

**Report on the Investigation of Espionage Allegations
Against Dr. Wen Ho Lee**

Reforms Required to Prevent Future Mishandling of Investigations
Like That of Dr. Wen Ho Lee

At the bail hearing of Dr. Wen Ho Lee on Dec. 13, 1999, the key government witness, Dr. Stephen Younger, Associate Laboratory Director for Nuclear Weapons at Los Alamos, testified as follows about the nuclear secrets Dr. Lee is accused of mishandling:

These codes, and their associated data bases, and the input file, combined with someone that knew how to use them, could, in my opinion, in the wrong hands, change the global strategic balance.¹

It would be hard, realistically impossible, to pose a more severe risk than to "change the global strategic balance."

Dr. Younger further testified that:

They enable the possessor to design the only objects that could result in the military defeat of America's conventional forces They represent the gravest possible security risk to ... the supreme national interest.²

A "military defeat of America's conventional forces" and "the gravest possible security risk to ... the supreme national interest" constitute threats of obvious enormous importance.

Although the Subcommittee's inquiry into the handling of the Dr. Wen Ho Lee investigation is not completed, important

conclusions have been reached which require Congressional consideration of remedial legislation at the earliest possible time.

The purpose of counter-intelligence is to identify suspicious conduct and then pursue an investigation to prevent or minimize access by foreign agents to our secrets. The investigation of Dr. Lee since 1982 has been characterized by a series of errors and omissions by the Department of Energy and the Department of Justice, including the FBI, which have permitted Dr. Lee to threaten US supremacy by putting at risk information that could change the "global strategic balance." This interim report will describe and discuss some of those errors and omissions and suggest remedial legislation.

Dr. Wen Ho Lee was investigated on multiple occasions over seventeen years, but none of these investigations - or the security measures in place at Los Alamos - came close to discovering and preventing Dr. Lee from putting the national security at risk by placing highly classified nuclear secrets on an unsecure system where they could easily be accessed by even unsophisticated hackers.³ It is difficult to comprehend how officials entrusted with the responsibility for protecting our

national security could have failed to discover what was really happening with Dr. Lee, given all the indicators that were present.

The 1982-1984 Investigation

Dr. Wen Ho Lee was born in Nantou, Taiwan, in 1939. After graduating from Texas A&M University with a Doctorate in 1969, he became a U.S. citizen in 1974, and began working at Los Alamos National Laboratory in applied mathematics and fluid dynamics in 1978.⁴ The FBI first became concerned about Dr. Lee as a result of contacts he made with a suspected PRC intelligence agent in the early 1980s. On December 3, 1982, Dr. Lee called a former employee of Lawrence Livermore National Laboratory (LLNL) who was suspected of passing classified information to the Peoples Republic of China (PRC). This call was intercepted pursuant to a FISA court authorized wiretap in another FBI espionage investigation. After introducing himself, Dr. Lee stated that he had heard about the Lawrence Livermore scientist's "matter" and that Lee thought he could find out who had "squealed" on the employee.⁵ Based on the intercepted phone call, the FBI opened an espionage investigation on Dr. Lee.

For the next several months the FBI investigated Dr. Lee,

with much of the work being done under the guise of the periodic reinvestigation required for individuals with security clearances. On November 9, 1983, the FBI interviewed Dr. Lee. Before being informed that the FBI had intercepted his call to the Lawrence Livermore employee, Lee stated that he had never attempted to contact the employee, did not know the employee, and had not initiated any telephone calls to him. These representations were patently false.⁶ Dr. Lee offered during the course of this interview to assist the FBI with its investigation of the other scientist.

On December 20, 1983 Dr. Lee was again interviewed by the FBI,⁷ this time in California. During this interview, Lee explained that he had been in contact with Taiwanese nuclear researchers since 1977 or 1978, had done consulting work for them, and had sent some information that was not classified but that should have been cleared with DOE officials. He tried to explain that he had contacted the subject of the other investigation because he thought this other scientist was in trouble for doing the same thing that Lee had been doing for Taiwan.⁸ After this interview, the FBI sent Dr. Lee to meet with the espionage suspect. On the record currently available, that meeting did not produce anything.

On January 24, 1984, Dr. Lee took an FBI polygraph examination which included questions about passing classified information to any foreign government, Lee's contacts with the Taiwanese Embassy, and his contacts with the LLNL scientist. Although the FBI has subsequently contended that Dr. Lee's answers on this polygraph were satisfactory,⁹ there remained important reasons to continue the investigation. His suspicious conduct in contacting the Lawrence Livermore scientist and then lying about it, the nature of the documents that he was sending to the Taiwanese Embassy, and the status of the person to whom he was sending those documents were potential danger signals. Although not classified, the documents Dr. Lee was passing to Taiwan's Coordination Council of North America were subject to Nuclear Regulatory Commission export controls. They were specifically stamped "no foreign dissemination." According to testimony of FBI Special Agent Robert Messemer at a special hearing on December 29, 1999, FBI files also contain evidence of other "misrepresentations" that Dr. Lee made to the FBI in 1983-1984 which have raised "grave and serious concerns" about Dr. Lee's truthfulness. For security reasons, these matters cannot be further detailed.¹⁰ Notwithstanding these reasons for continuing the investigation, the FBI closed its initial investigation of Lee on March 12, 1984.¹¹

During the course of the investigation it was clear that, by virtue of his work assignment and access to top nuclear secrets, Dr. Lee was in a position to do considerable damage to the national security. Thus, suspicions of espionage or a lack of trustworthiness should have been treated with great concern. On the state of the record, consideration should have been given to suspending his access to classified information and, at a minimum, an intensified investigation should have been pursued. Instead, the FBI permitted him to stay in place, which enabled him to undertake a course of conduct, years later, leading to his potential to change the global strategic balance.

The 1982-1984 investigation of Dr. Lee represents a missed opportunity to protect the nation's secrets. Had the matter been handled properly, Dr. Lee's clearance and access would most likely have been removed long ago, before he was able to put the global strategic balance at risk.

The 1994-November 2, 1995, Investigation of Dr. Lee

This investigation of Dr. Lee was initiated based upon the discovery that he was well acquainted with a high-ranking Chinese nuclear scientist who visited Los Alamos as part of a delegation in 1994.¹² Dr. Lee had never reported meeting this scientist,

which he was required to do by DOE regulations, so his relationship with this person aroused the FBI's concern. Unclassified sources have reported that Dr. Lee was greeted by "a leading scientist in China's nuclear weapons program who then made it clear to others in the meeting that Lee had been helpful to China's nuclear program."¹³ In concert with the 1982-1984 investigation, Dr. Lee's undisclosed relationship with this top Chinese nuclear scientist should have alerted the FBI and the DOE of the imperative for intensified investigation and reconsideration of his access to classified information. Instead, this FBI investigation was deferred on November 2, 1995, because Dr. Lee was by then emerging as a central figure in the Department of Energy's Administrative Inquiry, which was developed by a DOE counterintelligence expert in concert with a seasoned FBI agent who had been assigned to DOE for the purposes of the inquiry. The DOE Administrative Inquiry was given the code name Kindred Spirit.¹⁴ The investigation of Dr. Lee was essentially dormant from November 1995 until May 1996, when the FBI received the results of the DOE Administrative Inquiry and opened a new investigation of Dr. Lee on May 30, 1996.

