CHAPTER NINETEEN

(U) THE STATE OF KNOWLEDGE, AWARENESS AND PARTICIPATION IN THE INVESTIGATION BY DOJ'S CRIMINAL DIVISION

Questions Presented:

Question One: (U) What was the FBI's internal perception as to whether a goal of the investigation was criminal prosecution?

Question Two: (U) Under the Attorney General's July 19, 1995 memorandum, when should the Criminal Division have been notified as to the existence of this investigation?

Question Three: (U) Who had the obligation of notification to the Criminal Division?

Question Four: (U) When was the Criminal Division notified of the existence of the investigation and by whom?

Question Five: (U) What role could and should the Criminal Division have played had it become aware of the investigation at an earlier point in time?

Question Six: (U) What were the consequences of the failure to notify the Criminal Division?

A. (U) Introduction

(U) On January 7, 1999, the Wall Street Journal did what the FBI had never done in the entire history of this investigation: it notified the Criminal Division of the existence of the Wen Ho Lee investigation. The FBI's failure to notify the Criminal Division of the investigation in September 1995 constitutes a *clear* violation of the

Attorney General's mandatory notification procedures.[910] This violation of the Attorney General's procedures had serious adverse consequences for the Wen Ho Lee investigation and, very possibly, for our nation's security.

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B. (S) A goal of the investigation was prosecution

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(S) From the beginning of the Wen Ho Lee full investigation – indeed, before it began – the investigation had *both* legitimate counterintelligence goals *and* legitimate aspirations of an ultimate criminal prosecution. Indeed, even before DOE delivered the AI to the FBI, DOE was *equating* a successful resolution of the case with prosecution. See [redacted] to Trulock memorandum, dated May 2, 1996, expressing concerns that DOE management not take steps which could "hinder any successful resolution (prosecution) of this matter." (DOE 2407)

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(S) After the AI was delivered, the FBI began to think *immediately* in terms of a potential trial of Wen Ho Lee. See, e.g., SSA [redacted] statement to FBI-AQ, advising that "it would be necessary to document things in the DOE report for any trials of captioned subjects."[911] (AQI 954) This point was expressed even more explicitly in a communication which SA [redacted] sent to NSD and WFO, in connection with FBI-AQ's request that WFO conduct certain interviews of DOE personnel: "*The goal of this investigation is prosecution.*"[912] (AQI 970)

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[910] (U) See "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations," signed by the Attorney General Reno on July 19, 1995. (Appendix D, Tab 23)

[911] (U) (S) See also this statement from a July 10, 1996 FBI memorandum on the case: "The long term goal [of the investigation] is to either discount the Lees as suspects, or to use the surveillance to catch them in the act of passing information. The investigation may ultimately result in an espionage arrest and prosecution." (FBI 583) Or, as SSA [redacted] told SA [redacted] "If we get lucky, this thing is going to trial." [redacted] 12/15/99)

[912] (U) (S) That message was obviously received by DOE, which noted that the FBI had indicated that it would be sending an agent over to DOE to "take a statement" and

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(S) The prospect for criminal prosecution was never far from the forefront of the FBI's investigation, both at FBI-HQ[913] and FBI-AQ.[914] Even the National Security Council was asking: "Is there a prosecutable case?" (FBI 12432)

(S/NF) The focus on prosecution continued in 1998 and, indeed, played a *critical* but *unfortunate* role in the planning of the [redacted] The FBI's recognition [redacted] was an implicit recognition of what NSD was also stating explicitly: "[E]vidence supporting prosecution will be pursued."[915] (FBI 1246)

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"[c]aution was given to not say anything that one would not be comfortable testifying on a witness stand." (FBI 674)

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[913] (S/NF) For example, in August 1996, when SSA [redacted] temporarily suspended the investigation [redacted] he rationalized the suspension in part based on the potential for a prosecution: "If this investigation eventually results in an indictment of the LEEs for espionage, and the defense discovers we ignored a possibly significant change in our predication for the case, it would look as if we were persecuting the LEEs rather than investigating them." (FBI 609)

