and participated in discussions with PRC scientists [redacted]

(S/NF) Eighth, Draft #3 states that the fact that Wen Ho Lee and Sylvia Lee were ethnic Chinese was "significant" [redacted] (FBI 13311) Wen Ho Lee was identified as being a naturalized American citizen from Taiwan and Sylvia Lee a naturalized American citizen from the Hunan Province, in China. (FBI 13311)

(S/NF) Ninth, Draft #3 stated how significant it was that the Lees had twice traveled to the PRC. [redacted] (FBI 13313)

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(~~SANF~~) Tenth, Draft #3 stated that on both their trips to China [redacted] (FBI 13316)

(~~SANF~~) Eleventh, Draft #3 identified an entirely separate avenue by which the Lees might have come to be recruited to compromise the W-88 information [redacted] (FBI 13318)

(~~SANF~~) Twelfth, Draft #3 identified the significance of [redacted] (FBI 13313-13314)

(U) (~~S~~) Thirteenth, Draft #3 identified significant information in Sylvia Lee's employment at LANL that would suggest [redacted] and security concerns. "The FBI also learned from DOE that Sylvia Lee's employment [redacted]

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[redacted] at the Los Alamos National Laboratory,[717] and that her file included incidents of security violations and [redacted]" (FBI 13314)

DOE 66, 67C

(S/NF/RD) Fourteenth, and of remarkable significance, Draft #3 identified Lee as the subject of a *prior* FBI espionage investigation in 1982-1984 [redacted] This investigation, [redacted] determined the following:

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- [redacted]
- [redacted] (FBI 3586)
- [redacted] (FBI 3587)
- [redacted]
- [redacted]

[717] (U) This is not quite correct. Sylvia Lee [redacted] (Kirby 4/27/00)

DOE 66 67C

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[redacted] (Id.)

(S/NF) [redacted] However, according to Draft #3, "the FBI

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[redacted][718] (FBI 5588)

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[718] (S/NF) This statement is *completely* inaccurate. [redacted] (SF 87)

(S/NF) How did this error work its way into Draft #3? [redacted]

FOI b6, b7C

(S/NF) This was an error on the part of the FBI and, in particular, on the part of SSA [redacted] that should *never* have happened. [redacted] (SF 77) Lee's interviews with the FBI in 1983 and 1984, which include an FD-302 devoted to this meeting (FBI 2126-2127), were one of the three items concerning which OIPR requested additional information on July 11, 1997. (AQI 5341)

(S/NF) This error, however, does not alter the ultimate significance of the [redacted] to the probable cause calculus. It does not negate the importance of: [redacted]

(S) Fifteenth, Draft #3 indicates that in the course of conducting the 1982-1984 espionage investigation of Wen Ho Lee, the FBI learned [redacted]

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(S/NF) Sixteenth, and more significant than even the [redacted] was Draft #3's recounting of certain events that occurred [redacted]

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[719] (S/NF) The failure of the FBI to advise OIPR [redacted] is without a doubt one of the two most significant errors made by the FBI in its entire effort in 1997 to obtain a FISA order. See discussion below.

[720] (S/NF) [redacted] The FBI's failure to advise OIPR of [redacted] is the second most significant error which the FBI made in its effort to obtain a FISA order. [redacted] was extraordinarily significant. Had it been fully reported, it might have been not only significant but decisive. See discussion below.

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(FBI 3589)

(S/NF) Seventeenth, Draft #3 stated that, despite

(FBI 3589)

(S/NF/RD) Eighteenth, Draft #3 elaborates on the significance of

(FBI 3590)

(S/NF) Nineteenth, a second source, described as

[721] (FBI 3591)

(S) Twentieth, Draft #3 states that

[721]

(U)

(S/NF) Twenty-first, Draft #3 stated that the FBI had interviewed the Director of X Division in April 1997 and learned two items of significance:

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- [redacted]
- [redacted]

(S/NF/RD) Twenty-second, Draft #3 states that [redacted] (FBI 3592)

(S/RD) Twenty-third, Draft #3 states that the Director of X Division indicated [redacted][22] Draft #3 then states that the Director "brought this to Lee's attention [and] Lee agreed that this was so, and said he would have the student work on a less sensitive research project while visiting the lab." (FBI 3592) Lee's immediate supervisor confirmed that LANL would have [redacted] work on "a sanitized project which is very academic and open."

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[22] (S/NF/RD) As stated in Chapter 10, the AGRT has been advised that [redacted]

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(FBI 13324) Draft #3 states that [redacted] (FBI 133324)

(S) Twenty-fourth, and last, Draft #3 states that the FBI had discovered [redacted] (FBI 13324-13325)

b. (U) The factors not supporting probable cause

(U)
(S) To be sure, Draft #3 also contained reference to other information that diluted the significance of the information that supported probable cause. That information consisted of the following:

(S) (1) Wen Ho Lee was from Taiwan, not China. [redacted] A LANL employee told the FBI that Lee was a strong Taiwanese supporter. Lee made a trip to Taiwan in 1983.

(S) (2) Wen Ho Lee and Sylvia Lee were [redacted] LANL employees with access to the W-88 who traveled to China during the pertinent time frame. [redacted]

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(S) (3) During part of the time that Sylvia Lee hosted PRC delegations to LANL, [redacted]

(U)

(S) (4) Wen Ho Lee's trips to the PRC were disclosed on trip reports submitted to LANL, including his visits to the IAPCM, and also including lists of PRC scientists with whom he said he came into contact.

