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

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

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

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

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

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

(U)

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

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

- [redacted]

(U)

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

(U)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(u)

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

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

4. (U) The principal arguments against probable cause

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

a. (U) The "matrix" was inadequate

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

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

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

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

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

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

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

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

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

c. (S) [redacted]

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

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(S) First, [redacted]

(S) Second, [redacted]

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

d. (S//NF) [redacted]

(S//NF) [redacted]

(S//NF) First, [redacted]

(S//NF) Second, [redacted]

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

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[redacted]

e. (S//NF) [redacted]

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

(FBI 5686)

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

(U)

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

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

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

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[redacted]

g. (S/NF) [redacted]

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

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

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

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

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

FBI b6 b7C

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

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

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

(U)

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

(U)

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

(U)

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

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

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(FBI 13312)

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

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

(w).

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

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

FBI b6 b7C

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

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

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

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

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

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

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

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

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

i. (S/NF) [redacted]

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(S/NF) The FBI omitted [redacted]

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

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

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

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

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

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

FBI 66, 67C

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

FBI 66, 67C

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

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

FBI 66 67C

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

FBI 66, 67C

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

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

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

(U)

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

ii. (S/NF) [redacted]

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

[redacted]

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

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

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

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

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

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

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

[redacted]

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(S/NF) [redacted]

(Id.)

(W)

FBI b6 b7C

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

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

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

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

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

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(S/NF) [redacted]

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

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

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

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

(U)

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

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

(U)

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

(U)

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

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

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

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

(U)

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

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

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

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

* * *

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

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

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

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

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

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

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

DOE 66 67C

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

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

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

DOE 66 67C

(FBI 8359-8360)

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

DOE 66 67C

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

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

DOE 66, 67C

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

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

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

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

OIP 66 67C

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

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

OIP b6 b7C

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

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

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

DOE b6 b7C

FBI b6 b7C

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

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

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

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

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

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

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

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

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

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

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(U)

FBI 66 67C (S) In his interview with the AGRT, SSA [redacted] was similarly blunt: "In no way would I try to twist Sylvia Lee's role." [redacted] 7/23/99) SSA [redacted] general view of submissions to OIPR was that he was "an advocate" and he did not need "to put in a bunch of nebulous stuff" into a request to OIPR for a FISA order. Nevertheless, he emphasized, "I won't hide a pink mouse from a federal judge or OIPR." [redacted] 12/15/99) In this case, SSA [redacted] FISA LHM did anything but hide the "pink mouse." These are excerpts from SSA [redacted] LHM:

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

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(U)

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

(U)

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

(U)

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

b1

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

DOE 66 67C

FBI 66 67C [740] (U) The records to which SSA [redacted] referred may have disclosed no calls to the PRC but that did not mean that Sylvia Lee [redacted] 4/27/00) That should have been in the FISA application but apparently was unknown to FBI-AQ or NSD. It could have been known to the FBI if it had interviewed [redacted] but SSA [redacted] considered interviews in an FCI investigation a definite "no-no." See Chapter 4.

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

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

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

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

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

FBI 66 67C

8. (U) The matter of "intermission"

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

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

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

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

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

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

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

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

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

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

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

FBI
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b7C

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

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

FBI
66
67C

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

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

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

10. (U) Conclusion

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

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