It is difficult to understand why the FBI would suspend the investigation in 1995, even to wait for the Kindred Spirit

Administrative Inquiry, when the issues that gave rise to 1994-1995 investigation remained valid and unrelated to the Kindred Spirit investigation. The key elements of the 1994-1995 investigation are described in the 1997 Letterhead Memorandum (LHM) which was prepared to support the request for a FISA search warrant. Specifically, the LHM describes the unreported contact with the top nuclear scientist,¹⁵ and it makes reference to the "PRC using certain computational codes ... which were later identified as something that [Lee] had unique access to."¹⁶ And, finally, the LHM states that "the Director subsequently learned that Lee Wen Ho had worked on legacy codes."¹⁷ Given these serious allegations, it was a serious error to allow the investigation to wait for several months while the DOE AI was being completed. This deferral needlessly delayed the investigation and left important issues unresolved.

In addition to information known to the FBI which required further intensified investigation and not a deferred investigation on November 2, 1995, the Department of Energy was incredibly lax in failing to understand and pursue obvious evidence that Dr. Lee was downloading large quantities of classified information to an unclassified system. The sheer volume of Dr. Lee's downloading showed up on a DOE report in

1993.¹⁸ Cheryl Wampler, from the Los Alamos computer office, has testified that the NADIR system, short for Network Anomaly Detection and Intrusion Recording, flagged Dr. Lee's massive downloading in 1993.¹⁹ This system is specifically designed to create profiles of scientists' daily computer usage so it can detect unusual behaviors. A DOE official with direct knowledge of this suspicious activity failed to act on it, or to tell DOE counterintelligence personnel or the FBI. Based on its design, the NADIR system would have continued to flag Dr. Lee's computer activities in 1994 as being unusual, but no one from DOE took any action to investigate what was going on.²⁰ And it wasn't mentioned to the FBI or DOE's counter-intelligence personnel.

Had DOE transmitted this information to the FBI, and had the FBI acted on it, Dr. Lee could have and should have been stopped in his tracks in 1994 on these indicators of downloading. The full extent of the importance of the information that Dr. Lee was putting at risk through his downloading was encapsulated in a document the Government filed in December 1999 as part of the criminal action against Dr. Lee:

[I]n 1993 and 1994, Lee knowingly assembled 19 collections of files, called tape archive (TAR) files, containing Secret and Confidential Restricted Data relating to atomic weapon research, design, construction, and testing. Lee gathered and collected information from the secure, classified LANL

computer system, moved it to an unsecure, "open" computer, and then later downloaded 17 of the 19 classified TAR files to nine portable computer tapes.²¹

These files, which amounted to more than 806 megabytes, contained information that could do vast damage to the national security.

The end result of these missteps and lack of communication was that, during some of the very time that the FBI had an espionage investigation open on Dr. Lee resulting from his unreported contacts with a top Chinese scientist and the realization that the Chinese were using codes to which Dr. Lee had unique access, DOE computer personnel were being warned by the NADIR system that Dr. Lee was moving suspiciously large amounts of information around, but were ignoring those warnings and were not passing them on to the FBI.

The near perfect correlation between the allegations which began the 1994-1995 investigation and Dr. Lee's computer activities is stunning. The codes the Chinese were known to be using were computer codes, yet FBI and DOE counter-intelligence officials never managed to discover these massive file transfers. Where, if not on his computer, were they looking? And, as for the lab computer personnel who saw but ignored the NADIR reports, what possible explanation can there be for a failure to conduct

even the most minimal investigation?

The Investigation Renewed, May 30, 1996 to August 12, 1997

As noted previously, the investigation of Dr. Lee was dormant from November 2, 1995 until May 30, 1996.

In 1995, DOE scientists received information which raised the possibility that the Chinese had made significant technological advancements in warhead design. The now infamous "walk-in" document was added to the equation in the summer of 1995. The "walk-in" document, coupled with concerns raised from a string of Chinese nuclear tests, led to the formal establishment of a DOE Administrative Inquiry (AI) on September 28, 1995. As noted previously, at DOE's request, a senior FBI special agent was assigned to work this inquiry jointly a DOE counter-intelligence officer. This AI was presented to the FBI on May 28, 1996, and the FBI reopened its investigation of Dr. Lee on May 30, 1996.

The "walk-in" document is central to the Kindred Spirit investigation, so it should be described in the greatest detail consistent with classification concerns. This document, dated 1988, is said to lay out China's nuclear modernization plan for Beijing's First Ministry of Machine Building, which is

responsible for making missiles and nose cones.²² The 74-page document contains dozens of facts about U.S. warheads, mostly in a two-page chart. On one side of the chart are various US Air Force and US Navy warheads, including some older bombs as well as the W-80 warhead (cruise missiles), the W-87 (Minuteman III); and the W-88 (Trident II).²³ Among the most important items of information in the "walk-in" document are details about the W-88 warhead.

The Cox Committee Report provides the following description and assessment of the "walk-in" document:

In 1995, a "walk-in" approached the Central Intelligence Agency outside of the PRC and provided an official PRC document classified "Secret" that contained design information on the W-88 Trident D-5 warhead, the most modern in the U.S. arsenal, as well as technical information concerning other thermonuclear warheads.

The CIA later determined that the "walk-in" was directed by the PRC intelligence services. Nonetheless, the CIA and other Intelligence Community analysts that reviewed the document concluded that it contained U.S. thermonuclear warhead design information.

The "walk-in" document recognized that the U.S. nuclear warheads represented the state-of-the-art against which PRC thermonuclear warheads should be measured.

Over the following months, an assessment of the information in the document was conducted by a multidisciplinary group from the U.S. government, including the Department of Energy and scientists from the U.S. national weapons laboratories.²⁴

The Cox Committee's view that the Chinese had obtained

sensitive design information about U.S. thermonuclear warheads is bolstered by the June 1999 report of the President's Foreign Intelligence Advisory Board, which states that the "walk-in" document:

unquestionably contains some information that is still highly sensitive, including descriptions, in varying degrees of specificity, of the technical characteristics of seven U.S. thermonuclear warheads.²⁵

When the FBI received notice that the source of the "walk-in" document was under the control of PRC intelligence services, however, the Kindred Spirit investigation was actually halted for a time, from July 31, 1996 until August 20, 1996. Even when it was restarted, it was not pursued with particular vigor in the latter part of 1996.

It is surprising that the investigation was halted, even for a few weeks, since it was conclusive that the "walk-in" document did contain important classified information which had somehow fallen into the hands of a foreign power. The Cox Committee report and the President's Foreign Intelligence Advisory Board have recently reconfirmed that the "walk-in" document was proof that the Chinese had obtained sensitive nuclear information, but there should never have been any doubt on the part of the FBI about that question in the summer of 1996. Moreover, the

information which led to the 1994-1995 investigation was no less valid because of any doubts about the "walk-in" document or even the Kindred Spirit Administrative Inquiry itself.

