CHAPTER TWELVE

(U) THE FISA "APPEAL": AUGUST 1997

Questions Presented:

Question One: (U) Did the FBI sufficiently apprise the Attorney General of its concerns about OIPR's rejection of its FISA application?

Question Two: (U) Did the Attorney General take appropriate measures to insure that this matter was handled as she intended?

Question Three: (U) Did former Associate Deputy Attorney General Daniel Seikaly handle the appeal appropriately?

PFIAB Question #6: (U) Whether the FBI adequately raised to the Attorney General the FBI's concerns over the declination of the FISA request.

A. (U) Introduction

(S) After the August 12, 1997 meeting between the FBI and OIPR concerning the Wen Ho Lee FISA application, UC [redacted] called SC Dillard, who was on leave, to let him know that the "FISA package" had been rejected by OIPR. (Dillard 8/6/99) By August 19, 1997, SC Dillard had three immediate objectives for the Wen Ho Lee investigation. One was to consider [redacted] The second was to consider whether there were [redacted] And the third was "Revisit FISA." (Dillard 8/6/99; FBI 6424) SC Dillard pressed AD Lewis for further action on the issue. (Lewis 7/6/99)

(U) The next day, both AD Lewis and SC Dillard went to the Office of the Attorney General to be present for Notra Trulock's briefing of the Attorney General. AD

Lewis had received this briefing on August 1, 1997, Director Freeh had received it on August 12, 1997, and now the Attorney General and Deputy Attorney General would receive it as well.[744] (Gallantin 11/23/99; Lewis 7/6/99; Freeh 11/11/99; GAL 0006; FBI 12475)

(S/NF/RD) Trulock's briefing to the Attorney General, like his prior briefings, addressed the PRC's nuclear weapons program and the PRC's efforts to penetrate the United States' national nuclear weapons laboratories. As part of that presentation, Trulock made brief reference to several FBI investigations, including "Kindred Spirit."[745] The thrust of Trulock's briefing, according to the Attorney General, was that actions needed to be taken to make the laboratories secure. (Reno 11/30/99) Trulock recalls telling the Attorney General [redacted] b1 (Trulock 10/12/99)

(U) After the DOE contingent left, there was an FBI "follow-up" meeting with the Attorney General and other DOJ personnel. (DAG 1303) The Attorney General asked AD Lewis whether there were any issues that needed attention between the FBI and DOJ. (Lewis 7/6/99) AD Lewis had not gone to the meeting intending to raise the rejection of the Wen Ho Lee FISA application but, given the Attorney General's invitation, he did so. (Lewis 7/6/99; Dillard 8/6/99) The Attorney General told the AGRT that she had a

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[744] (U) Among the individuals present at the Trulock briefing were the following: Attorney General Reno, Deputy Attorney General Holder, Associate Deputy Attorney General Daniel Seikaly, Deputy Assistant Attorney General for the Criminal Division Mark Richard, AD Lewis, SC Dillard and, from DOE, Trulock, Ken Baker and Elwood Holstein, Secretary Pena's Chief of Staff. (FBI 7165, 7170, DAG 1303)

[745] (S) b1 "Kindred Spirit" may not have been mentioned by name. Seikaly's notes of the briefing indicate that "DOE investigation led to names of ethnic Chinese subjects which were provided to FBI." The cases are identified as "one old, 79-81," "one current, 5/96," and "one very recent." The reference to "one current 5/96" appears to be a reference to the "Kindred Spirit"/Wen Ho Lee investigation. (DAG 1303)

vague recollection of AD Lewis approaching her after the meeting had broken up and telling her that the FBI was having a problem with obtaining a FISA order in a particular case.[746] (Reno 11/30/99)

[746] (U) AD Lewis was not positive that he specifically advised the Attorney General that the case at issue was the Wen Ho Lee investigation. He "may have" done so. (Lewis 5/8/00) Even if Lee's name was not specifically mentioned, however, the matter arose in the context of a meeting concerning PRC penetration of the national laboratories.

(U) ADAG Director Seikaly[747] was given the responsibility for reviewing the FISA application.[748] It is not clear precisely *how* Seikaly got the assignment,[749] but it is clear that it did become his responsibility.