(S/NF) (5) [redacted]

(S) (6) Lee was given a polygraph in January 1984 concerning whether he had ever passed classified information to any foreign government, as well as the nature of his contacts [redacted] He "passed" the polygraph examination, and the investigation of Lee was closed.

c. (U) Analysis

(S/RD/NF) Draft #3 established probable cause [redacted]

(S/RD/NF) First, Draft #3 established probable cause [redacted]

(S/NF) Second, Draft #3 demonstrated just how small the universe of potential suspects was. Any bonafide suspect would first have to work at a facility with access to the W-88 information during the right time frame. [redacted] Then the pool of suspects was further reduced by limiting it to individuals who, themselves, had actual access to the W-88 data, i.e., holders of Top Secret "Q" clearances. Then the pool of suspects was even further limited to individuals

who had traveled to China during the pertinent time frame. This winnowing process resulted in [redacted] including the Lees.[723]

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(S/NF/RD) That [redacted] – was particularly significant, especially given the possibility that the compromise need not have been accomplished by *just* the Lees. [redacted][724]

(S/NF) In short, the fact that [redacted] who had the means (a Top Secret "Q" clearance and employment at LANL) and likely opportunity (travel to the PRC [redacted] is significant, *in and of itself.* Probable cause, as the term implies, is a matter of probabilities. As the universe shrinks – from all Americans, to those Americans with security clearances, to those Americans with security clearances at the Top Secret "Q" level, to those holders of a "Q" clearance who worked at LANL, to those who worked at LANL during the "window" of compromise and, finally, to those who actually traveled to the PRC during the right time frame – the probability of culpability increases as to each of the individuals remaining on the list. That the probabilities are not the type associated with, for example, DNA fingerprinting, does not make them irrelevant either. They are a *step* toward probable cause.

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[723] (S/NF) While Draft #3 does not state and, of course, could not state, that it would have been impossible for the compromise to have occurred anywhere other than on a trip to China, it does emphasize [redacted] (FBI 13313)

[724] (21) (S) FBI General Counsel Parkinson made a related point to the AGRT, one that went to the assumption that in order for a matrix analysis to be successful it must eliminate *all* suspects but *one*. "Why can't you go [with a FISA order] on two or four people who meet the criteria?" (Parkinson 8/11/99)

(U) (S/NF) And, while it is certainly true that one step does not make a ladder, in this case there were numerous *other* steps. Most significantly, there was the following material from Draft #3:

(U)

- (S) Wen Ho Lee had not only visited the PRC but he had twice visited the facility responsible for PRC's nuclear weapons design;

- (S/NF) On one or both of these trips, Wen Ho Lee [redacted] yet he had withheld this information from his official travel reports;

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- [redacted]

(U)

- (S/NF) Lee not only had the security clearance that made it *possible* that he would have access to design information about the W-88; he had *actual* access to such information; and he was the expert, in fact, on certain computer codes associated with the modeling of such weapons systems.

(U)

- (S/NF) In October 1994, the Deputy Director of X Division had visited the IAPCM and was surprised to learn that the PRC was using certain computational codes, codes with which Lee had been involved.

- (S/NF) Lee had the dubious distinction of being in the midst of his *second* full FBI espionage investigation, having provoked the first one by [redacted]

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- (U) (S) When questioned about this by the FBI, Lee [redacted]

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- (U) (S) Sylvia Lee had insinuated herself into a position as the host of PRC delegations to LANL. She became the *only* LANL employee to have regular contact with almost all visiting Chinese delegations. [redacted] violations of LANL's security regulations and [redacted] as indicated by [redacted]

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- (S/NF) Then there were the four explanatory factors derived by the FBI from prior investigations [redacted]

- (S/NF/RD) And, finally, and of most recent vintage, was Lee's effort to bring a PRC national into LANL to work with him at the very same time Lee was about to become a participant in the design of an improved version of the W-88. [redacted]

(S) Thus, it was not *just* that the Lees were [redacted] potential suspects. It was all these *additional* indications that the Lees were the culprits.

(U) (S) As to the matter of "currency;" it is the AGRT's view that "currency" should never have been an impediment to the approval of this FISA application. There were at least five substantial indications of "currency."

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(S/NF) First, of course, there was the 1994 encounter [redacted] Even given that the most significant aspects of the 1994 encounter were omitted, see below, what was *not* omitted was sufficient to indicate [redacted]

(U) (S) Second, there was the unexpected discovery in October 1994 by a LANL senior official that the PRC was using certain computational codes with which Lee himself had been involved.[725]

(S) Third, there was Lee's efforts in December 1994 [redacted]

(U) (S) Fourth, there was the fact that Lee maintained and retained his Top Secret "Q" clearance, his position as a LANL scientist, and his continuing access to classified nuclear weapons secrets, up through the time of the FISA application. Obviously, the retention of a clearance or of a job, *by itself*, means nothing. But in the context of all the other factors indicating Lee's involvement in clandestine intelligence gathering activities on behalf of the PRC, it is significant. It indicates Lee's commitment to keeping himself in a position to retain access to classified nuclear weapons information.