From 1996 until 1997 the DOE and FBI investigation was characterized by additional inexplicable lapses. For example, in November 1996, the FBI asked DOE counter-intelligence team leader Terry Craig for access to Dr. Lee's computer. Although Mr. Craig apparently did not know it until 1999, Dr. Lee had signed a consent-to-monitor waiver²⁶ on April 19, 1995. The relevant portion of the waiver states:

WARNING: To protect the LAN [local area network] systems from unauthorized use and to ensure that the systems are functioning properly, activities on these systems are monitored and recorded and subject to audit. Use of these systems is expressed consent to such monitoring and recording. Any unauthorized access or use of this LAN is prohibited and could be subject to criminal and civil penalties.²⁷

Moreover, the computer that Dr. Lee used apparently also had a banner, which had information that may have constituted sufficient notice to give the FBI access to its contents. And, finally, LANL computer use policy gave authorities the ability to search computers to prevent waste, fraud and abuse.²⁸ As noted in the press release accompanying the August 12, 1999, Department

of Energy Inspector General's Report, Mr. Craig's "failure to conduct a diligent search deprived the FBI of relevant and potentially vital information."²⁹ Had the FBI National Security Law Unit (NSLU) been given the opportunity to review these facts, it may well have concluded that no FISA warrant was necessary to conduct a preliminary investigation of Dr. Lee's computer. More importantly, records from the DOE monitoring systems like NADIR could almost certainly have been reviewed without a FISA warrant. Had these records been searched, Dr. Lee's unauthorized downloading would have been found nearly three years earlier. Unfortunately, through the failures of both DOE and FBI personnel, this critical information never reached FBI Headquarters, and the NSLU decided that Dr. Lee's computer could not be searched without a FISA warrant.³⁰ Thus, a critical opportunity was lost to find and remove from an unsecure system, information that could alter the global strategic balance.

Nonetheless, the FBI developed an adequate factual basis for the issuance of a FISA warrant. The information developed by the FBI to support its FISA application in 1997 was cogently summarized in the August 5, 1999 special statement of Senators Thompson and Lieberman of the Senate Committee on Governmental Affairs:³¹

1. DOE counterintelligence and weapons experts had concluded that there was a great probability that the W-88 information had been compromised between 1984 and 1988 at the nuclear weapons division of the Los Alamos laboratory.
2. It was standard PRC intelligence tradecraft to focus particularly upon targeting and recruitment of ethnic Chinese living in foreign countries (e.g., Chinese-Americans).
3. It is common in PRC intelligence tradecraft to use academic delegations -- rather than traditional intelligence officers -- to collect information on science-related topics. It was, in fact, standard PRC intelligence tradecraft to use scientific delegations to identify and target scientists working at restricted United States facilities such as LANL, since they "have better access than PRC intelligence personnel to scientists and other counterparts at the United States National Laboratories."
4. Sylvia Lee, wife of Wen Ho Lee, had extremely close contacts with visiting Chinese scientific delegations. Sylvia Lee, in fact, had volunteered to act as hostess for visiting Chinese scientific delegations at LANL when such visits first began in 1980, and had apparently had more extensive contacts and closer relationships with these delegations than anyone else at the laboratory. On one occasion, moreover, Wen-Ho Lee had himself aggressively sought involvement with a visiting Chinese scientific delegation, insisting upon acting as an interpreter for the group despite his inability to perform this function very effectively.
5. Sylvia Lee was involuntarily terminated at LANL during a reduction-in-force in 1995. Her personnel file indicated incidents of security violations and threats she allegedly made against coworkers.
6. In 1986, Wen-Ho Lee and his wife traveled to China on LANL business to deliver a paper on hydrodynamics³² to a symposium in Beijing. He visited the Chinese laboratory -- the Institute for Applied Physics and Computational Mathematics (IAPCM) -- that designs the PRC's nuclear weapons.
7. The Lees visited the PRC -- and IAPCM -- on LANL business again in 1988.
8. It was standard PRC intelligence tradecraft, when targeting ethnic Chinese living overseas, to encourage travel to the "homeland" -- particularly where visits to ancestral villages and/or old family members could be arranged -- as a way of trying to dilute loyalty to other countries and encouraging solidarity with the authorities in Beijing.

9. The Lees took vacation time to travel elsewhere in China during their two trips to China in 1986 and 1988.
10. The FBI also learned of the Lees' purchase of unknown goods or services from a travel agent in Hong Kong while on a trip to that colony and to Taiwan in 1992. On the basis of the record, the FBI determined that there was reason to believe that this payment might have been for tickets for an unreported side trip across the border into the PRC to Beijing.
11. Though Wen-Ho Lee had visited IAPCM in both 1986 and 1988 and had filed "contact reports" claiming to recount all of the Chinese scientists he met there, he had failed to disclose his relationship with the PRC scientist who visited LANL in 1994.
12. Wen-Ho Lee worked on specialized computer codes at Los Alamos -- so-called "legacy codes" related to nuclear testing data -- that were a particular target for Chinese intelligence.
13. The FBI learned that during a visit to Los Alamos by scientists from IAPCM, Lee had discussed certain unclassified hydrodynamic computer codes with the Chinese delegation. It was reported that Lee had helped the Chinese scientists with their codes by providing software and calculations relating to hydrodynamics.
14. In 1997, Lee had requested permission to hire a graduate student, a Chinese national, to help him with work on "Lagrangian codes" at LANL. When the FBI evaluated this request, investigators were told by laboratory officials that there was no such thing as an unclassified Lagrangian code, which describes certain hydrodynamic processes and are used to model some aspects of nuclear weapons testing.
15. In 1984, the FBI questioned Wen-Ho Lee about his 1982 contact with a U.S. scientist at another DOE nuclear weapons laboratory who was under investigation.
16. When questioned about this contact, Lee gave deceptive answers. After offering further explanations, Lee took a polygraph, claiming that he had been concerned only with this other scientist's alleged passing of unclassified information to a foreign government against DOE and Nuclear Regulatory Commission regulations -- something that Lee himself admitted doing. (As previously noted, he FBI closed this investigation of Lee in 1984.)
17. The FBI, as noted above, had begun another investigation into Lee in the early 1990s, before the W-88 design information compromise came to light. This investigation was based upon an FBI investigative lead that Lee had provided

- significant assistance to the PRC.
18. The FBI obtained a copy of a note on IAPCM letterhead dated 1987 listing three LANL reports by their laboratory publication number. On this note, in English, was a handwritten comment to "Linda" saying "[t]he Deputy Director of this Institute asked [for] these paper[s]. His name is Dr. Zheng Shaotang. Please check if they are unclassified and send to them. Thanks a lot. Sylvia Lee."

The FBI request was worked into a draft FISA application by Mr. David Ryan, a line attorney from the Department of Justice's Office of Intelligence Policy and Review (OIPR) with considerable experience in FISA matters. It was then reviewed by Mr. Allan Kornblum, as Deputy Counsel for Intelligence Operations, and finally, by Mr. Gerald Schroeder, Acting Counsel, OIPR.³³ As is well known by now, the OIPR did not agree to forward the FISA application, and yet another opportunity to discover what Dr. Lee was up to was lost.

The Department of Justice Should Have Taken the FBI's Request for a FISA Warrant on Dr. Lee to the Court on August 12, 1997.

Attorney General Reno testified about this case before the Senate Judiciary Committee on June 8, 1999. A redacted version of her testimony was released on December 21, 1999. The transcript makes it clear that the Department of Justice should have agreed to go forward with the search warrant for surveillance of Dr. Wen Ho Lee under the Foreign Intelligence

Surveillance Act when the FBI made the request in 1997.

In evaluating the sufficiency of the FBI's statement of probable cause, the Attorney General and the Department of Justice failed to follow the standards of the Supreme Court of the United States that the requirements for "domestic surveillance may be less precise than that directed against more conventional types of crime." In United States v. U.S. District Court 407 U.S. 297, 322-23 (1972) the Court held:

We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime" ...the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.... Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. [emphasis added]

Even where domestic surveillance is not involved, the Supreme Court has held that the first focus is upon the governmental interest involved in determining whether constitutional standards are met. In Camera v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 534-539, (1967), the Supreme Court said:

In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen..... [emphasis added]

Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails....