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[914] (S) See, e.g., this DOE memorandum written after an April 15, 1997 meeting among FBI-AQ, DOE-HQ and LANL personnel: "[SSA] [redacted] said he does not intend to let this investigation drag on, that [if] the FISA coverage (if indeed we receive it) doesn't produce the evidence needed to formally charge SUBJECT, then he would recommend – sooner rather than later – a confrontative interview of SUBJECT." (DOE 4475)

[915] (S) See also FBI 16125: "if FBI Albuquerque obtains adequate information as a result of the [redacted] it is conceivable that there will be an indictment of Lee Wen-Ho for espionage/theft of trade secrets in this particular matter."

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(S) Thus, throughout the investigation of Wen Ho Lee, the FBI consistently recognized that criminal prosecution was both a goal and a genuine possibility. While there are undoubtedly FCI investigations where the prospects for criminal prosecution are negligible, [redacted] this was not the case in the "Kindred Spirit" investigation. Wen Ho Lee was an American citizen suspected of committing espionage involving the United States' most sensitive nuclear secrets.[916] If the evidence was there, he *was* going to be prosecuted. And yet the FBI – which *was* briefing Congress repeatedly on the Wen Ho Lee investigation[917] and which *was* briefing the NSC

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[916] (S) That the FBI *understood* that it was "espionage" at issue in the Wen Ho Lee investigation, rather than a mere "counterintelligence" investigation, cannot be seriously doubted – regardless of the fact that the FBI opened the full investigation as a [redacted] [counterintelligence] investigation. That was simply a device to prevent the case from *appearing* to be "to[o] criminal in nature," as SA [redacted] put it. (AQI 954) As SSA [redacted] told FBI-AQ back in July 1996: "[T]his will not become a 65 [espionage] matter until the very last minute because it would be hard to go to the FISA court under this category at this point." (Id.) SSA [redacted] made a similar statement to the AGRT: "If you put 65 label on it, it's a lot easier to say it's a sham," referring to a FISA submission. [redacted] 12/15/99) Yet SSA [redacted] clearly understood it was *really* a "65" espionage investigation, even if it bore a different label. As he wrote in an internal briefing memorandum in March 1996 – two months before he opened the Wen Ho Lee investigation as a [redacted] case: "If Kindred Spirit develops any good suspects, open 65 (Espionage) cases and seek FISC [FISA Court] coverage, which is the best way to prove up an espionage case." (FBI 470)

[917] (S) FBI records indicate "Kindred Spirit" Congressional briefings took place on April 16, 1997 (FBI 6413, 823, 6413, 13030), September 18, 1997 (FBI 12205, 20821), February 2, 1998 (FBI 12521), February 6, 1998 (FBI 11782), July 23, 1998 (FBI 13015, 1329, 20962, 13013, 1330, 1348), July 30, 1998 (FBI 20962), November 16, 1998 (FBI 11553), November 24, 1998 (FBI 11553), December 2, 1998 (FBI 11553), December 11, 1998 (OIPR 917), and December 16, 1998 (FBI 11553), among other occasions.

repeatedly on the Wen Ho Lee investigation"[11] – never told the one entity in the United States law enforcement establishment actually charged with the responsibility for evaluating and coordinating that prosecution: the Internal Security Section of the Criminal Division of the Department of Justice.

C. (U) The Attorney General's July 19, 1995 memorandum and the FBI's notification obligations in the Wen Ho Lee investigation

(U) The Attorney General's memorandum is explicit as to when the FBI must notify the Criminal Division concerning a foreign intelligence or foreign counterintelligence investigation:

> (U) If, in the course of an FI or FCI investigation in which FISA electronic surveillance or physical searches are not being conducted, *facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed*, the FBI shall notify the Criminal Division.

AG Memorandum, Section B(1) (Appendix D, Tab 23) (emphasis added). These guidelines went into effect on July 19, 1995, about two weeks after the FBI was first briefed on the "Kindred Spirit" investigation. (FBI 679, DOE 4270)

(U) When did the FBI first know that there were "facts or circumstances" which "reasonably indicate" that "a significant federal crime has been, is being, or may be committed?"

