

CHAPTER SIXTEEN

~~(S)~~ THE FISA RECONSIDERATION BY OIPR: DECEMBER 1998

(U) Questions Presented

Question One: ~~(S)~~ Did the [REDACTED] warrant the submission of a FISA application and the issuance of a FISA order?

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Question Two: ~~(S)~~ Did FBI-HQ personnel make a serious and substantial effort in December 1998 to advise OIPR of incriminating information arising out of the August 1998 [REDACTED] and to persuade OIPR to submit a new FISA application?

Question Three: ^(U)~~(S)~~ Did OIPR handle this matter appropriately?

A. (U) Introduction

~~(S)~~ In Chapter 4, Section "H(4)(e)(vi)," above, the AGRT addressed NSD's failure *promptly* to pursue a FISA application in the fall of 1998 in light of the [REDACTED]. In this chapter, the AGRT addresses NSD's failure *seriously* to pursue the FISA application *at any time* after [REDACTED]. What took place on December 22, 1998 was, in no respect, a serious run at FISA. It was nothing more than an effort to "check the box" and to provide confirmation of a decision the FBI had already made.

B: ~~(S)~~ The significance of the [REDACTED]

~~(S)~~ SSA [REDACTED] viewed the [REDACTED] as a "bust" [REDACTED] (7/23/99), and certainly it was not all that FBI-AQ and FBI-HQ had hoped it would be. But it most

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certainly was not a bust."³³ For the reasons set forth in Chapter 14, the [REDACTED] did materially advance the case for a FISA order, it *should* have resulted in a serious and substantial effort on the part of NSD to persuade OIPR that the FBI now had a sufficient basis for a FISA order, it *should* have caused the submission of a FISA application, and it *should* have resulted in a FISA order.

(S) OIPR's principal reason for rejecting the FISA application submitted in June 1997 was a lack of probable cause. See Chapter 11. Whether the FBI agreed with that assessment, it was stuck with it. The [REDACTED] properly analyzed, could have and should have overcome OIPR's objections. The [REDACTED] yielded 19 specific items of incriminating material, see Chapter 14, and made the following contributions to the probable cause analysis:

(S) First, it demonstrated [REDACTED]

[REDACTED] That [REDACTED] it included a number of [REDACTED]

(S) Second, it demonstrated [REDACTED]

(S) Third, it demonstrated [REDACTED]

(S) Fourth, it demonstrated [REDACTED]

³³ (S) As FBI-AQ ASAC Dick wrote in an e-mail to SAC Kitchen, SA [REDACTED] and others immediately after the [REDACTED] was executed: "Great Job! While it was not a home run we certainly got to second base." (AQI 4861)

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(S) And, finally, it demonstrated [REDACTED]

[REDACTED]

(S/NF) The [REDACTED] is not, of course, evidence of actual espionage. It is, after all, [REDACTED] It is evidence, however, [REDACTED]

[REDACTED] in a far more sinister light.

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(S) This was certainly the view of FBI-AQ. When SA [REDACTED] took over the investigation from SA [REDACTED] her first order of business was to draft a request to FBI-HQ for submission to OIPR of a FISA application. [REDACTED] (9/7/99) She did so immediately and sent an EC to NSD on November 10, 1998 that ably and effectively set forth the case for a FISA order. (AQI 1964)

(S) SSA [REDACTED] however, did not see the [REDACTED] as FBI-AQ did. His reaction to SA [REDACTED] EC was immediate and negative, as shown by his handwritten comments on FBI-HQ's copy. (FBI 1381) Then, on December 10, 1998, he formally rejected FBI-AQ's request for a FISA order (FBI 1406), which UC [REDACTED] endorsed three days later. (Id.) According to UC [REDACTED] SSA [REDACTED] was not going to even present this matter to OIPR for its review. [REDACTED] (12/29/99)

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(S) Nevertheless, despite having rejected the FISA request on December 10, 1998, SSA [REDACTED] found himself in the office of OIPR attorney Dave Ryan on December 22, 1998 discussing that very possibility. How did this happen?