The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

Where the Court allowed inspections in Camera without probable cause that a particular dwelling contained violations, it is obvious that even more latitude would be constitutionally permissible where national security is in issue and millions of American lives may be at stake. Even under the erroneous, unduly high standard applied by the Department of Justice, however, the FBI's statement of probable cause was sufficient to activate the FISA warrant.

FBI Director Freeh correctly concluded that probable cause existed for the issuance of the FISA warrant. At the June 8 hearing, Attorney General Reno stated her belief that there had

not been a sufficient showing of probable cause but conceded that FBI Director Freeh, a former Federal judge, concluded that probable cause existed as a matter of law.³⁴

The Department of Justice applied a clearly erroneous standard to determine whether probable cause existed. As noted in the transcript of Attorney General Reno's testimony:

On 8-12-97 Mr. Allan Kornblum of OIPR advised that he could not send our (the FBI) application forward for those reasons. We had not shown that subjects were the ones who passed the W-88 [design information] to the PRC, and we had little to show that they were presently engaged in clandestine intelligence activities.³⁵

It is obviously not necessary to have a showing that the subjects were the ones who passed W-88 design information to the PRC. That would be the standard for establishing guilt at a trial, which is a far higher standard than establishing probable cause for the issuance of a search warrant. Attorney General Reno contended that other people, actually a relatively small number of people, would have to be ruled out as the ones who passed W-88 design information to the PRC before probable cause would be established for issuance of the FISA warrant on Dr. Lee. That, again, is the standard for conviction at trial instead of establishing probable cause for the issuance of a search warrant. For some inexplicable reason, the Department of Justice has

insisted on redacting the exact number of people who were situated similarly to Dr. Lee. However, it is apparent from the Kornblum statement that the wrong standard was applied: "that subjects were the ones that passed the W-88 [design information] to the PRC."³⁶

DOJ was also wrong when Mr. Kornblum concluded that: "We had little to show that they were presently engaged in clandestine intelligence activities."³⁷ There is substantial evidence that Dr. Lee's relevant activities continued from the 1980s to 1992, 1994 and 1997 as noted above.

When FBI Assistant Director John Lewis met with Attorney General Reno on August 20, 1997, to ask about the issuance of the FISA warrant, Attorney General Reno delegated the matter to Mr. Daniel Seikaly, former Director, DOJ Executive Office for National Security, and she had nothing more to do with the matter. Mr. Seikaly completed his review by late August or early September and communicated his results to the FBI through Mr. Kornblum. As Mr. Seikaly has testified, this was the first time he had ever worked on a FISA request and he was not "a FISA expert." It was not surprising then that Seikaly applied the wrong standard for a FISA application:

We can't do it (a FISA wiretap) unless there was probable cause to believe that that facility, their home, is being used or about to be used by them as agents of a foreign power.³⁸

Mr. Seikaly applied the standard from the typical criminal warrant as opposed to a FISA warrant. 18 U.S.C. 2518, governing criminal wiretaps, allows surveillance where there is:

Probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted, are being used, or are about to be used in connection with the commission of such offense. [emphasis added]

This criminal standard specifically requires that the facility be used in the "commission of such offense." FISA, however, contains no such requirement. 50 U.S.C. 1805 (Section 105 of FISA) states that a warrant shall be issued if there is probable cause to believe that:

Each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.

There is no requirement in this FISA language that the facility is being used in the commission of an offense.

Attorney General Reno demonstrated an unfamiliarity with technical requirements of Section 1802 versus Section 1804. She was questioned about the higher standard under 1802 than 1804:

"It seems the statutory scheme is a lot tougher on 1802 on its face."³⁹

Attorney General Reno replied: "Well I don't know. I've got to make a finding that under 1804, that it satisfies the requirement and criteria -- and requirement of such application as set forth in the chapter, and it's fairly detailed."⁴⁰

When further questioned about her interpretation on 1802 and 1804, Attorney General Reno indicated lack of familiarity with these provisions, saying:

Since I did not address this, let me ask Ms. Townsend who heads the office of policy review to address it for you in this context and then I will⁴¹

As noted in the record, the offer to let Ms. Townsend answer the question was rejected in the interest of getting the Attorney General's view on this important matter rather than that of a subordinate.

The lack of communication between the Attorney General and the Director of the FBI on a matter of such grave importance is troubling. As noted previously, Director Freeh sent John Lewis, Assistant FBI Director for National Security to discuss this matter with the Attorney General on August 20, 1996. However, when the request for a review of the matter did not lead to the forwarding of the FISA application to the court, Director Freeh

did not further press the issue. And Attorney General Reno conceded that she did not follow up on the Wen Ho Lee matter. During the June 8 hearing, Senator Sessions asked, "Did your staff convey to you that they had once again denied this matter?"⁴²

Attorney General Reno replied, "No, they had not."⁴³

The June 8, 1999 hearing also included a discussion as to whether FBI Director Freeh should have personally brought the matter again to Attorney General Reno. The Attorney General replied that she did not "complain" about FBI Director Freeh's not doing so and stated, "I hold myself responsible for it."⁴⁴

Attorney General Reno conceded the seriousness of the case, stating, "I don't think the FBI had to convey to the attorneys the seriousness of it. I think anytime you are faced with facts like this it is extremely serious."⁴⁵

In the context of this serious case, it would have been expected that Attorney General Reno would have agreed with FBI Director Freeh that the FISA warrant should have been issued. In her testimony, she conceded that if some 300 lives were at stake

on a 747 she would take a chance, testifying: "My chance that I take if I illegally search somebody, if I save 300 lives on a 747, I'd take it."⁴⁶

In that context, with the potential for the PRC obtaining U.S. secrets on nuclear warheads, putting at risk millions of Americans, it would have been expected that the Attorney General would find a balance in favor of moving forward with the FISA warrant. As demonstrated by her testimony, Attorney General Reno sought at every turn to minimize the FBI's statement of probable cause. On the issue of Dr. Lee's opportunity to have visited Beijing when he had been in Hong Kong and incurred additional travel costs of the approximate expense of traveling to Beijing, the Attorney General said that "an unexplained travel voucher in Hong Kong does not lead me to the conclusion that someone went to Beijing any more than they went to Taipei."⁴⁷

It might well be reasonable for a fact-finder to conclude that Dr. Lee did not go to Beijing; but, certainly, his proximity to Beijing, the opportunity to visit there and his inclination for having done so in the past would at least provide some "weight" in assessing probable cause. But the Attorney General dismissed those factors as having no weight even on the issue of

probable cause, testifying, "I don't find any weight when I don't know where the person went."⁴⁸ Of course it is not known "where the person went." If that fact had been established, it would have been beyond the realm of "probable cause." Such summary dismissal by the Attorney General on a matter involving national security is inappropriate given the circumstances. In other legal contexts, opportunity and inclination are sufficient to cause an inference of certain conduct as a matter of law.

The importance of DOJ's erroneous interpretation of the law in this case, which resulted in the FISA rejection, should not be underestimated. Had this application for a FISA warrant been submitted to the court, it doubtless would have been approved. DOJ officials reported that approximately 800 FISA warrants were issued each year with no one remembering any occasion when the court rejected an application.