(S/NF/RD) Certainly, by September 25, 1995, it had this information. On that date, Kenneth Baker, Acting Director of DOE's Office of Nonproliferation and National Security, wrote AD Bryan [redacted]

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[11] (U) FBI records indicate NSC briefings took place on March 25, 1997 (FBI 978, 12076, 20338), September 5, 1998 (FBI 15752, 1085, 20916), and November 16, 1998 (FBI 19993, 1470).

b1 [redacted] (FBI 13045, 375, DOE 2410) By this date, *if not earlier*,[919] the FBI knew that DOE had concluded that an *extraordinarily* significant federal crime had been committed. That neither DOE nor the FBI had yet to name a suspect is irrelevant. The AG Memorandum requires notification upon the identification of a *crime*, not the identification of a *culprit*.

(U) (S) Even if one were to conclude that DOE's September 25, 1995 letter did not meet the standards of the AG Memorandum, there were four subsequent events that ought to have reminded the FBI of its notification obligation.

(U) (S) First, on May 28, 1996, DOE formally transmitted its AI to the FBI. That AI stated, in part, the following:

b1 (S/RD/NF) [redacted] (LANL), NM.[920]

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(S/RD/NF) [redacted]

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[919] (U) (S) The FBI knew prior to September 25, 1995 that DOE had reached this judgment. In fact, the September 25 letter was generated as a result of an FBI request to DOE to confirm in writing its request of September 13, 1995 to DAD Lewis for FBI support of its AI. (FBI 378)

[920] (U) (S/NF) That this statement was inaccurate, see Chapters 6 and 7, does not detract from the fact that it was made to the FBI, which accepted it as true.

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(S) [I]t is the opinion of the writer that Wen Ho LEE is the only individual identified during this inquiry who had, opportunity, motivation and LEGITIMATE access . . . .

(FBI 525) Thus, the AI identified not only the crime but the suspected criminal.

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(S/NF) Second, on May 30, 1996, NSD instructed FBI-AQ to open a full investigation on Wen Ho Lee and Sylvia Lee. The criteria for the opening of a full investigation are governed by the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (hereafter "AG Guidelines").[921] Where the underlying allegation is espionage, there is no functional or material difference between the criteria for the opening of a full investigation (specific and articulable facts giving reason to believe that a person may be involved in certain activities such as espionage) and the criteria for Criminal Division notification (a reasonable indication that a significant federal crime has been, is being, or may be committed). Thus, the opening of the full investigation should have triggered Criminal Division notification.[922]

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(S/NF) Under those guidelines, a full FCI investigation may be opened "on the basis of specific and articulable facts giving reason to believe that a person, group or organization is or may be" involved in certain activities such as espionage, sabatoge, or international terrorism. AG Guidelines, Section III(C)(1)(b). The Wen Ho Lee/Sylvia Lee full investigation was explicitly opened pursuant to this criteria. See NSD's teletype to FBI-AQ, authorizing the full investigation of the Lees: "Based on the specific and articulable facts set out in DOE's Administrative Inquiry, and in accordance with the AG FCI Guidelines, III, C, 1, B, 1. And 4., a full FCI investigation of Lee Wen Ho and Sylvia Lee is authorized May 30, 1996." (AQI 882) Sections 1 and 4 of the AG Guidelines specifically reference "espionage, sabotage, or intelligence activities for or on behalf" of a foreign power or a "criteria" country, respectively. AG Guidelines, Section III (C)(1)(b)(1) and (4).