B. (U) The Seikaly Review

(U) In the course of his review, Seikaly did the following:

- (U) He reviewed the FISA statute for the purpose of examining its legal requirements, and did some research on the subject. (Seikaly 7/1/99) His

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[747] (U) Daniel Seikaly served as both an Associate Deputy Attorney General and as Director of the Executive Office for National Security ("EONS").

[748] (S/NF) Seikaly's handwritten notes reflect three "Action" items: "(1) Review FISA application; (2) Consider [redacted] and (3) Reconvene after CIA [redacted] analysis." (DAG 1303) The last item appears to be a reference to the CIA's August 1997 assessment of the PRC's nuclear weapons program that had been requested by the NSC. See Chapters 6 and 13.

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[749] (U) The Attorney General told the AGRT that she might have asked Seikaly to examine the matter because Seikaly was at the meeting in question and Merrick Garland, the person to whom she normally would have turned, had left the Department by this point. She speculated, however, that she might have asked the Deputy Attorney General to examine the matter and he might have assigned it to Seikaly. (Reno 11/30/99) Seikaly, too, did not have a clear recollection as to how he got the assignment and suggested it might have happened this way: The Attorney General may have turned to the Deputy Attorney General and asked him to handle it and the Deputy Attorney General then turned to Seikaly and told him to take care of it. (Seikaly 7/1/99) The Deputy Attorney General told the AGRT that he does not have a recollection of being involved in the matter. (Holder 11/22/99) AD Lewis told the AGRT that he recalls bringing the FISA turn-down up with the Attorney General and the Attorney General assigning the matter to DAG Holder and Seikaly. (Lewis 5/8/00)

prior exposure to FISA was extremely limited and he was initially "baffled" by what the probable cause requirement turned on.[750] (Id.)

- (U) He called Gerry Schroeder and told him he had been tasked with reviewing the FISA application. (Seikaly 7/1/99)[751]

- (U) Shortly thereafter, he met with Alan Kornblum to discuss the FISA application. Seikaly reviewed Draft #3. Kornblum presented his assessment that the application did not meet the probable cause requirement and Seikaly told Kornblum that he "thought [his] analysis correct." (Seikaly 7/1/99; Kornblum 7/15/99) [752] Seikaly's principal concern with the application was a lack of "currency." (Seikaly 7/1/99)

- (U) A few days later, he spoke with Gerry Schroeder for about 30 minutes. Seikaly states that he discussed with Schroeder "what else could be done" to "make it [the application] more current." Schroeder told him the FBI was "working on it." (Seikaly 7/1/99)

(U) In the course of his review, Seikaly did not do the following: He did not see or review either of the prior drafts (#1 or #2) or the FISA LHM or the eight inserts or other information about the Wen Ho Lee investigation. He did not talk to AD Lewis, SC Dillard, UC [redacted] or SSA [redacted] about the matter, or speak with anyone else from the

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[750] (U) Seikaly indicated that there had been a few occasions when he had seen FISA applications at the direction of DAG Holder when the Deputy was serving as Acting Attorney General, but indicated that he did not know much about FISA at the time he received this assignment. He told the AGRT that it "came as a surprise that I was asked to review this application." (Seikaly 7/1/99)

[751] (U) It "bothered" Schroeder to learn that Seikaly was examining the application. Schroeder thought the FBI had "gone around" him. (Schroeder 7/7/99)

[752] (U) According to Seikaly, he recalls that these events took place over the course of two meetings with Kornblum. Kornblum recalls one meeting that lasted 30-40 minutes. (Kornblum 7/15/99)

FBI. He did not communicate his conclusions to either the Attorney General or the Deputy Attorney General or to other senior DOJ officials, such as Robert Litt, John Hogan or others. (Seikaly 1/5/00; Litt 12/27/99; Hogan 1/5/00) He left it to OIPR to communicate his assessment to the FBI. (Seikaly 1/5/00)

C. (U) Analysis

(U) When AD Lewis advised the Attorney General that the FBI was having a problem with a FISA application, it was an unusual event for both AD Lewis and the FBI. For the FBI to raise such a complaint directly with the Attorney General was, to say the least, exceptional. Director Freeh told the AGRT that he was only aware of an appeal of this nature happening on one other occasion. (Freeh 11/11/99)[753] Particularly given the underlying allegations, this matter warranted extraordinary handling and attention within the Department of Justice. It did not get it.