Had the FBI obtained the FISA search warrant, it might have had a material effect on the investigation and criminal charging of Dr. Lee. Given the serious mistakes that had been made by the FBI prior to 1997, there is no guarantee that a FISA warrant would have led to a successful conclusion to the investigation, but the failure to issue a warrant clearly had an adverse impact

on the case. Certainly Dr. Lee would have been removed from a very sensitive job at least 18 months earlier and the probabilities are high that significant additional incriminating evidence could have been found had Dr. Lee not had the opportunity to download the codes and conceal his taking of sensitive information.

To put the 1997 FISA rejection in perspective, consider that the open network to which Dr. Lee had transferred the legacy codes was "linked to the Internet and e-mail, a system that had been attacked several times by hackers."⁴⁹ Although we do not know the exact figures for the number of times that it was accessed, it has been reported that between October 1997 and June 1998 alone, "there were more than 300 foreign attacks on the Energy Department's unclassified systems, where Mr. Lee had downloaded the secrets of the U.S. nuclear arsenal."⁵⁰

Consider also the following from a December 23, 1999, Government filing in the criminal case against Dr. Lee:

... in 1997 Lee downloaded directly from the classified system to a tenth portable computer tape a current nuclear weapons design code and its auxiliary libraries and utility codes.⁵¹

This direct downloading had been made possible by Los Alamos

computer managers who made Lee's file transfers "easier in the mid-1990s by putting a tape drive on Lee's classified computer."⁵² As incomprehensible as it seems, despite the fact that Dr. Lee was the prime suspect in an ongoing espionage investigation, and despite plans to limit his access to classified information to limit any damage he might do, DOE computer personnel installed a tape drive on his computer that made it possible for him to directly download the nation's top nuclear secrets.

An important aim of surveillance under the FISA statute is to determine whether foreign intelligence services are getting access to our classified national security information. Despite what we know about Dr. Lee's activities - and regardless of whether a jury ever finds that his acts were criminal - there should be no doubt that transferring classified information to an unclassified computer system and making unauthorized tape copies of that information created a substantial opportunity for foreign intelligence services to access that information.

Investigation from August 12, 1997 to December 23, 1998

Notwithstanding the serious evidence against Dr. Lee on matters of great national security importance, the FBI

investigation languished for 16 months, from August 1997 until December 1998, with the Department of Energy permitting Dr. Lee to continue on the job with access to classified information.

After OIPR's August 1997 decision not to forward the FISA application, FBI Director Louis Freeh met with Deputy Energy Secretary Elizabeth Moler to tell her that there was no longer any investigatory reason to keep Lee in place at LANL, and that DOE should feel free to remove him in order to protect against further disclosures of classified information. In October 1997, Director Freeh delivered the same message to Energy Secretary Federico Pena that he had given to Moler.⁵³ These warnings were not acted on, and Dr. Lee was left in place, as were the files he had downloaded to the unclassified system, accessible to any hacker on the Internet.

After the rejection of the FISA warrant request on August 12, it took the FBI three and one-half months to send a memo dated December 19, 1997, to the Albuquerque field office listing fifteen investigative steps that should be taken to move the investigation forward. The Albuquerque field office did not respond directly until November 10, 1998. The fifteen investigative steps were principally in response to the concerns

raised by OIPR about the previous FISA request. To protect sources and methods, the specific investigative steps in the December 19, 1997 teletype cannot be disclosed, but have been summarized by the FBI as follows:

1. Conduct Additional Interviews
 - a) Open preliminary inquiries on other individuals named in the DOE AI who met critical criteria;
 - b) Develop information on associate's background, and interview the associate, and
 - c) Interview co-workers, supervisors, and neighbors.
2. Conduct Physical Surveillance
3. Conduct Other Investigative Techniques
 - a) Review information resulting from other investigative methods;
 - b) Review other investigations for lead purposes; and
 - c) Implement alternative investigative methods.⁵⁴

As best as can be determined at this time, only two of the leads were seriously pursued. Most importantly, the FBI did not open investigations on the other individuals named in the DOE AI until recently.

The FBI conducted a "False Flag" operation against Dr. Lee in August 1998, in which an FBI Agent posing as a Chinese intelligence officer contacted Lee. The FBI Agent provided Dr. Lee with a beeper number and a hotel name. Dr. Lee did not immediately report this contact, but he told his wife who told a

friend, who told DOE security. When Dr. Lee was questioned by DOE counter-intelligence personnel about the phone call, he was vague, and specifically failed to mention the beeper number or the hotel.

These additional steps did yield significant information which was relevant to supporting a determination of probable cause for a renewed FISA warrant, but the information was not used. While the FBI informally told OIPR of Dr. Lee's failure to fully report the August contact, that conversation did not take place until three months after the incident occurred.

The second lead which was pursued related to a potentially sophisticated communications system being available to Dr. Lee, the specifics of which cannot be further detailed in this report for security reasons. This information, developed by the new agent in charge of the case and included in the November 10, 1998 FBI Albuquerque request for a new FISA application, would have been very important to OIPR's concerns about whether Dr. Lee was "currently engaged" in espionage, as well as the requirement for the activity to be clandestine.

The FBI never made another formal request for DOJ to approve

a new FISA warrant application after the 1997 OIPR decision not to send the request forward, despite the development of significant relevant information on the probable cause issue. When such serious national interests were involved in this case, it was simply unacceptable for the FBI to tarry from August 12, 1997 to December 19, 1997, to send the Albuquerque field office a memo. It was equally unacceptable for the Albuquerque field office to take from December 19, 1997 until November 10, 1998, to respond to the guidance from Headquarters, and then for the FBI not to renew the request for a FISA warrant based on the additional evidence.

DOE's Interference in the Investigation

Dr. Lee traveled to Taiwan during the first three weeks of December 1998. The FBI agent who took over the case on November 6, 1998, did not agree with the DOE decision to have Wackenhut⁵⁵ give Dr. Lee a polygraph examination upon his return from Taiwan on December 23, 1998, and has called it "irresponsible." According to FBI protocol, Dr. Lee would have been questioned as part of a post-travel interview. However, the case agents were inexplicably unprepared to conduct such an interview. Ultimately, the polygraph decision was coordinated between DOE

and the FBI's National Security Division. It should be noted, however, that the agent's concerns were supported by the June 1999 report of the President's Foreign Intelligence Advisory Board, which recommended that the Attorney General determine, among other things, "why DOE, rather than the FBI, conducted the first polygraph in this case when the case was an open FBI investigation ..."⁵⁶

There was no good reason for DOE to polygraph Dr. Lee in late 1998. There was no sudden change in status on the case: the last warning from the FBI about the need to remove Dr. Lee's classified access to protect national security had come some fourteen months before, in October 1997. Available Department of Energy documents do not address this question. Other sources, including an FBI HQ memorandum for Director Freeh, dated December 21, 1998, and a sworn deposition from an FBI agent who worked on the case, indicate that senior DOE officials were concerned about the imminent release of the Cox Committee report and wanted to bring the case to a conclusion.

Even more important than the question of why DOE, rather than FBI, administered this polygraph is the way the results were reported. It should be noted that, as late as March 2000, there still exists considerable disagreement between the FBI and the

DOE regarding the sequence and timing of events related to the production of information about the December 23, 1998 polygraph. When given an opportunity to contest the FBI's representation of the facts, DOE's Mr. Ed Curran said they were incorrect, but was not prepared with specific contradictory information to offer as evidence. The resolution of these disagreements may ultimately turn on the credibility of the individuals involved in the disagreement, and will be the subject of a future subcommittee hearing.