(S/NF/RD) Finally, there is Lee's efforts to [redacted]

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[725] (U) (S) This item was actually somewhat overplayed by the FBI. While there is an FBI report indicating that Source #2 said [redacted] the same report also indicates that SA [redacted] spoke to the Deputy Director himself, who indicated that "almost all of the codes" were developed by the PRC itself and, while the Chinese did mention a code developed by the United States, that code was publicly available. (AQI 2828-2829)

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(u)

(S) Taken together, these factors establish sufficient "currency" to meet FISA's "knowingly engages" requirement.

(U) In summary, Draft #3 established probable cause. For that reason, given what the FBI and OIPR knew in 1997, it should have gone to the FISA Court.

4. (U) The principal arguments against probable cause

(U) To any student of this matter, no argument in this section will be unfamiliar. Draft #3 has received a degree of scrutiny which may be unparalleled. The principal arguments against probable cause have been identified, asserted and dissected. They are as follows:

a. (U) The "matrix" was inadequate

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(S) The "matrix" *was* inadequate. No effort had been devoted to investigating the [redacted] LANL employees listed in DOE's Administrative Inquiry. No effort had been devoted to determine who, in this list, had interacted with delegations from the PRC. No investigation had been conducted to see who, in this list, had visited the IAPCM during their trips to China.

(S) But this was *not*, at heart, a "matrix" case. The FBI was not seeking a FISA order on the Lees simply because they were two [redacted] listed employees. The FBI was seeking a FISA order on the Lees because of that fact *plus* all the other evidence it had accumulated against the Lees.

(S) Would the FISA application have been strengthened by the elimination of all or some [redacted] individuals? Obviously, yes. This was one among a *host* of things the FBI could have done to strengthen the application. A true "matrix" analysis might have dramatically reduced the probability that the compromise was committed by someone other than the Lees. That the FBI never investigated [redacted] was unfortunate, but it was not fatal.

b. (U) Wen Ho Lee's affinity was for Taiwan, not the PRC

(U) Essentially, this argument runs as follows: If Lee had an improper relationship with any foreign power, it was Taiwan, not the PRC. And the fact that it *was* Taiwan made it all the more unlikely that Lee would ever form an allegiance to the PRC.

(U) This argument presumes too much. First, it presumes that Lee's affinities did not change. Second, it presumes that the only motive for espionage is ideological when, in fact, that is often last on the list of motivations. Third, it presumes that Lee would not be dealing with *both* parties, at different times, or even at the same time.

(S/NF) Regardless of Lee's affinity for Taiwan, he did go to the PRC in 1986 with his wife. He did meet with IAPCM scientists during this trip and he did schedule additional vacation time in the PRC. Then he did this all over again in 1988. We also know Lee [redacted] b1

FBI 66, 67C [redacted] and [redacted] We also know that he sought to sponsor a PRC national to come into LANL for four months to work on [redacted] whose classified status was at best uncertain. And we also know that Lee's wife had become the unofficial host to virtually all PRC delegations, a task to which, Draft #3 says, she had appointed herself.

(U) In short, there was plenty in this application from which to conclude that, regardless of any affinity that Lee held or had held for Taiwan, he and his wife had formed a close association with the PRC and they had done so during the period of time of the "window" of compromise.

c. (S) [redacted]

(U) The AGRT considers this to be of no significance in the context of this FISA application.

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(S) First, [redacted]

(S) Second, [redacted]

(S) Third, [redacted] See Chapter 3.

d. (S//NF) [redacted]

(S//NF) [redacted]

(S//NF) First, [redacted]

(S//NF) Second, [redacted]

(S//NF) There is, however, a question that should be addressed: [redacted]

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[redacted]

e. (S//NF) [redacted]

(S//NF) The FBI's reporting of the encounter [redacted] did not include *either* of its most significant and incriminating aspects. See discussion below. That makes this a more difficult argument to rebut. Nevertheless, this can be said based on what *was* included in Draft #3: [redacted]

(FBI 5686)

(S//NF) Thus, we have a confidential statemen [redacted]

(U)

(S) It was not all it could have been, and that is certainly unfortunate. Nevertheless, it took Draft #3 a long way down the road toward probable cause.

f. (U) Lee's visits to the PRC and the IAPCM were not clandestine

(S) Lee's visits were not clandestine but that is also why these trips presented such an ideal opportunity for the commission of espionage. [redacted]

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[redacted]

g. (S/NF) [redacted]

(S/NF) This argument reduces the significance of [redacted]

(S/NF) Casting the incident in such an innocent light, however, is not persuasive. There are several ineluctable truths about [redacted][726]

h. (U) Lee's efforts to bring a PRC national into LANL were innocent

(S) Lee's efforts to bring [redacted] into LANL for four months of work on [redacted] it is argued, was nothing more than a routine request for a student internship, and was no indication of clandestine intelligence gathering activity.

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[726] (U) (S) Among the many ways in which the FBI made this FISA application a much harder "sell" to OIPR was its failure *fully* to report the circumstances of the 1984 Wen Ho Lee polygraph. In fact, [redacted] a very significant matter that is not even referenced in Draft #3. See disoussion below.

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(S/NF/RD) It is certainly the case, as stated in Chapter 10, that Lee's request to bring [redacted] into LANL does not, *by itself*, establish an effort to commit espionage. It does, however, contribute to the probable cause equation by showing tha[redacted]

According to Draft #3, his claim that the codes would be "unclassified" was disputed by a senior official of X Division and Lee immediately backed off. This suggests that Lee's original representation to LANL about the nature of [redacted] work was untrue.