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(8) On December 13, 1998, UC [REDACTED] had signed off on SSA [REDACTED] rejection of the FISA request.³⁹ The next day, however, SC Chuck Middleton told him he wanted "final pleadings" made with OIPR for a FISA application.⁴⁰ (FBI 11953) The next day, SC Middleton, UC [REDACTED] SSA [REDACTED] and others from the FBI met with DOE's Ed Curran and others from DOE. Curran was told that a "2nd FISA request . . . [was] coming up." (FBI 11950, 21564)

(8) UC [REDACTED] recognized that SSA [REDACTED] had no enthusiasm for making such a request given his perception, as later communicated to the AGRT by SSA [REDACTED] himself, that the [REDACTED] was a "bust."⁴¹ But, said UC [REDACTED] "my point to

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³⁹ (8) SSA [REDACTED] was "upset" when he learned of the rejection. He told SA [REDACTED] "This is B-S-, we give him [SSA [REDACTED] what he wants and he does nothing." [REDACTED] 9/7/99)

⁴⁰ (S/NF) What led SC Middleton to take this action? It certainly was not enthusiasm for the results of the [REDACTED]. He viewed the results as "garbage" and "not successful" and "as alerting as could be." (FBI 1493; Middleton 8/3/99) He wasn't "optimistic" that OIPR would approve a FISA application and, if approved, that it would be "productive." (Id.) And yet, here he was, ordering "final pleadings" with OIPR. Why? It is unclear, but the case had begun to attract the kind of scrutiny that might have led a section chief not to want to reject a FISA request without at least running it by OIPR. Three days earlier, SC Middleton and UC [REDACTED] had met with Christopher Cox, Chairman of the Cox Committee, and had provided him a "detailed briefing" on "Kindred Spirit," [REDACTED] and [REDACTED] (FBI 11553) According to notes obtained by the AGRT, Chairman Cox had questions "re-FISA, Dept. actions" in the "Kindred Spirit" case and was "upset." (OIPR 917)

⁴¹ (8) UC [REDACTED] own view is a little less clear. According to a December 2, 1998 note sent to DOE's Curran by an FBI detailee to DOE, [REDACTED] UC [REDACTED] view was that FBI-AQ's request for a FISA was "still short of probable cause to take to the FISA court." (DOE 3988) And UC [REDACTED] immediate reaction upon reading the [REDACTED] (FBI 11954) SSA [REDACTED] told the AGRT that [REDACTED] agreed that it [REDACTED] was

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[REDACTED] was we're not the attorneys of record." [REDACTED] 12/29/99) OIPR was, and even though it was being done out of a "surfeit" of caution, it still needed to be done and "then we can check the box."⁴² (Id.) Thus, UC [REDACTED] "ordered" SSA [REDACTED] to go see OIPR.⁴³ [REDACTED] 12/15/99)

(u) (s) That the FBI lacked confidence in its own claim on a FISA order was made abundantly clear in a note that AD Gallagher sent to Director Freeh on December 18, 1998, just four days before SSA [REDACTED] went over to OIPR to present the matter. This note confirms to Director Freeh what NSD had told FBI-AQ the previous week: "[T]he results of [REDACTED] were not likely to be sufficient justification for electronic surveillance." (FBI 7652) 61

(u) (s) The FBI's gloomy prognosis carried over to SSA [REDACTED] meeting with OIPR on December 22, 1998. There is no question that this was *not* a "serious run" at a FISA application but, rather, an effort by NSD to gain OIPR's endorsement of a decision that it had *already* made and *already* communicated to both FBI-AQ and to the Director himself.⁴⁴

[a] bust" [REDACTED] 12/15/99) Nevertheless, when the AGRT interviewed UC [REDACTED] in July 1999, he said he viewed the [REDACTED] results as very probative and not consistent with [REDACTED] 7/19/99) 61

⁴² (u) (s) When the AGRT interviewed UC [REDACTED] in July 1999, UC [REDACTED] emphasized that he had really intended the approach to OIPR to be a "serious run" at a FISA order. His view was that the full context of the [REDACTED] supported a FISA application, whether or not it was ultimately approved. [REDACTED] 7/19/99) 61

(u) (s) AD Gallagher told the AGRT that he was not aware of this second "run" at a FISA but, upon reviewing what happened, the "reality is that it was crossing the last 'T' before going to [the] polygraph." (Gallagher 10/28/99)