[922] (S) See also the FBI's [redacted] stating that the investigation was authorized by FBI-HQ based on the existence of [redacted] (FBI 591)

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(S/R/NF) Third, on or about July 19, 1996, the FBI submitted to OIPR [redacted]

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[redacted]

(FBI 591)

(U) (S) Fourth, on or about June 30, 1997, the FBI formally transmitted to OIPR its LHM in support of an application for a FISA order in the Wen Ho Lee and Sylvia Lee full investigation. In this investigation, a FISA order would only have been warranted if the Foreign Intelligence Surveillance Court judge found "probable cause" to believe that the target of the surveillance – Wen Ho and Sylvia Lee – were agents of a foreign power. 50 U.S.C. Section 1805(a)(3)(A).[923] Thus, as of June 1997, the FBI had already determined – at least to the level of "probable cause" – that Wen Ho Lee and Sylvia Lee were involved in criminal activities. That finding went significantly beyond the "reasonable indication" requirement necessary to trigger Criminal Division notification.[924]

(U) (S) Thus, the FBI failed to comply with its Criminal Division notification obligations in September 1995, May 1996, July 1996 and June 1997, not to mention the times in between. Significantly, it does not appear that the FBI contemplated, and then rejected, Criminal Division notification. Rather, it appears that they never even contemplated it. The AGRT has not observed a single indication in the documentary record

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[923] (S/NF) The "agent of a foreign power" requirement involved a finding that Wen Ho and Sylvia Lee "knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, *which activities involve or may involve a violation of the criminal statutes of the United States.*" 50 U.S.C. 1801(b)(2)(A) (emphasis added). See also FISA application "Draft #3," which states in part:

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[redacted]

(FBI 15310)

[924] (U) (S) SC Middleton told the AGRT that, in his opinion, Dion should have been notified at this point, and it was "nuts" not to have done so. (Middleton 8/3/99) "He's the guru of espionage prosecution." (Id.)

of this case to suggest that FBI compliance with the Attorney General's July 19, 1995 memorandum was ever even considered.

D. (U) OIPR should also have notified the Criminal Division

(U) Because there was no FISA coverage, the notification obligation was *solely* that of the FBI, not OIPR. Had FISA coverage been underway, *both* the FBI and OIPR would "independently" have had a notification obligation. AG's Memorandum, Section A(1).

(U) (S//NF) That is not the end of the inquiry, however. What OIPR was *obligated to do* and what OIPR *should have done* are not the same thing. Clearly, under the spirit of the AG Guidelines, even if not its letter, OIPR should have taken steps to insure that the Criminal Division was notified of the existence of the investigation, even if the FBI failed to do so. OIPR, of course, had detailed knowledge about the case:

- (S//NF) First, in July 1996, it knew of the investigation through [redacted] (FBI 591), approved by OIPR on July 31, 1996 (AQI 1017), as well as through the discussions that followed SSA [redacted] temporary suspension of the investigation. (FBI 663)

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- (U) (S) Second, in December 1996, it knew of the investigation through the FBI's mail cover application (AGO 139), endorsed by OIPR on January 3, 1997. (OIPR 64)
- (U) (S) Third, in June 1997, it knew of the investigation through the FBI's LHM in support of the FISA application (AGO 133, FBI 962, AQI 5255), rejected by OIPR on August 12, 1997. (FBI 12475, 1057)
- (U) (S) Fourth, in or about June 1997, it knew of the investigation through the annual LHM for 1997 (FBI 967), approved by OIPR on July 24, 1997. (FBI 1054, AGO 127)
- (U) (S) Fifth, in June 1998, it knew of the investigation through the annual LHM for 1998 (FBI 1312, AGO 118), approved on October 30, 1998. (AGO 117)

(U) (S) Given the significance of the underlying allegation, it was incumbent on OIPR's management to determine whether the FBI had notified the Criminal Division of the Wen Ho Lee investigation and, if it had not, to insist that it do so. This is particularly true where the Counsel for OIPR had actual, as opposed to constructive, knowledge of the Wen Ho Lee investigation. Counsel James McAdams had such knowledge in January 1997 when he endorsed the mail cover application. (OIPR 64) And Acting Counsel Gerald Schroeder had such knowledge in July and August 1997, when he became involved in the FISA application, when he authorized a briefing to the NSC,[925] and when he became aware of [redacted][926] (Schroeder 7/7/99 and 7/19/99) Each Counsel should have undertaken the responsibility for insuring that the FBI had notified the Criminal Division and, if it had not, for insuring that it was done.[927]