(S) The [redacted] matter is certainly not overwhelming. But that is not the standard by which it must be measured. The correct standard is whether it made a material contribution to the probable cause analysis. It did.

(U)

5. (S) Draft #3 included serious, if unintentional, misrepresentations of fact

(U)

(S/NF) In Chapter 6, this report states that as a result of misrepresentations made by DOE to the FBI, the FBI investigated the "wrong" crime for years. Here, the FBI pled it.

(U)

(S/NF) Draft #3 contained the following statements, all of which came with slight alteration from the FISA LHM:

- [redacted] (FBI 13312)
- [redacted] (FBI 13312)
- [redacted]

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(FBI 13312)

- (FBI 13312)
- (FBI 13312-13313)

~~(S/NF/RD)~~ *Each of these statements was inaccurate.* See Chapter 6.

(w).

~~(S/NF)~~ How these misrepresentations found their way into a draft FISA application is clear beyond question: First, DOE misrepresented certain key findings to the FBI. Second, the FBI accepted those findings without serious investigation. And, third, the FBI transmitted those findings to OIPR for inclusion in the application. See Chapters 4-8.

~~(S/NF/RD)~~ The mischaracterization of the predicate not only led to a mischaracterization of the crime at issue. It also led to a mischaracterization of one of the factors contributing to probable cause, i.e., that the Lees were likely suspects. The presumption led to a presumption that the culprit had to be a LANL employee and, finally, to the identification of LANL employees. Had the presumption been accurately defined - the universe of

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candidates for suspicion would undoubtedly had been far larger[redacted][727] Thus, the mischaracterization of the predicate not only impacted on the description of the crime but on the identification of the culprit.

(U) (S/NF) In short, knowing what we now today, this application could not have gone forward to any court. It contained significant, if unintentional, misrepresentations.

6. (U) How the FBI could have made Draft #3 much stronger

(U) That OIPR should have approved the submission of Draft #3 to the FISA Court in 1997 is only half the story. The other half is that the FBI could have made it far, far easier for OIPR to come to that judgment itself.

(U) There was, of course, information *unknown* to the FBI that could have made the FISA application a foregone conclusion. In particular, an awareness of even some of Wen Ho Lee's misconduct involving computer files could have made the resolution of this matter *easy*. That this information remained unknown until March 1999 is the subject of Chapter 9.

(U) The focus of this section, however, is on what the FBI *did* know but, nevertheless, *did not include* in its FISA submission.

a. (U) (S/NF) What *really* happened on February 23, 1994

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(S/NF) In two respects, the FBI's reporting of [redacted] was fundamentally deficient. One error was explicable. The AGRT understands *exactly* how it happened. The other error remains inexplicable.

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[727] (U) (S/NF) Just how large is beyond the scope of the AGRT's mission. It is one of the matters currently being addressed by the FBI.

i. (S/NF) [redacted]

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(S/NF) The FBI omitted [redacted]

(S/NF) Draft #3 states [redacted]

(S/NF) Specifically, according to a *second* source, [redacted] (AQI 3892-3893)

(S/NF) That (1) [redacted] and that (2), [redacted] could obviously have made a significant difference to OIPR's view of [redacted]

(U) How did this information come to be omitted?

(S/NF) First, it is important to understand what NSD was *first* told by the field [redacted] (FBI 1039)

(S/A/F) The reason *why* the teletype did not contain this information is that the FBI got it *indirectly* and it was, therefore, reported in a *separate* communication with FBI-HQ. Specifically, [redacted][29] (AQI 3889)

FBI 66, 67C

(S/A/F) Had SA [redacted] left matters alone at that point, NSD's description of [redacted] might have reflected *both* the contents of the March 3, 1994 and March 31, 1994 teletypes. [redacted] he omitted any reference to Source #2's material in this teletype. The reason this was particularly unfortunate was that this June 1994 teletype became the *sole* source document for the FISA application's descriptions of [redacted]

FBI 66, 67C

(S/A/F) SA [redacted] then proceeded to compound the problem substantially by apparently, and amazingly, *forgetting* [redacted]

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[728] (S/A/F) [redacted] (AQI 1795-1798)

FBI 66 67C

[729] (S) Specifically, it was sent to [redacted] for the attention of SSA [redacted]

FBI 66, 67C

SA [redacted] sent a teletype to FBI-HQ that stated, without further elaboration, that [redacted] (AQI 2830-2831) No reference was made [redacted]

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(S/NF) Thus, this critical comment [redacted] never to be cited again.

(S/NF) In Draft #3, [redacted] *would* appear, but it was attributed to [redacted] see FBI 3590-3591, and it was completely disassociated from [redacted]

(U)

(S/NF) This error was principally the fault of FBI-AQ, but the original reporting *was* in NSD's own files and could have and should have been retrieved. The second error, and one that was even more consequential than the first, would be the fault of NSD entirely, although FBI-AQ could have and should have caught it when it reviewed the FISA LHM.

ii. (S/NF) [redacted]

(S/NF) Draft #3 states [redacted] (FBI 3589) This statement was taken directly from the FISA LHM [redacted]

[redacted]

a matter that could hardly have been *more* relevant to the FISA application.