(u) (s) If more evidence of this fact was necessary, one need only look at the FBI's acquiescence in DOE's determination to interview and polygraph Wen Ho Lee in late December 1998. If the FBI actually thought there was a chance for a FISA order, it certainly would have asked DOE to hold off, at least briefly, on the interview and

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(S) Even the fact that SSA [REDACTED] encounter with OIPR took place on December 22, 1998 is significant. SSA [REDACTED] told the AGRT that it was strictly a coincidence that his meeting with OIPR took place just one day before Wen Ho Lee's meeting with the DOE interviewer and polygrapher. [REDACTED] 7/23/99) SSA [REDACTED] may well view it as coincidence but, after all, SSA [REDACTED] did not go to OIPR on his own initiative - UC [REDACTED] ordered him to meet with OIPR. [REDACTED] 12/15/99; [REDACTED] 12/29/99) And that very morning UC [REDACTED] had found out from [REDACTED] a retired DOE b6, b7C FBI agent who worked for Curran in DOE's Office of Counterintelligence, that the interview and polygraph of Wen Ho Lee - which UC [REDACTED] had previously been told would take place on December 29, 1999 (FBI 11947, 20325) - had been moved up to December 22, 1998 per instructions from Secretary Richardson.⁴⁴ (FBI 11944, 20324) If this was a "box" that NSD needed to "check," it needed to check it immediately.

C. (U) The December 22, 1998 meeting

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(S) On December 22, 1998, SSA [REDACTED] had his meeting with OIPR, although it was such a casual and off-the-cuff encounter that it hardly warrants the term "meeting." There are basically three sources of information about what went on at this meeting: SSA [REDACTED] recollection of events; OIPR attorney David Ryan's recollection of events; and SSA [REDACTED] handwritten note to the file. Although all three sources are slightly different, they tell a similar story.

(S) According to SSA [REDACTED] this is what happened: SSA [REDACTED] "popped" into to Ryan's office at OIPR and basically described the circumstances of the [REDACTED] b1 He states that he did not "tell him every detail" and did not go into the [REDACTED] details," in other words, he did not go into the critical events immediately following the [REDACTED] Nevertheless, SSA [REDACTED] said he was "pretty sure" he told Ryan that Wen Ho Lee [REDACTED]

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polygraph of Wen Ho Lee which, by alerting Lee to the fact that he was under additional scrutiny, would inevitably render electronic surveillance less productive.

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⁴⁴ (S) The interview did not take place until December 23, 1998, but that was because Lee was delayed in getting back to New Mexico from his trip to Taiwan. [REDACTED] 9/7/99)

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It was, according to SSA [REDACTED] "not [an] overly lengthy" meeting. SSA [REDACTED] view, in going into the meeting, was that nothing that happened in the [REDACTED] could have changed things" and that there was nothing in [REDACTED] report that would have justified a finding of probable cause. [REDACTED] (7/23/99, 12/15/99) Ryan said "loud and clear" that the [REDACTED] results changed "nothing." [REDACTED] (12/15/99)

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(S) According to OIPR Attorney Dave Ryan, this is what happened: SSA [REDACTED] came by for a meeting that lasted about five minutes. SSA [REDACTED] told Ryan that an unsuccessful [REDACTED] SSA [REDACTED] did not give Ryan any additional details and then asked Ryan if these facts alone would warrant approval of a FISA order. Obviously, the answer was no. When Ryan told him this, SSA [REDACTED] state: "That's what I thought." (Ryan 7/8/99) Significantly, Ryan said SSA [REDACTED] never told him that Wen Ho Lee had failed to report [REDACTED] indeed, told him just the opposite. Had SSA [REDACTED] told him about the failure to report, Ryan states he would have pursued it with Alan Kornblum, but it probably would not have led to a different result. (Id.)