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E. (U) Notification

(U) On January 7, 1999, the Wall Street Journal printed a story entitled "China Got Secret Data on U.S. Warhead." The article began:

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[925] (U) (S) On August 29, 1997, UC [redacted] called OIPR attorney Dave Ryan to report that National Security Advisor Sandy Berger wanted a member of his staff to be briefed on the "Kindred Spirit" investigation. (FBI 710) Ryan passed this message on to Schroeder and, several days later, called UC [redacted] with a few follow-up questions from Schroeder. (FBI 12434) The briefing took place on September 5, 1997, with Schroeder's approval. (FBI 1085)

[926] (S) It is not clear whether Schroeder learned of the [redacted] before he was replaced as OIPR's Counsel by Francis F. Townsend, who took over on March 15, 1998. Although Francis F. Townsend became OIPR Counsel in March 1998, she told the AGRT that she was not aware of the Wen Ho Lee investigation until March 1999. (Townsend 6/29/99) The case is referred to briefly in a memorandum to the Attorney General, dated December 17, 1998, under Townsend's signature, but no case details were provided. (FBI 7107)

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[927] (U) Schroeder told the AGRT that, in hindsight, he would have notified the Criminal Division himself. (Schroeder 7/19/99)

(U) China received secret design information for the most modern U.S. nuclear warhead, and U.S. officials say the top suspect is an American scientist working at a U.S. Department of Energy weapons laboratory.

(U) The FBI is still investigating the incident, which occurred in the mid-1980s at the Los Alamos National Laboratory, but was only uncovered in 1995. No arrest has been made, but officials say the suspect, whom they declined to name, has been removed from any sensitive projects.

(U) U.S. officials describe the loss of data on the W-88 warhead as the most significant in a 20-year espionage effort by Beijing that targeted the U.S. nuclear-weapons laboratories.

(FBI 1447)[928] John Dion, Acting Chief of the Internal Security Section ("ISS"), saw the article and was angry that he had never been told about this investigation before.[929] (Dion 8/5/99) The next day he spoke to [redacted] who was then unit chief of the National Security Law Unit. According to UC [redacted] e-mail to SSA [redacted] "John expressed some concern that he knew nothing about it and was disturbed (as I suspect you were) to be reading about it in the paper." (FBI 1448) That same day UC [redacted] sent a facsimile to Dion containing a briefing memorandum on the Wen Ho Lee investigation created the previous November. (FBI 1443)

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[928] (S/NF) The FBI had seen the article coming. The previous day, Ed Curran, DOE's Director of the Office of Counterintelligence, had called UC [redacted] and told him that he was to be interviewed that day by the Wall Street Journal and he expected questions about the [redacted] and "Kindred Spirit" investigations. Curran told UC [redacted] he would not discuss these cases with the Wall Street Journal and, although he is quoted in the article, it is on general issues concerning DOE's counterintelligence efforts.

[929] (U) AD John Lewis told the AGRT that he thought SC Dillard might have talked to Dion about the investigation at some point. (Lewis 7/6/99) SC Dillard stated, however, that he had not, in fact, talked to Dion about the investigation. (Dillard 4/3/00)

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(S) Thus began the Criminal Division's involvement in the Wen Ho Lee investigation.[930] In February 1999, the Criminal Division would receive more information and the United States Attorneys Office for the District of New Mexico would be briefed on the case.[931] In March and April 1999, with the discovery of Wen Ho Lee's illicit computer activities, the Criminal Division and the United States Attorney's Office would become deeply involved in this investigation.

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[930] (~~S/RD/NF~~) It should be noted here that Mark Richard, former Deputy Assistant Attorney General for the Criminal Division, *was* in attendance at Notra Trulock's August 20, 1997 briefing to the Attorney General, but that briefing principally concerned the general threat posed by PRC efforts to penetrate DOE's national laboratories and obtain nuclear weapons information, rather than specifically the status of the "Kindred Spirit" investigation. [redacted] (Trulock 10/12/99) The Attorney General could not recall whether Wen Ho Lee's name was mentioned at this briefing but does recall that the presentation dealt with security at the national laboratories, not a specific case. Richard left the meeting with the impression that DOE had to get its house in order but wondering why the Criminal Division had been invited to the meeting in the first place. (Richard 8/12/99)