According to the record as it now stands, the FBI was told on December 23 that Dr. Lee had passed the polygraph. The agents who were handling the case were given a summary sheet to support this conclusion, but were not given access to the actual polygraph charts or the videotape of the interview.

Although DOE's quality control review process apparently changed the interpretation of the polygraph results - concluding that Dr. Lee should be questioned again on key issues - that information was not immediately provided to the FBI. According to FBI records, the FBI's Albuquerque office did not receive the charts and videotapes from the December 23 polygraph until January 22, 1999. When the charts and videotape were subsequently analyzed by FBI polygraph experts in early February, they concluded that Dr. Lee had failed relevant questions⁵⁷ or was, at best, inconclusive.⁵⁸ Based on these concerns, the FBI

arranged for additional interviews and a new polygraph on February 10, 1999.

The DOE failed to keep the FBI fully informed on the polygraph issue in a timely fashion. Although they were present at the exam, FBI agents did not receive the polygraph charts until a month later, even though the charts had been assessed by Wackenhut quality control personnel on December 23 and again on December 28. No satisfactory explanation has yet been offered for this delay. It should be noted, however, that according to a February 26, 1999, FBI memorandum, DOE employees were initially instructed not to provide the FBI with the full results of the polygraph, only the summary sheet.

On this state of the record, it appears that DOE did take the position that Dr. Lee passed the December 23 polygraph. As late as March 16, 1999, Energy Secretary William Richardson said on *CNN Crossfire* that DOE "instituted a polygraph on this person, which he first passed."⁵⁹ Secretary Richardson then described a second polygraph, apparently referring to the FBI-administered polygraph in February, which Dr. Lee failed.

Given the representation by DOE that Dr. Lee passed the polygraph, it is not surprising that the FBI's investigation of

Dr. Lee was thrown off course in late 1998. In contrast with the FBI's renewed efforts for the FISA warrant, as laid out in the November 10, 1998 teletype from the Albuquerque office, when told by DOE that Dr. Lee had passed the polygraph, the FBI interviewed Dr. Lee on January 17, 1999,⁶⁰ and in a January 22, 1999 teletype to FBI HQ, in effect, concluded that the investigation should not be pursued.

In late January, Dr. Lee began erasing the classified files from the unsecure area of the computer. After the interview on January 17, Dr. Lee "began a sequence of massive file deletions ..."⁶¹ He even called the help desk at the Los Alamos computer center to get instructions for deleting files. After he was interviewed and polygraphed again on February 10, within two hours of the time he was told he had failed the exam, he deleted even more files. All told, Dr. Lee deleted files on January 20th, February 9th, 10th, 11th, 12th, and 17th. When he called the help desk on January 22nd, his question indicated that he did not know that the "delay" function of the computer he was using would keep deleted files in the directory for some period of time. He asked why, when he deleted files, were the ones in parentheses not going away, and asked how to make them go away immediately. He also asked, on February 16, how to replace an entire file on a

tape.⁶²

Thus, the report that Dr. Lee had passed the December 23 polygraph gave Dr. Lee precious time to delete and secrete information. The significance of Dr. Lee's file deletions - and the unreasonable delays in carrying out the investigation that should have detected and prevented them - should not be underestimated. As FBI Agent Robert Messemer has testified, the FBI came very close, "within literally days, of having lost that material."⁶³ The FBI was almost unable to prove that Dr. Lee downloaded classified files. If the material had been overwritten after it was deleted, "that deletion by Dr. Lee [would] have kept that forever from this investigation." In this context, the repeated delays, the lack of coordination between the FBI and the Department of Energy, and later between the FBI and the Department of Justice, are much more serious.

February 10, 1999 to March 8, 1999

On February 10, 1999, Wen Ho Lee was again given a polygraph examination, this time by the FBI. During this second test, which Lee failed, he was asked: "Have you ever given any of [a particular type of classified computer code related to nuclear weapons testing] to any unauthorized person?" and "Have you ever

passed W-88 information to any unauthorized person?"⁶⁴ It should be noted that the 1997 FISA request mentioned that the PRC was using certain computational codes, which were later identified as something Lee had unique access to.⁶⁵ Moreover, the computer code information had been developed independently of the DOE Administrative Inquiry which is now being questioned by FBI and DOJ officials.

After this second failed polygraph, there should have been no doubt that Dr. Lee was aware he was a suspect in an espionage investigation, and it is inconceivable that neither the FBI nor DOE personnel took the rudimentary steps of checking to see if he was engaging in any unusual computer activity. Again, this is not hindsight. The classified information to which Dr. Lee had access, and which he had been asked about in the polygraph, was located on the Los Alamos computer system. The failure of DOE and FBI officials to promptly find out what was happening with Dr. Lee's computer after he was deceptive on the code-related polygraph question is inexplicable. As noted above, this failure afforded Dr. Lee yet another opportunity to erase files from both the unsecure system and the unauthorized tapes he had made.

As should have been expected, Dr. Lee used the time afforded him by the delays to delete the classified information he had placed on the unclassified system. He also approached two other T-Division employees with a request to use their tape drive to delete classified data from two tapes (he no longer had access to the one that had been installed in his X-Division computer since he had been moved from that division in December 1998).

Nearly three weeks after the polygraph failure, the FBI finally asked for and received permission to search Lee's office and his office computer, whereupon they began to discover evidence of his unauthorized and unlawful computer activities. Even so, the FBI did not immediately move to request a search warrant. The three week delay, from February 10 until the first week of March, is inexplicable.

March 8, 1999 to April 7, 1999

Dr. Lee was fired on March 8, 1999. While it is difficult to understand why the FBI did not move more quickly after the February polygraph failure, the subsequent delay - from when Wen Ho Lee was fired on March 8, until a search warrant for his home was finally obtained on April 9 - is equally inexplicable. Rather than moving quickly to discover the extent of the

potential damage, FBI and DOJ officials continued to wrangle over whether the matter should be handled under FISA or was "way too criminal" for that.⁶⁶ Meanwhile, information that could change the global strategic balance was left exposed on an unclassified computer system where even an unsophisticated hacker could gain access to it.

It was not until nearly a month after Lee was fired on March 8 that progress was made on the search warrant issue. Only after a meeting on April 7, 1999, when FBI officials indicated that FBI Director Freeh was "prepared formally to supply the necessary certifications that this search met the requirements of the FISA statute - that is, that it was being sought for purposes of intelligence collection (e.g., to learn about Lee's alleged contacts with Chinese intelligence),"⁶⁷ did the search warrant process begin to move forward.

At this April 7 meeting, OIPR attorneys raised their old concerns about the currency and sufficiency of the evidence against Lee, as well as new concerns about the appearance of improperly using FISA for criminal purposes and the prospect of conducting an unprecedented overt FISA search.⁶⁸ Frustrated that the Criminal Division continued to believe that the FBI's draft

affidavit contained an insufficient showing of probable cause to search Lee's residence, FBI officials began working with an Assistant U.S. Attorney in Albuquerque to craft a second affidavit which was presented to a U.S. Magistrate Judge on April 9, 1999, and was executed without incident the following day.⁶⁹

Reopening the W-88 Investigation and the Criminal Case Against Dr. Lee

The September 1999 decision by the FBI and the DOJ to expand the investigation of suspected Chinese nuclear espionage⁷⁰ is puzzling, primarily because it should have happened long ago.