(S/NF) Nor is the significance [redacted]

(S/NF) How this critical fact came to be omitted from the FBI's FISA LHM and, consequently, from Draft #3, is inexplicable. NSD knew [redacted]

(S/NF) On March 3, 1994 [redacted] FBI-SF specifically advised [redacted] was repeated in SA [redacted] June 1994 teletype to FBI-HQ. (AQI 2890)

(S/NF) Then, in January 1997, SA [redacted] brought [redacted] to the attention of NSD again. In an EC dated January 21, 1997, to the attention of SSA [redacted] SA [redacted] specifically asked NSD [redacted] (AQI 1162)

(S/NF) Thus, as of January 1997, the FBI had not only determined [redacted] but also [redacted]

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730 (U) (S) This was not Wen Ho Lee. [redacted] 4/27/00)

[redacted]

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(S/NF) [redacted]

(Id.)

(W)

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(S/NF) Given all this, it is unfathomable how SSA [redacted] neglected to include this in the FISA LHM or to insist on its inclusion in Draft #3. Even if one assumes that SSA [redacted] somehow forgot about this matter, the record establishes that he was reminded of it in the midst of his working with OIPR on the FISA application and specifically in connection to that application.

(S/NF) On July 11, 1997, SSA [redacted] met with Dave Ryan. He came away from that meeting with the understanding that OIPR needed more information [redacted] That is reflected both in SA [redacted] handwritten note concerning his July 14, 1997 telephone conversation with SSA [redacted] (AQI 5341) and in OIPR's handwritten notes on Draft #1 next to the section dealing with [redacted] (FBI 13465)

(S/NF) SSA [redacted] obviously understood this because he *immediately* had FBI-SF fax him another copy of its March 3, 1994 original reporting [redacted] (FBI

1038) That original reporting [redacted] (FBI 1042)

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(S/NF) And yet, despite [redacted] and despite the fact that SSA [redacted] prepared the eight inserts within days of receiving the original teletype, there is no evidence that further information was provided to OIPR.[733]

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(S/NF) [redacted]

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[731] (S/NF) [redacted] (FBI 1044)

[732] (S/NF) [redacted] (FBI 21425)

[733] (S/NF) SA [redacted] July 14, 1997 note states that SSA [redacted] "furnished" additional information to OIPR, including Source #1's reporting. This did not happen. [redacted] was more interpretation, not more facts. [redacted] (Ryan 11/23/99; Ryan 4/27/00) Nor did SSA [redacted] inserts contain the information from the original teletype. Despite the fact that OIPR clearly communicated on July 11, 1997 the critical need for more information on this matter, and despite the fact that SSA [redacted] had that same day acquired (again) just such information, the description [redacted] remained essentially unchanged. Compare the FISA LHM at FBI 8361-8362 with Draft #1 at FBI 13464-13465 with Draft #3 at FBI 3588-3589. Draft #3 did contain the additional gloss placed on the incident by Insert #6 (FBI 7481) but that was all it was, gloss.

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[redacted] 12/29/99) That it was.

(U)

b. (S) What the FBI could have and should have included about the 1982-1984 full investigation of Wen Ho Lee

(S/NF) In five respects, the FBI failed to convey to OIPR critical information about the events associated with the FBI's 1982-1984 investigation of Wen Ho Lee arising out of [redacted][734]

(U)

(S) First, while Draft #3 states that Lee "passed a polygraph examination" on January 24, 1984, it omits the fact that [redacted][735]

(U)

(S) Second, the *reason* Wen Ho Lee [redacted] is that he had [redacted] Lee had told the FBI on December 20, 1983 that some of the

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[734] (S/NF) It could be argued that there is a sixth respect in which [redacted] was not presented by the FBI to OIPR as fully as possible. [redacted] (Ryan 7/8/99)

[735] (U) (S) See FD-302, dated January 24, 1984: "Following the administration of the examination, a review of the polygrams revealed [redacted] (FBI 2131)

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(SF 81) He told the FBI (FBI 2123) Lee admitted only in his response to relevant questions." (FBI 2131)

(U)

(S) Third, what Lee then confessed to was (AQI 3539) According to SA report of the polygraph: (AQI 3539; see also FBI 2131)

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(S/NF) Fourth, Draft #3 never described

(S/NF/RD) Finally, the 1982-1984 investigation of Wen Ho Lee should have been used by the FBI to lend to Draft #3 invaluable insight The FBI did not need to rely on interviews conducted in 1997 to assess what Lee might have had access to in the early 1980's. Rather, it had information on that very issue actually acquired *during* the early 1980's. For example, the FBI acquired the following information from Jimmy McClary, who was described as the head of the Safeguards and Security Division at LANL, and who prepared a "threat assessment" on Lee in 1982:

[Lee] works with the [two named] weapons design codes. These are both two dimensional hydrodynamics codes. Working on the codes allows him access to the input to any problem being run with these or similar codes.

* * *

SUMMARY: The subjects current position allows him access to practically all current design studies. I worked in such a position for many years. The code developers have access to the designers, the input to the codes, and to classified documents related to the physics of the design. In particular, the code developers are especially interested in determining how well their codes will handle new design features.

RECOMMENDATION: From OS [Office of Security] Division's standpoint, we should get him out of there.