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[931] (U)
(S) On February 17, 1999, Dion and an ISS attorney, Michael Liebman, received a briefing on the investigation from UC [redacted] and SSA [redacted] (FBI 1575; AQI 166) and, soon thereafter, so did John Kelly and Robert Gorence, the United States Attorney for the District of New Mexico and his first assistant. (AQI 210) On February 22, 1999, the FBI provided Dion with copies of the February 10, 1999 polygraph report on Wen Ho Lee, Lee's signed statement of January 21, 1999, and FBI-AQ SAC Kitchen's EC of January 22, 1999, referenced in Chapter 4 of this report. (FBI 1575)

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F. (U) Why the Criminal Division was not notified

(U) The AGRT concludes that the FBI excluded the Criminal Division from this investigation for three reasons, each of which are discussed further in Chapter 20:

(U) First, the FBI perceived little "value added" in having contact with the Criminal Division, in general, or ISS, in particular. In large part, this was the unfortunate product of the rules of engagement imposed by OIPR on communications between the FBI and the Criminal Division in foreign counterintelligence cases, resulting in a relationship between the FBI and the Criminal Division described as "strained," "awkward," "dysfunctional" and "broken" and resulting in meetings characterized as "surreal," with the Criminal Division acting like a "potted plant." (Parkinson 8/11/99; Dion 8/5/99)

(U) (S) Second, the FBI perceived a huge potential down-side to notification, i.e., loss of its FISA option. This, too, is attributable in large part to OIPR. As further discussed in Chapter 20, OIPR created an unjustifiable climate of fear that forced the FBI to ask itself as to each contact with the Criminal Division: Is this the one that will cost us our FISA? Had the FBI needed a charging instrument in 1996, or 1997, or 1998, the Criminal Division would, of course, have been contacted. Had the FBI wanted a Title III, or a Rule 41 search warrant, or a grand jury subpoena, the Criminal Division would have been contacted. But, absent such a specific requirement, absent a requirement that could not be obtained by other means, there would be no contact. Hence, there *was* no contact.

(U) Third, there was no automatic or routine mechanism that forced the FBI to evaluate, and then periodically reevaluate, whether it was in compliance with the Attorney General's July 15, 1995 Memorandum. Such a mechanism almost certainly would have prompted notification to the Criminal Division, regardless of the FBI's lack of enthusiasm for this course of action.[932]

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[932] (U) Such a mechanism is now in place. See Chapter 20.

G. (U) Consequences

(U) The first, and most significant, consequence of the exclusion of the Criminal Division from the Wen Ho Lee investigation is that the Computer Crime Section of the Criminal Division was unable to serve as a critical resource for the FBI in 1996 when it was examining the issue of access to Wen Ho Lee's computer.

(U) We recognize the speculative quality of this statement. It presumes, for example, that the FBI in 1996 recognized that it needed help on this matter – that certainly *cannot* be presumed.[933] It also presumes that the advice that the Computer Crime Section would have *actually* given the FBI is the same advice that Scott Charney, former Chief of that section, told the AGRT the Computer Crime Section *should* have given the FBI (had it been asked.) And, most significantly, it presumes that such advice, if given, would have been accepted.

(U) What can be said *definitively*, however, is the following: If the FBI had initiated and maintained regular communication with the Criminal Division concerning the Wen Ho Lee investigation, there is a far greater likelihood that it would have recognized the Computer Crime Section as an invaluable resource that could have been tapped for advice on this complex issue. Even with notification to the Criminal Division, that *might not* have happened. But, in the absence of notification to the Criminal Division, it *simply would not* have happened. If the Criminal Division *was* going to be notified of the existence of the Wen Ho Lee investigation – with all the attendant risks to a FISA that might flow from such notification – it would certainly not be done simply to get advice on computer searches.