Assistant FBI Director Neil Gallagher's November 10, 1999 letter on the question of why the investigation is being reopened raises more questions than it answers. He acknowledges that when discussing the DOE's Administrative Inquiry (AI) during his June 9, 1999, testimony before the Governmental Affairs Committee,⁷¹ he stated that he "had full credibility in the report," had "found nothing in DOE's AI, nor the conclusions drawn from it to be erroneous," and stated there is a "compelling case made in the AI to warrant focusing on Los Alamos."⁷²

As a result of further inquiry, however, Mr. Gallagher now

has reason to question the conclusions of the AI. He cites an August 20, 1999, interview by FBI officials of one of the scientists who participated in the technical portion of the AI, in which the scientist "stated that he had expressed a dissenting opinion with respect to the technical aspects of the AI," and points out that the statement of this scientist is "in direct conflict with the AI submitted to the FBI because the AI does not reflect any dissension by the 'DOE Nuclear Weapons Experts.'" ⁷³

Although both the FBI and the DOE have repeatedly promised to do so, neither agency has yet provided an answer as to how many scientists were involved in the technical review mentioned in the August 1999 interview, and what the majority opinion of that group really was. Mr. Gallagher explains that "a review has been initiated by the FBI to re-evaluate the scope of the AI," and that "the focus of this new initiative is to determine the full universe of both compromised restricted nuclear weapons information and who had access to that information in addition to anyone identified in the original AI." ⁷⁴ .

The delay by DOJ and the FBI until September 1999 is perplexing since four governmental reports had concluded, with varying degrees of specificity, that the losses of classified

information extended beyond W-88 design information and beyond Los Alamos:

- 1) the classified version of the Cox Report (January 1999);
- 2) the April 21, 1999 damage assessment by Mr, Robert Walpole, the National Intelligence Officer for Strategic and Nuclear Programs;⁷⁵
- 3) the unclassified version of the Cox Committee Report (May 25, 1999); and
- 4) the Special Report of the President's Foreign Intelligence Advisory Board (June 1999).

All of these reports gave FBI and DOJ ample evidence that further investigation was necessary. For example, the Cox Committee report states flatly that "the PRC stole classified information on every currently deployed U.S. inter-continental ballistic missile (ICBM) and submarine-launched ballistic missile (SLBM).⁷⁶ Tellingly, the Cox Committee notes that "a Department of Energy investigation of the loss of technical information about the other five U.S. thermonuclear warheads had not begun as of January 3, 1999 ..." and that "the FBI had not yet initiated an investigation" as of that date.⁷⁷ Thus, the failure to reopen the investigation into the loss of W-88 design information much sooner, or to even initiate an investigation of the other losses, simply continued that pattern of errors.

The subcommittee's investigation thus far has identified several areas where reform is necessary and identified appropriate solutions. These solutions have been incorporated in the "Counter-Intelligence Reform Act of 2000," which is summarized below.

The Counter-Intelligence Reform Act of 2000

1. This bill amends the Foreign Intelligence Surveillance Act by providing that, upon the personal request of the Director of the FBI, the Secretary of State, the Secretary of Defense or the Director of Central Intelligence, the Attorney General shall personally review a FISA application. The failure to forward the FISA request to the court in 1997 represents a critical failure in this case. When the "global strategic balance" is in issue, the Attorney General should not delegate the review to subordinates with no experience in FISA matters, as happened in this instance. Because this provision is triggered only by a personal request from the Director of the FBI or one of the other few Cabinet officials authorized to request FISA warrants, it will not impose upon the duties of the Attorney General except in truly exceptional cases where such imposition is clearly warranted.

2. If the Attorney General decides not to forward the application for a warrant to the court, that decision must be communicated in writing to the requesting official with specific recommendations on what additional investigation should be undertaken to establish the requisite probable cause. A decision to reject a FISA application should come only after careful analysis of the specifics. Should the Attorney General still decline to go forward with a request after such analysis, the requesting agency should have the benefit of that analysis, as well as a plan to remedy any deficiencies. By definition, this section will only apply in cases where the Director of the FBI or another senior Cabinet official has made a personal appeal to the Attorney General. By communicating the reasons for the rejection in writing, along with recommendations for improvements, the Attorney General can facilitate the proper functioning of the FISA process, to ensure that the national security is not put at risk due to misunderstandings about the showing of probable cause in a case.

3. The requesting official must personally supervise the implementation of the Attorney General's recommendations. The FBI's delay of three and one-half months after the August 1997 decision regarding the FISA application, and the delay from

December 19, 1997, until November 10, 1998, for a response by the Albuquerque office were unacceptable in the context of the national security information at risk. In cases of such great importance, the personal knowledge and supervision by top officials is appropriate and necessary.

4. This bill addresses the issue of whether an individual is "presently engaged" in the particular activity in order not to preclude conduct in the past from serving as the basis for a warrant, even if a substantial period of time has elapsed, recognizing that espionage or related activities not unusually span a considerable period of time, causing the legislature to omit any statute of limitations for such crimes. Where directly relevant conduct has occurred in the past, it should not be excluded if it reasonably can be interpreted as indicating that an individual is involved in espionage. OIPR's focus on the contention that the W-88 information had been lost some ten years prior was clearly misplaced. The loss of our national security information is so important that it must be investigated, even if discovered somewhat after the fact. Keeping in mind that FISA surveillance is primarily for intelligence rather than for criminal purposes, such events should not be unnecessarily excluded from consideration.

6. And, finally, this bill improves the coordination of counter-intelligence activities by requiring that:

a) If the FBI requests a FISA warrant on an individual with whom it, or any law enforcement or intelligence agency has a relationship, that fact must be disclosed to OIPR as part of the FISA request.

b) When the FBI desires to leave an individual in place for investigative reasons, that decision must be communicated in writing to the head of the affected agency, along with a plan to minimize the potential for harm to the national security, which shall take precedence over investigative concerns. The agency head must likewise respond in writing, and any disagreements over the proper course of action will be referred to the National Counterintelligence Policy Board.

c) when the FBI opens a counterintelligence investigation on a subject, it must coordinate with other intelligence and law-enforcement agencies to identify any relationship between the subject and those entities.

I urge prompt consideration of these proposals.

Notes

1. Stephen Younger, "Transcript of Proceedings, Detention Hearing in the case of United States vs. Wen Ho Lee," December 13, 1999: 38. [Hereinafter, Transcript of Proceedings]

2. Transcript of Proceedings, 38.

3. Transcript of Proceedings, Motion Hearing, December 27, 1999: 49. [Hereinafter Motion Hearing].

4. This information was drawn from Dr. Lee's web site at <http://wenholee.org/whois.htm>.

5. United States of America, "Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention," December 23, 1999: 10. See also, United States Senate, Committee on the Judiciary, Redacted Transcript of Closed Hearing with Attorney General Janet Reno Regarding the FISA Process in the Wen Ho Lee Case, June 8, 1999: 14-16.

6. USA, "Response," 10. See also, United States Senate, Committee on the Judiciary. Redacted Transcript of Closed Hearing with Attorney General Janet Reno Regarding the FISA Process in the Wen Ho Lee Case, June 8, 1999: 15. [Hereinafter, Redacted Transcript]

7. Redacted Transcript, 15.

8. Redacted Transcript, 15.

9. "Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention," December 23, 1999: 13, footnote 4.