(AQI 3023-3024) Thus, just before the "window" of compromise opened, LANL security was taking the position that Lee posed a threat to the security of its nuclear weapons information and "we should get him out of there." Moreover, LANL security personnel specifically noted that Lee worked with several nuclear weapon "two dimensional hydrodynamics codes." [redacted]

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(U) (S) c. What the FBI could have and should have included from Sylvia Lee's personnel and security files

(U) (S) The FBI had access to information from the Lees' personnel and security files that would have contributed to the probable cause analysis. Some of this information was

included in the FISA LHM[736] and should have, but did not, make it into Draft #3.[737] Other information was not even included in the FISA LHM. For example:

1. (U) (S) During the course of a background investigation in 1993, several co-workers were interviewed. [redacted] (DOE 987)

DOE 66 67C

2. (U) (S) In May 1988, Sylvia Lee [redacted] Sylvia Lee for [redacted] it was noted that she had [redacted] (DOE 783-785, 881, 887, 984, 882, 987-988) When Sylvia Lee was interviewed about the matter, she admitted to [redacted]

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[736] (U) (S) The FISA LHM contained the following description of Sylvia Lee's personnel files:

> (U) (S) The Kindred Spirit [DOE] report also disclosed that Sylvia's personnel security file notes that in 1988, Sylvia [redacted] The security file also reflected that she [redacted] (no further information), and that one coworker alleged she [redacted] Lastly, her security clearance reinvestigation indicated some coworkers [redacted]

DOE 66 67C

(FBI 8359-8360)

[737] (U) (S) What made it into Draft #3 was the following phrase: "her file included incidents of security violations and [redacted]" (FBI 3583)

DOE 66 67C

[redacted] (DOE 785) These events, and the resentments that gave rise to these events, occurred prior to the Lees' 1988 trip to the PRC.

3. (U) (S) Sylvia Lee clearly [redacted] In a background investigation interview conducted in February 1992, she noted that her employers had [redacted] (DOE 878-894)

DOE 66, 67C

4. (U) (S) One of Sylvia Lee's supervisors expressed the opinion that Sylvia Lee [redacted] (DOE 786)

d. (U) (S) What the FBI failed to explain about the 1986 and 1988 trips to China

(S) Draft #3 provides no insight into how the Lees came to be in the PRC in 1986 and 1988. [redacted]

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(S) The facts are these: In March 1985, Wen Ho Lee attended a scientific conference in South Carolina. (AQI 3612) At the conference, he met two PRC nuclear scientists, one of whom was [redacted] a scientist in the IAPCM. As stated in Draft #3, [redacted]

OIP 66 67C

(U) (S) Wen Ho Lee had conversations with [redacted] during the South Carolina conference, which Lee would later characterize as "small talk." (Id.) Subsequently, he listed [redacted] as one of the nine PRC scientists "he knows best." (DAG 871)

(U) (S) In early 1986, Wen Ho Lee and Sylvia Lee were invited to the PRC to attend a conference in Beijing. One of the co-sponsors was the IAPCM. (FBI 15492) Significantly, the invitation to attend the conference came from [redacted] and [redacted] is also listed as a member of the "local committee" sponsoring the conference. (AQI 3613, FBI 15493) Wen Ho Lee, in his "Request for Approval of Official Travel," listed [redacted] as one of the persons with whom he would be in contact on this trip. (FBI 10886)

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(U) (S) In 1988, [redacted] was again at the center of Wen Ho Lee's trip to China. This time he was co-chairman of the conference that Lee was attending. (AQI 2422) Lee listed [redacted] as one of the two individuals who "jointly organized" the meeting.

(U) (S) This obviously does not *prove* espionage. But it does *contribute* to the picture of Wen Ho Lee as a recruited asset of the PRC.

e. (U) (S) [redacted] memorandum

DOE b6 b7C

FBI b6 b7C

(U) (S) On February 6, 1998, [redacted] gave SA [redacted] a memorandum [redacted] had prepared concerning [redacted] contacts with, and concerns about, Sylvia Lee in 1988 and 1989. (FBI 1213-1218) Even if this information did not come into the FBI's possession until February 1998, it was certainly *available* far earlier.[738]

(U) (S) [redacted] memorandum indicates, among other matters, the following:

- (S) On or about January 25, 1989, Sylvia Lee wrote a LANL scientist telling him that three PRC scientists - [redacted] - were seeking a particular computer code written by the scientist. While there is no

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[738] (U) (S) First, the FBI should have known from a review of Sylvia Lee's security files that [redacted] had some involvement in her past difficulties within LANL. See, e.g., DOE 891. Second, the FBI could have interviewed [redacted] about Sylvia Lee without any additional risk that it would alert Sylvia or Wen Ho Lee. [redacted] and had *regular* contact with the FBI during the course of its investigation of the Lees.

indication that the code involved was classified, this does provide an indication of Sylvia Lee having an association with an individual who would figure prominently in Draft #3.