(U) Second, the Criminal Division could have contributed materially to the FBI's consideration and evaluation of several matters critical to any potential prosecution. After

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[933] (U) Indeed, the NSLU did not seem at all reticent to opine on this issue without seeking advice from anyone. See Chapter 9. And NSLU attorney [redacted] told the AGRT that he was not inhibited from calling the Computer Crime Section due to concerns about the Attorney General's July 19, 1995 memorandum. [redacted] 7/16/99)

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all, prosecution was always a goal of this investigation. In this context, the complete exclusion of the one entity, the Criminal Division, that would ultimately be held responsible for any prosecution, was unjustified and not in the best interest of law enforcement. The Criminal Division did have a role to play as to the following matters:

1. ~~(S)~~ (U) Verification of the predicate

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~~(SAINF/RD)~~ When SSA [redacted] instructed SA [redacted] to send out leads to WFO to have certain DOE personnel interviewed concerning the predicate, the purpose was to document the predicate *for use at trial*. SSA [redacted] obviously recognized that, at such a trial, a prosecutor would have to convince a jury that the crime alleged was in fact committed. [redacted] b1 The Criminal Division could have been of substantial assistance in determining how to go about the preparation for that task. It is clear that SSA [redacted] needed the help: he was not even addressing the right issue. The right issue was not the *documentation* of the predicate, but the *verification* of it. It only needed to be documented *after* it was verified. Ultimately, the FBI did a completely inadequate job of examining the predicate.

2. ~~(S//NF)~~ (U) The source of the walk-in document

~~(S//NF)~~ Given the preeminent role of the walk-in document in the establishment of the predicate, it was obviously significant that [redacted] b1 Ultimately, if this case proceeded to trial, a prosecutor would need to establish the predicate and, therefore, barring alternatives, would probably need to establish the authenticity and admissibility of the walk-in document. Indeed, it was even possible, perhaps probable, that the Government would need to call the source of the walk-in document as a witness. ISS could have provided valuable advice concerning the handling of this matter, not only in connection with the initial determination that the walk-in document was legitimate, but in connection with any further contact between the United States Government and the source of the walk-in document.

3. (U) The case against Wen Ho Lee

(S/RD) [redacted] The Government would, of course, have to establish that Wen Ho Lee and/or Sylvia Lee were the culprits who did it. b1

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(S/RD/NF) SSA [redacted] was counting on FISA to do this. When FISA was rejected, FBI-AQ was counting on the [redacted] to do it. But any prosecutor who examined this matter would recognize that *neither* admissions during FISA surveillance *nor* admissions during the [redacted] would be enough. [redacted] b1

(U) (S) In addition, the Government would need to establish Wen Ho Lee's motive to commit espionage. While juries are told that *motive* is not an element of the offense, *intent* obviously is an element, and intent and motive are so intertwined as to be nearly inseparable. What worked in the AI – an undocumented claim that Wen Ho Lee had the motive to commit espionage – would obviously not work at trial. The FBI needed to do a number of discrete interviews of former supervisors, former co-workers, and former associates, to address the issue of motive. ISS could certainly have been helpful in identifying the need for this evidence.[934]

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[934] (U) In this respect, it must be emphasized that the constraints that would have limited the advice that the Criminal Division was permitted to provide to the FBI under the July 1995 memorandum did not apply when no FISA had been conducted. See Attorney General's July 19, 1995 memorandum, Section (B)(3).

4. (S) The [redacted]

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(S) SSA [redacted] clearly recognized that [redacted] could generate evidence to support a prosecution. See, e.g., the memorandum approving the [redacted] "evidence supporting prosecution will be pursued." (FBI 1246) Given this recognition, the FBI should have briefed ISS [redacted] and obtained its advice.