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(S) SSA [REDACTED] note to the file, in its entirety, reads as follows:

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(S) Re Kindred Spirit:

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(S) Spoke this day with OIPR's Dave Ryan who drafted last year's application for ELSUR [Electronic Surveillance] on the Lees. I reviewed the prior application and the reasons for declination. Dave remembered the case, especially since it just came up again in another context last week."⁴⁶

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⁴⁶ (S) On December 17, 1998, OIPR Counsel Francis F. Townsend had written a memorandum to Attorney General Reno summarizing the November 1998 DOE Threat Assessment Report. (FBI 7107) The memorandum included a summary of FISA matters

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(S) I then advised Dave of the [REDACTED] and the results. I ended by asking him if he thought there might be enough to do another application. He immediately responded "No."

(S) We agreed that the [REDACTED] in no way supported, by itself, the requirement for being presently engaged in clandestine intelligence activity.

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(S) I advised JRK [REDACTED] of this 12/22

(FBI 7111)

(S) These three accounts essentially paint the same portrait: SSA [REDACTED] had a brief encounter with Ryan intended to obtain OIPR's endorsement of a decision SSA [REDACTED] and his supervisors at NSD had *already* made, i.e., [REDACTED] "in no way" added anything to the issue of "probable cause." Not surprisingly, indeed inevitably, Ryan agreed. No serious effort was made by SSA [REDACTED] to present Ryan with the several [REDACTED]

[REDACTED] See Chapter 14. Nor was any effort made to present Ryan with Lee [REDACTED] SSA [REDACTED] got what he came for: confirmation of a decision he had already made and already communicated to FBI-AQ. What he should have come for was a FISA order.⁶⁴⁷

involving DOE targets and included reference to the August 1997 Wen Ho Lee FISA declination. (Id.)

⁶⁴⁷ (S) There is one significant discrepancy in the accounts of Ryan and SSA [REDACTED] Ryan says that SSA [REDACTED] told him that Wen Ho Lee had reported [REDACTED] SSA [REDACTED] says that he told Ryan that it was [REDACTED] Presented *this* way, this is a distinction without a difference. In fact, this was a big deal, as would have been apparent if it had been presented in context. First, and most significantly, [REDACTED]

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(U) As to OIPR, its ability to have put together a FISA application in December 1998 would have been significantly handicapped by its destruction of its own records concerning the June 1997 FISA application. See Chapter 11 and 12. That never became a problem because there was *nothing* in SSA [REDACTED] presentation to support a reconsideration of the matter.

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D. (U) Conclusion

(S) Ultimately, the responsibility for the inadequate presentation to Ryan lies only partially with SSA [REDACTED] UC [REDACTED] must also bear responsibility for a decision which he told the AGRT in July 1999 he regretted. [REDACTED] 7/19/99) UC [REDACTED] stated that he believed the [REDACTED] was not communicated fully to OIPR by SSA [REDACTED] and he regrets not having presented the FISA issue to OIPR himself. He indicated that if the context of the [REDACTED] had been presented fully he believes it would have supported a FISA application, whether or not it was actually approved. (Id.)

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[REDACTED] Second, by the time [REDACTED] made Wen Ho Lee aware that LANL knew [REDACTED] It is obvious that Wen Ho Lee had *no* intention of reporting [REDACTED] regardless of what he may have told [REDACTED] (FBI 1350) [REDACTED] reached the same conclusion and told SA [REDACTED] this. See AQI 4793.) [REDACTED]

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[REDACTED] As to the fact that SSA [REDACTED] says he is "pretty sure" he told Ryan about [REDACTED] and SSA [REDACTED] told the AGRT that he "didn't go into the [REDACTED] details." [REDACTED] 7/23/99) Thus, we cannot conclude that this information was communicated to Ryan.

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b1 (S) On September 1, 1998, NSD told Director Freeh that after it received the [REDACTED] will present the details to DOJ/OIPR and again ask for an electronic surveillance application to the Foreign Intelligence Surveillance Court." (FBI 7651) By December 18, 1998, NSD was telling Director Freeh something very different: the results of the [REDACTED] were not likely to be sufficient justification for electronic surveillance." (FBI 7652) NSD's first instincts were the correct ones. It should have "again ask[ed]" for a FISA application. It did not.

(S) Had a serious and substantial presentation been made to OIPR concerning the [REDACTED] and had OIPR nevertheless rejected the submission of a FISA application, it would warrant criticism. Instead, OIPR never got the chance to decide the matter one way or the other. OIPR was told nothing that could possibly have led it to believe that the matter warranted any further inquiry.