DOE
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(U)
- (S) On April 4, 1989, a LANL employee told that Sylvia Lee had told the employee that According to the employee, Sylvia Lee said She also reportedly told the employee that

(U)
7. (S) "The Pink Mouse"

(S/NF) As the controversy developed in the Spring of 1999 concerning OIPR's handling of the FISA application, OIPR generated a memorandum that suggested the FBI had not fully informed OIPR of In part, OIPR's memorandum read as follows: "There are only two sentences in the FBI's LHM that discuss These sentences fail to convey . . ." (FBI 121) Kornblum made a similar point to the AGRT: The FBI should have provided OIPR with more information concerning [739] (Kornblum 7/15/99)

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(S) SSA took strong exception to this assertion. In a memorandum from SSA to SC Middleton, dated May 10, 1999, he wrote the following: "An impartial reading of this whole objection is that OIPR was justified in declining my application for a reason they did not know about, and that I failed to give them more information about even though OIPR did not then see this as a problem and did not ask for more information to solve this fictitious problem." (FBI 11522)

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[739] (S) Schroeder told the AGRT that he was "comfortable" with the level of information provided by the FBI concerning (Schroeder 7/7/99)

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(U)
(S) In his interview with the AGRT, SSA [redacted] was similarly blunt: "In no way would I try to twist Sylvia Lee's role." [redacted] 7/23/99) SSA [redacted] general view of submissions to OIPR was that he was "an advocate" and he did not need "to put in a bunch of nebulous stuff" into a request to OIPR for a FISA order. Nevertheless, he emphasized, "I won't hide a pink mouse from a federal judge or OIPR." [redacted] 12/15/99) In this case, SSA [redacted] FISA LHM did anything but hide the "pink mouse." These are excerpts from SSA [redacted] LHM:

- (S/NF/RD) "Because the predication for this investigation is somewhat hypothetical, specific questioning of likely FBI and Central Intelligence Agency sources was arranged and pursued. [redacted] (FBI 9381)

(U)
- (S) Re the mail cover: "To date, this mail cover has disclosed no mail from the PRC." (FBI 9383)

(U)
- (S) Re Sylvia Lee's telephone calls from LANL: "The records disclosed no calls or faxes to the PRC."[740] (FBI 9383)

(U)
- (S) Re the Lees' home telephone toll records: "Examination of the long distance calls going back to 1/1/84 disclosed no calls from the LEE residence to the PRC." (FBI 9384)

- (S) Re the PRC student [redacted] "Search of records at FBIHQ has disclosed no record [redacted] And this: "Later contact with [redacted] disclosed Lee claimed to not know [redacted] but only selected him as a student

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[740] (U) The records to which SSA [redacted] referred may have disclosed no calls to the PRC but that did not mean that Sylvia Lee [redacted] 4/27/00) That should have been in the FISA application but apparently was unknown to FBI-AQ or NSD. It could have been known to the FBI if it had interviewed [redacted] but SSA [redacted] considered interviews in an FCI investigation a definite "no-no." See Chapter 4.

summer employee based on his resume, which was one of many which are circulated throughout the lab." (FBI 9386)

FBI 66, 67C (U) (S) These excerpts indicate that SSA [redacted] was careful to insure that information that did not support his request for a FISA order was properly communicated to OIPR.[741]

b1 (S/NF) As to [redacted] we disagree with the implication of the OIPR memorandum that the FBI withheld information concerning the [redacted] The FISA LHM, on this matter, reads as follows:

> (S) A search of FBI HQ records for information about LEE and [redacted]
>
> (FBI 11512) Given what the AGRT has learned about [redacted] In this respect, two points are significant: (1) [redacted] and (2) [redacted] See Chapter 3. [redacted] (FBI 11512)

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[741] (U) (S/NF) The FISA LHM did not, however note, that the predicate for the investigation was based, in large part, on a "walk-in" document [redacted] (FBI 602) Nevertheless, this was certainly not an effort to hide information from OIPR. After all, it was SSA [redacted] who had suspended the investigation entirely in July 1996 pending DOE's and OIPR's review of this *precise* issue. (AQI 992) And the lawyer at OIPR who conducted that review was none other than Dave Ryan. (FBI 663)

FBI 66 67C

8. (U) The matter of "intermission"

(U) OIPR clearly perceived the events of August 12, 1997 as something other than a final and ultimate conclusion of the matter of FISA coverage in the Wen Ho Lee investigation.

(U)
(S) Schroeder told the AGRT that he "fully expected a continuing dialogue" with the FBI. He viewed the matter as being in "intermission," not as being "over." (Schroeder 7/7/99) "To me," he added, "this was a dialogue with an intermission." He "felt sure the Bureau would get back to us." He "contemplated," and it was his "assumption," that the FBI "would go out and get more facts, be more aggressive with other techniques." He never thought that "would be the end of it." (Id.) Kornblum said that OIPR "always anticipated" that the matter would go forward. (Kornblum 7/15/99) It was "very, very unusual for them [the FBI] to go away." (Kornblum 7/15/99) Ryan said he told the FBI at the August 12th meeting that "we'll leave the case open for you to add information." (Ryan 7/8/99) The "sense of the meeting," he said, was that the case "would be kept open." (Id.)

(U)
(S) The FBI, too, does not appear to have viewed this as *necessarily* the final chapter, but it certainly did not share OIPR's optimism that the matter would be coming back before OIPR. The FBI clearly understood two things: (1) *this* FISA application would not be going forward; and (2) *another* FISA application could possibly go forward if additional information was produced "to justify a renewed application for electronic surveillance." See AQI 5325, AQI 5551, FBI 13331, 13023.

(U) What is the significance of OIPR's view that the matter was in "intermission"?