10. Ian Hoffman, "Agent: Lee Admitted Lying," *Albuquerque Journal*, January 18, 2000, online edition.

11. Redacted Transcript, 16.

12. Redacted Transcript, 16-17; Thompson and Lieberman Statement, 6,16.

13. James Risen and David Johnston. "U.S. Will Broaden Investigation of China Nuclear Secrets Case," *New York Times*, September 23, 1999, Online Edition.

14. *Thompson and Lieberman Statement*, 6, footnote 14.
15. Redacted Transcript, 108-109.
16. Redacted Transcript, 109.
17. Redacted Transcript, 109.
18. Ian Hoffman, "Lawyer: Lee's Intent in Question," *Albuquerque Journal*, January 5, 2000, at <http://wenholee.org/ABQJournal010500.htm>.
19. For a discussion of this issue, see Motion Hearing, 147-157.
20. Motion Hearing, 152-153.
21. United States of America, "Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention," December 23, 1999.
22. William Broad, "Spies Versus Sweat: The Debate Over China's Nuclear Advance," *New York Times*, September 7, 1999, Online Edition.
23. Vernon Loeb and Walter Pincus. "China Prefers the Sand to the Moles," *Washington Post*, December 12, 1999, A02.
24. United States House of Representatives, *Report of the Select Committee on U.S. National Security and Military/Commercial Concerns With the People's Republic of China*, May 25, 1999: Volume 1, 83-84. [Hereinafter, *Cox Report*] A "walk-in" is an individual who voluntarily offers to conduct espionage.
25. President's Foreign Intelligence Advisory Board. *Science at its Best; Security at its Worst*, June 1999, 30-31.
27. *Thompson and Lieberman Statement*, 6-7.
28. X-Division Open LAN Rules of Use, executed by Dr. Wen Ho Lee on April 19, 1995.
29. *Thompson and Lieberman Statement*, 9.
29. "Richardson Announces Results of Inquiries Related to Espionage Investigation," Department of Energy News Release,

August 12, 1999.

30. *Thompson and Lieberman Statement*, 9.

31. This list has been extracted from the August 5, 1999, Statement by Senate Governmental Affairs Committee Chairman Fred Thompson and Ranking Minority Member Joseph Lieberman, *Department of Energy, FBI, and Department of Justice Handling of Espionage Investigation into the Compromise of Design Information on the W-88 Warhead*, 14-17.

32. Hydrodynamics is a science that is relevant to the development of nuclear weapons designs.

33. See Redacted Transcript, 35 and 88.

34. Redacted Transcript, 118-119.

35. Redacted Transcript, 52. In a March 6, 2000 letter from Assistant Attorney General Robert Rabin to Senator Hatch, the Department of Justice takes issue with this statement, and quotes Senator Kyl's testimony on the subject: "So it would be your view that [the language quoted in the draft report] is a summary that probably overstates the Justice Department's requirements for the FBI? The Attorney General responded: "That is correct." Transcript of June 8, 1999 at 49." [sic] For the actual exchange, see page 53 of the June 8, 1999 transcript.

36. Redacted Transcript, 52.

37. Redacted Transcript, 52.

38. Unclassified excerpt of Mr. Seikaly's testimony before the Senate Select Committee on Intelligence, May 1999.

39. Redacted Transcript, 49.

40. Redacted Transcript, 49.

41. Redacted Transcript, 24-25.

42. Redacted Transcript, 39.

43. Redacted Transcript, 39.

44. Redacted Transcript, 40.
45. Redacted Transcript, 36.
46. Redacted Transcript, 56.
47. Redacted Transcript, 117.
48. Redacted Transcript, 117.
49. Motion Hearing, 85. See also Pete Carey, "Los Alamos Suspect May Have Been Doing His Job: Rerouting Files Common at Lab," *Florida Times-Union*, June 20, 1999, G-8.
50. "With Intent to Injure the U.S." *Washington Times*, editorial, December 14, 1999, A16.
51. United States of America, "Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention," December 23, 1999, 3-4.
52. Hoffman.
53. *Thompson and Lieberman Statement*, 23-24.
54. Unclassified summary of the December 19, 1997, FBIHQ teletype to Albuquerque, provided by FBI Office of Public and Congressional Affairs, December 3, 1999.
55. Wackenhut is a private company that has a contract with DOE to perform security related polygraphs.
56. PFIAB, 34.
57. See FBI Headquarters internal memo dated February 2, 1999 and or February 6, 1999 on the same subject.
58. United States Senate, Committee on Governmental Affairs, Testimony from June 9, 1999 closed hearing: 145.
59. The information regarding Secretary Richardson's public statements on the polygraph question can be found in footnote 108 of the August 5, 1999, special statement of the Senate Governmental Affairs Committee.

60. Transcript of Proceeding, Detention Hearing, in the case of *U.S. vs Wen Ho Lee*, December 13, 1999, before the Honorable Don J. Svet in the U.S. District Court for the District of New Mexico: 118.

61. Transcript of Proceedings, 118.

62. For a detailed discussion of Dr. Lee's deletions and his call to the computer help line, see "Transcript of Proceedings, Motion Hearing, December 27, 1999," *United States of America vs. Wen Ho Lee*, pages 132-138.

63. Transcript of Proceedings, 146.

64. *Thompson and Lieberman Statement*, 26.

65. For a detailed discussion of the computer code issue, see the transcript of Attorney General Reno's testimony before the Senate Judiciary Committee on June 8, 1999, 108-109 {as numbered in the lower-right-hand corner}.

66. For a discussion of the debate between FBI and DOJ after Lee's computer was searched, see *Thompson and Lieberman Statement*, 27-29.

67. *Thompson and Lieberman Statement*, 28.

68. *Thompson and Lieberman Statement*, 28-29.

69. *Thompson and Lieberman Statement*, 27-28. In a March 6, 2000 letter to Senator Hatch, Assistant Attorney General Robert Rabin expressed the views of the Department of Justice on the subpoena issue: "...the Department disagrees with the draft's characterization of the role the Criminal Division played in obtaining a search warrant for Mr. Lee's residence. The Criminal Division in Washington and the U.S. Attorney's Office in Albuquerque worked together throughout the process of obtaining a search warrant for Wen Ho Lee's home. After discussing the issue together, both offices agreed that the first draft search warrant affidavit needed to cite additional facts to establish probable cause. That conclusion was communicated in a joint conference call of both Offices with the FBI. The revised affidavit submitted by the FBI was reviewed and approved by both Offices working together, and was then presented to the U.S. Magistrate Judge on April 9, 1999.

70. See, for example, the September 28, 1999 press release from the FBI National Press Office which states that Special Agent in Charge Steve Dillard "has been appointed as Inspector in Charge of a task force composed of FBI Special Agents and analysts that will investigate the possible theft or compromise of classified information from United States nuclear laboratories" The full text of the press release is available at <http://www.fbi.gov/pressrm/pressrel/dillard.htm>.

71. He made similar representations in other briefings provided to Senate staff.

72. Gallagher, letter of November 10, 1.

73. Gallagher, letter of November 10, 2.

74. Gallagher, letter of November 10, 2-3.

75. See "DCI Statement on Damage Assessment," at http://www.cia.gov/cia/public_affairs/press_release/ps042199.html, and the "Key Findings" at http://www.cia.gov/cia/public_affairs/press_release/0421kf.html.

76. *Cox Committee Report, Vol 1, 68.*

77. *Cox Committee Report, Vol 1, 83-84.*