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.

(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]

---

[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

FBI 66 67C

b1

---

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

b1

[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.

b1

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.)

FBI b6 b7C

(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)

OIPR b6

---

[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."

FBI 66 67C

(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.

FBI 66 67C

[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."

FBI b6 b7C

- ~~(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]

b1

- ~~(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]

FBI b6, b7C

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

---

[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

FBI b6 b7C

(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

FBI
b6
b7C

---

[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.)

FBI
b6
b7C

(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

---

[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.

FBI
b6
b7C

---

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

---

[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:

---

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

---

[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

---

[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]

---

[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)

FBI b6 b7C

[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

---

[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]

b1

(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)

12213)

b1

(~~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]

DOE
b6
b7C

[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:

b1

- [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

b1

[redacted] (Id.)

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

b1

[redacted][718] (FBI 5588)

---

[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]

b1

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

---

[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.

b1

(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:

b1

- [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."

---

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

b1

(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]

b1

(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