(U) First, there was a failure to communicate at the most senior level of the Department. What the *Attorney General* expected Seikaly to do and what *Seikaly*, himself, expected to do were two different things.

(U) The Attorney General told the AGRT that she expected that whoever reviewed the matter within DOJ would examine the FISA application and, if he deemed it insufficient, would make recommendations to work toward a resolution. (Reno 11/30/99) She anticipated that if AD Lewis remained unsatisfied with the resolution, he would bring it to her attention and she and the Director would sit down, discuss the matter, and "resolve" the problem.[754]

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[753] (U) See also notes made by Director Freeh on May 28, 1999: "This was the only FISA in my 6 years that was appealed directly to the AG." (FBI 04083)

[754] (U) AD Lewis told the AGRT that it was his understanding that DAG Holder and Seikaly would review the matter and see if they concurred with OIPR. (Lewis 5/8/00)

(U) Seikaly's perception of his task was far different from that of the Attorney General. Indeed, it was limited to doing just *one* thing: review the FISA application for legal sufficiency and determine whether he agreed with the conclusion reached by OIPR. Having done that, he was finished.

(U) Second, this matter should not have been assigned to an attorney who did not already have a solid grounding in FISA law, FISA applications, and the FISA Court.

(U) That Seikaly was sufficiently conscientious that he took the time to familiarize himself with FISA law is not the point. The point is that, in a matter this consequential, it should never have been assigned to an attorney who *needed* to familiarize himself with FISA law, however competent and experienced that attorney might otherwise be. Seikaly was a long-term and respected veteran of the United States Attorneys Office for the District of Columbia. But he was no FISA expert, not even close. Seikaly obviously recognized this, as well, because one of the first things he did was to read the statute and grapple with the applicability of the probable cause requirement. The FBI had a right to expect that the person charged by the Department with the review of this critical matter would be *applying* the law of FISA, not still in the process of *learning* it.

(U) Seikaly's lack of experience with FISA made the outcome of this review nearly inevitable. Confronted by Kornblum's strong conviction that probable cause was lacking, and given that Kornblum was viewed – even within the FBI, indeed, even by AD Lewis, who had sought the review in the first place – as the "premier" counsel on FISA orders (Lewis 7/6/99), there was little likelihood that Seikaly would reach a different result.

(U) Third, that likelihood was reduced even further by Seikaly's unfortunate failure to meet with the FBI. It was the FBI, after all, which had sought this extraordinary review in the first place. It *deserved* to be heard and it *needed* to be heard. That Seikaly *did* meet with Kornblum compounded the problem because it gave him only OIPR's view of the probable cause analysis. While it is of course axiomatic that probable cause is judged by a review of what is within the "four corners" of an affidavit, Seikaly was not sitting as a Court of Appeals reviewing a final, executed affidavit. That Seikaly

understood this point was illustrated by the fact that Seikaly *had* met with Kornblum. That was, of course, perfectly appropriate, even necessary. Seikaly needed to understand *why* OIPR had rejected Draft #3, and who better to explain that than Kornblum. But Seikaly also needed to understand why the FBI disagreed with that decision - particularly since Seikaly viewed the matter at the time as a "close case for PC," even if not close enough to take to the Attorney General for her signature. (Seikaly 7/1/99) Instead, he never had a substantive discussion with the FBI covering this matter, not "before, during or after." (Seikaly 1/5/00) That was a mistake.

(U) Fourth, of course, Seikaly reached the wrong decision. For the reasons set forth in Chapter 11, Draft #3 did establish probable cause.