(U) First, no one in OIPR has suggested that, if the FBI had told OIPR that this was *it*, that this was all the information that would *ever* be mustered on this matter, it would have changed OIPR's position in any respect on the question of probable cause. Indeed, Kornblum told the AGRT that had he been told "that we were at the end of the line," he would have written a memorandum for the Attorney General with the "pros and cons" and recommended to her that the application not be signed. (Kornblum 7/15/99)

(U) That is, of course, not surprising. Either Draft #3 contained probable cause or it did not. Whether the FBI would be back before OIPR with a *new* application was irrelevant to the probable cause determination as to the *old* one.

(U)
(S) OIPR's perception that the FBI and OIPR were in an "intermission" did, however, have a significant effect on the case. According to Schroeder it impacted on his decision whether to notify the Attorney General about the matter. Schroeder stated that if he had known the matter was "over," he would have given the Attorney General "a heads up." (Schroeder 7/7/99)

(U) The Attorney General should have been advised of OIPR's handling of this matter, intermission or no intermission. **Schroeder should have advised her of the FISA application and its status so that the Attorney General, in a matter this consequential, could have addressed the matter herself.**

(U) It was not as if OIPR expected that the FBI would be back with its FISA application the next day or even next month. It had just spent six weeks attempting to "beef it up" and, in its opinion, the application was still "insufficient." (Ryan 7/8/99) Nor was it as if OIPR was keeping an "eye out" for the end of the "intermission" or that it was even aware that the "intermission" never really ended.[742]

(U)
(S/NF) To put it in appellate parlance, OIPR had issued a final – not an interlocutory – order. **The consequence of that order was to prevent *indefinitely* the FBI from obtaining a unique form of information as to the activities of the Lees in connection with the compromise of the United States Government's most sensitive nuclear secrets. The Attorney General should have been told.**

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[742] (U)
(S) Kornblum told the AGRT that "if it had occurred" to him that he had not heard back about the Wen Ho Lee matter, he would have raised the matter with UC [redacted] As it was, he said, he had three or four subsequent meetings with UC [redacted] and the matter "never came up." (Kornblum 7/15/99) Schroeder said something similar: "This is the only case where if you look back on it in hindsight you realize you didn't hear [back] from the Bureau." (Schroeder 7/7/99) ..

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9. (U) The destruction of OIPR's records

(U) According to Ryan, six months to a year after the August 12, 1997 meeting, he shredded his files on the Wen Ho Lee FISA application and overwrote the disk that contained his only copy of Draft #3. He did so because he "needed more room." (Ryan 7/8/99) Ryan took this action without checking with the FBI to determine the status of the case, even though he had told the FBI in August 1997 that "we'll leave the case open." (Id.) His reasoning was as follows: "They haven't come back and if they come back we will have to start from the beginning and write a fresh draft." (Id.) Ryan told the AGRT that he does not have "any regrets" about the destruction, that he did not think he had made a "mistake," and that he "saw no reason" why he should have discussed the matter with SSA [redacted] (Id.)

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(U) Schroeder told the AGRT that "he was shocked" to learn that Ryan had destroyed his files. (Schroeder 7/7/99) "Why would you destroy the files if it still had life?" Schroeder said he "couldn't imagine throwing this stuff away." (Id.) Kornblum told the AGRT that it "would have been reasonable" for Ryan to go back to the FBI before destroying his files and that he "probably should have kept" either the disk or his hard copy of the draft application. (Kornblum 7/15/99) Had Ryan come to him before destroying the records, Kornblum would have told him: "Okay, but check with the FBI." (Id.)

(U)
~~(S)~~ Ryan's destruction of OIPR's files on this matter was most certainly a substantial mistake. Even if, as Kornblum told the AGRT, erasing disks was a "common practice" in OIPR (Kornblum 7/15/99), the destruction of the Wen Ho Lee files and disk is difficult to comprehend. First, the underlying allegations were of the gravest consequence. Second, the investigation was still open, and OIPR, which approved the FBI's Annual LHMs in both 1997 and 1998, knew it. Moreover, Ryan *also* knew that OIPR had told the FBI on August 12, 1997 that "we'll leave the case open for you to add information." Third, Ryan's assumption – that he was not "destroying the only copies" – was just that, an assumption that might or might not be true. As to Draft #1 and #3 and the FISA LHM, it was true. As to Draft #2, it was apparently not true.

(U) It is the AGRT's understanding that OIPR now has in place a policy that will prevent a matter like this from happening again. See "OIPR Operations Record Retention Policy," dated May 11, 1999. (DAG 731) The work of OIPR is far too important, and the consequences of its decisions far too critical, to let it happen again.

10. (U) Conclusion

(U) OIPR's erroneous judgment that Draft #3 did not contain probable cause could not have been more consequential to the investigation of Wen Ho Lee. From the beginning of that investigation, the FBI's objective had been to obtain FISA coverage. It now faced the prospect of *no* FISA coverage, an eventuality for which it had never prepared. The other consequence, of course, is that such information as *might* have been acquired through FISA coverage was not acquired. It is impossible to say just what the FBI would have learned through FISA surveillance. That is, after all, the point of the surveillance.[743] What is clear is that Draft #3 should have been approved, not rejected. For all the problems with the FBI's counterintelligence investigation of Wen Ho Lee, and they were considerable, the FBI had somehow managed to stitch together an application that established probable cause. That OIPR would disagree with the assessment would deal this investigation a blow from which it would not recover.

[743] (U) Nevertheless, it can be said that any FISA coverage which included computer searches and monitoring would have certainly uncovered Lee's misconduct involving LANL's computer files.