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(S) [redacted] is rife with potential to make – or wreck – a prosecutable case. [redacted]

(S) Moreover, *every* [redacted] also presents a potential for flight, [redacted] As Dion said in the context of fast-moving developments in another espionage prosecution, the case "might move into DEFCON 5 immediately." (Dion 8/5/99) Putting aside the fact that *no* plans were made for that eventuality, see Chapter 14, even if plans *had* been made, they would be nearly meaningless without substantial advance notice to ISS. What if Wen Ho Lee had headed for the airport? Would he have been arrested? Could he have been arrested? What about Sylvia? *And, if arrested, how exactly were the Criminal Division and a United States Attorney's Office supposed to put themselves in a position, essentially overnight, to even comprehend – let alone communicate to a court – the substance of an investigation that had been going on, to one extent or another, for more than four years?*

(S) The *other* failures to seek out the Criminal Division for advice and counsel, as described above, were simply imprudent and unwise. All they did was jeopardize the potential for a *successful* prosecution. The failure to notify, or consult with, the Criminal Division [redacted] always presents a risk of flight – was a much different matter. It not only jeopardized the potential for a *successful* prosecution; it jeopardized the potential for *any* prosecution. Keeping the Criminal Division in the dark was not just unnecessary, it was dangerous.

5. (U) The interviews of Wen Ho Lee

(U) Wen Ho Lee was interviewed and polygraphed on December 23, 1998 (by DOE and Wackenhut) and interviewed again on January 17, 1999 (by the FBI).[933] A subject interview is obviously a critical stage in any investigation and certainly it was in this one.

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(S) A subject interview presents some of the very same flight risks [redacted] As Dion told the AGRT: [redacted] 61

(U) Beyond that, the December 23, 1998 interview – being a DOE interview of a LANL employee – required a thorough analysis under Garrity[936] to determine if there was a potential for Wen Ho Lee to make a claim that his interview was compelled and, hence, inadmissible, and, if so, how that potential could be minimized or avoided. As Dion said: "The FBI needed legal advice and didn't get it. [There was] no recognition of the issue at all." (Dion 8/5/99)

(U) Finally, the Criminal Division could have contributed significantly to the identification of matters to be addressed in a subject interview. Ultimately, if this case went to trial, this might well be the only occasion upon which the jury heard from the defendant. Equally important was the manner in which the Government conducted the interview. That, too, could end up being an issue in trial that a prosecutor would have to confront.

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[933] (U) By January 17, 1999, ISS was aware of the Wen Ho Lee investigation and had received a copy of a November 6, 1998 briefing memorandum. Dion told the AGRT, however, that he was probably not aware of the Wen Ho Lee interview. (Dion 8/5/99) The AGRT has seen no documentation to indicate that the Criminal Division had notice that this interview was to take place.

[936] (U) Garrity v. State of New Jersey, 385 U.S. 493 (1967).

(U) Excluding the Criminal Division from deliberations concerning this key stage in the investigation, simply put, made no sense. It made it that much more likely that the interview of Wen Ho Lee would not contribute to an ultimate prosecution and it increased the risk that it could undermine such a prosecution."[937]

G. (U) Conclusion

(U)
(S) The FBI's failure to notify the Criminal Division, and its failure to avail itself of the Criminal Division's expertise, are matters of great and grave consequence. OIPR, by its own failure to cause notification to the Criminal Division and by its fostering of a climate that created substantial disincentives to consultation with the Criminal Division, contributed immeasurably to the problems identified in this Chapter. The root of these problems lay, not in the Wen Ho Lee case, but in a long-term, previously acknowledged but never resolved, problematic relationship among the pertinent parties. See Chapter 20. It was predictable and, perhaps, inevitable that, sooner or later, a price would have to be paid for the Department's failure to fix this "broken" and "dysfunctional" relationship. Unfortunately, that price would be paid in the context of a critical investigation into the compromise of information concerning one of our nation's most sophisticated nuclear weapons.

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[937] (U)
(S) Of course, as is discussed in Chapter 4, the FBI was devoting virtually no attention itself to the planning of a subject interview. When SA [redacted] was summoned to go out to LANL on December 23, 1998 with SA [redacted] to do a follow-up interview of Wen Ho Lee should he flunk the Wackenhut polygraph, he had "zero amount of time to prepare for a very significant interview." [redacted] 8/18/88) In part, that was the product of the fast track that DOE had imposed on the Wen Ho Lee interview. But it was also the product of years of failure by multiple case agents to prepare for a subject interview that, one way or another, would inevitably occur.

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