(U) Finally, Seikaly should have gone back to the Attorney General and advised her as to his judgment on the matter. AD Lewis had complained *directly* to the Attorney General. If for no other reason than that, Seikaly should have communicated his resolution of the matter *directly* to her as well – especially when it was *not* the resolution which the FBI had sought. That Seikaly, like OIPR, believed the matter was not "over,"[755] that the FBI would continue to work on it, did not diminish his obligation to apprise the Attorney General of the results of his review. The FBI's work on the matter might not be over. *Seikaly's was*. The Attorney General should have been told.[756]

(U) The failure to advise the Attorney General of the resolution of this matter had an unfortunate consequence: It effectively denied the FBI the *true* appeal it had sought. When the FBI approached the Attorney General about this matter, it was for one purpose: to obtain a FISA order in the Wen Ho Lee investigation. Toward that end, the FBI turned to the Attorney General and the Attorney General turned to her subordinates. When the subordinate charged with handling the matter determined that a FISA order

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[755] (U) Seikaly told the AGRT: "No one thought of this as a denial. [We] thought more work needed to be done." (Seikaly 7/1/99)

[756] (U) OIPR *also* should have advised the Attorney General of the judgment reached by Seikaly. Although Schroeder was not initially aware of AD Lewis' approach to the Attorney General, he certainly become aware of the matter through Seikaly.

could not be predicated on Draft #3, the whole issue should have come back to the Attorney General so that the Attorney General could have *personally* reviewed Draft #3 and, if necessary, sat down with the Director and attempted to solve this problem. That did not happen because the Attorney General did not know of Scikaly's adverse resolution.

(U) In light of recent events, it is true that a different outcome would have been, at best, unlikely.[757] The Attorney General has weighed in on this issue and stated to both the AGRT and Congress[758] that she endorsed OIPR's interpretation of Draft #3, an interpretation we believe to be erroneous. Nevertheless, no one should discount what *might* have occurred if the Attorney General *and* the Director of the FBI had sat down together and, as the Attorney General put it, tried to "resolve" this problem.[759]

(U) One other point should be made: It has been suggested that, after it learned of the resolution of the Seikaly review, the FBI should have gone *back* to the Attorney General with yet another appeal. We disagree. It is hard to imagine how the FBI could possibly have thought that a *second* appeal would be a productive exercise given the resolution of the *first* one. The Assistant Director of the FBI had raised this matter clearly, explicitly and directly with the Attorney General, a highly unusual event. Nevertheless, it had not brought the FBI one step closer to a FISA order. Moreover,

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[757] (U) In this connection, see Director Freeh's May 28, 1999 note: "Since AG now concludes that the affidavit was insufficient for an application (which is incorrect) it does not make any difference that she did not follow-up on Seiklay's [sic] review or that the FBI or I did not "re-appeal" it again." (FBI 4083)

[758] (U) See e.g., the Attorney General's testimony of June 8, 1999 before the Senate Judiciary Committee: "the Department determined that the evidence was insufficient to support a finding of probable cause. I did not personally review the matter at the time, and I have since reviewed it, however, and I agree with the conclusions reached by the career lawyers in the Office of Intelligence Policy [and] Review." (DAG 1342)

[759] (U) It might have, for example, ultimately led to a "Draft #4," a draft that included some of the critical evidence omitted from Draft #3.

having raised this matter directly with the Attorney General, the FBI had reason to assume that the resolution of this matter by the Department of Justice was a resolution in which the Attorney General concurred. It did not, after all, know that the Attorney General had *never* been told about Seikaly's resolution of the matter.[760]

D. (U) Conclusion

(U) For the FBI and its FISA application, the Seikaly review was the end of the line. Four months had been devoted to the effort to assemble an application and obtain a FISA order and, ultimately, it had come to nothing. AD Lewis said: "We're done, that's all we can do." (Dillard 8/6/99)

(U) In the long and unhappy history of the Wen Ho Lee FCI investigation, there was only one occasion when the FBI sought *major* assistance from the Department.[761] This was it, and the Department failed the FBI. First, OIPR rejected an application it should have approved. Then, a senior Department official endorsed that rejection, when he should have opposed it.

(U) That the FBI could have put together a *better* application, while not beside the point, should not obscure it either: The FBI asked for the Department's help in a critical matter. It did not get it.

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[760] (U) As the Director said in his May 28, 1999 notes: "[The FBI] had to assume she [the Attorney General] would be told by Seikaly about the results of his study." (FBI 04083)

[761] (S) We exclude from this reference such *routine* assistance as approval of the annual LHMs, and the authorization for a mail cover. b1 [redacted]