S. HRG. 106–1040

CONTINUATION OF OVERSIGHT OF THE WEN HO LEE CASE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

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CONTINUATION OF OVERSIGHT OF THE WEN HO LEE CASE

WEDNESDAY, SEPTEMBER 27, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senator Torricelli.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. We are proceeding at 9 o'clock this morning because the objections are being raised about proceeding beyond 11:30, so we wanted to get started a little earlier. And since this hearing was scheduled, Senator Lott and Speaker Hastert have scheduled a meeting on the appropriations bill for Labor, Health, Human Services, and Education, a subcommittee which I chair, so I am going to have to excuse myself shortly before 11 o'clock. And there is quite a lot of ground to cover, so we are going to start now.

As you all know, this is, in effect, a continuation of the hearing from yesterday, and we are going to be looking at a fair number of issues. At the outset, I think it is important to note the difference in issues between what Dr. Wen Ho Lee did as to downloading and to the guilt which that evidence shows and to which he has pleaded guilty, contrasted with the kind of treatment which was afforded to him. Whether he was treated fairly or not does not really impact on this guilt, and we all know that in our society due process requires fair treatment for those who are guilty of the most heinous offenses.

We are going to want to pursue the details of this early offer which was referred to by Judge Parker, which we got into yesterday with Mr. Bay to an extent, to examine the specifics as to what the differences were between what was offered pre-indictment and what was obtained on September 13.

We are going to get into the details of why action was not taken against Dr. Lee earlier, with the evidence of downloading back in 1993 and 1994, and then what was found in April 1999 with the search warrant. Director Freeh testified about this, saying it was a very complicated case and could not have been acted upon until

the indictment in December. We are going to want to explore that in detail as to why not.

And then the elements of the offense, the question of the intent to injure the United States, is something we are going to want to take up in detail as to what constituted that, and then the issue of the restraints, the manacles, the references to the Rosenbergs, the erroneous testimony given, and an inference which may arise—I say "may"; I haven't reached a conclusion on it—an inference which may arise as to pressure to get Dr. Lee to plead guilty.

On our examination of the *Dr. Peter Lee* case, we had evidence that the Government wanted a jail sentence there to make him talk, put him in custody. And unless and until there are some very solid reasons to explain the treatment for Dr. Lee, that inference remains a distinct possibility. But that is what these oversight hearings are about to try to determine.

So with that very brief introduction, we will proceed with the witnesses, and we appreciate all of your coming. The witness list has Mr. Edward Curran first, so we will start with you. And in accordance with our practice, we are going to seek to limit opening statements to 5 minutes, leaving the maximum amount of time for dialog, questions and answers.

Mr. Curran, welcome, and the floor is yours.

Mr. CURRAN. Thank you, Mr. Specter. I have no opening statement.

Senator SPECTER. Mr. Parkinson.

Mr. PARKINSON. Mr. Chairman, as you know, the Director submitted a lengthy opening statement yesterday, so I don't intend to have an opening statement here, but I am happy to answer any questions.

Senator SPECTER. Mr. Bay.

Mr. BAY. Mr. Chairman, I don't have an opening statement either. As you know, the statement yesterday was a joint submission between the Department and the FBI.

Senator SPECTER. Mr. Robinson.

Mr. ROBINSON. I have no opening statement. We are happy to try to answer your questions, Senator.

Senator SPECTER. Let us start with the statement made by Judge Parker on September 13, "Before the executive branch obtained your indictment"—he was speaking to Dr. Lee—"on the 59 charges last December, your attorney, Mr. Holscher, made a written offer to the Office of the U.S. Attorney to have you explain the missing tapes under polygraph examination."

Now, Mr. Bay, what more did you get on September 13 than an agreement to explain the missing tapes with the check of a polygraph examination?

Mr. BAY. If I could, Mr. Chairman, I would first like to explain that Judge Parker qualified that remark at the sentencing hearing because the lead prosecutor, George Stamboulidis, corrected him, saying, you know, the Government responded and it is not just like there is the December 10 letter and nothing else there in the record. And Judge Parker admitted that there had been this exchange of correspondence, so I want to qualify that first.

Senator SPECTER. What portion of the transcript are you referring to now?

Mr. BAY. At one point, Mr.——

Senator SPECTER. Could you be specific?

Mr. BAY. I am sorry. I don't have the transcript in front of me, but I could find the reference if you like.

Senator SPECTER. I would like that.

Mr. BAY. OK; if someone could provide me with a copy, I will look it up for you.

But in any case, what we got in the September 13 plea agreement was that the defendant admitted his guilt to a serious felony. He pled to one of the counts in the indictment which involved the downloading of the classified information in an unsecure part of Los Alamos; that is, in the T Division, not in the X Division where he had been a scientist.

Senator SPECTER. Did that count require as an element of proof injury to the United States or aiding a foreign government?

Mr. BAY. It did not, Mr. Chairman. It did, however, require that he admit that he committed this act willfully and knowing that it was in violation of the law. So, that was the intent requirement for that count of the indictment.

So he admitted his guilt and, in addition, he agreed to fully cooperate with the Government for a year-long period, not simply to one proffer session. And more than that, the plea agreement was structured in such a way that there were huge penalties that could fall upon him if he lied. Put another way, there were huge incentives for him to tell the truth.

The plea agreement is written in such a way that not only does he give us this debriefing under oath over a 10-day period, at least for 3 days over a 3-week period, but we can also polygraph him.

Senator SPECTER. Well, you had a polygraph on the offer pre-indictment, didn't you?

Mr. BAY. That is correct. But, you know, I also want to point out that that offer did get withdrawn because once the indictment came down, that offer was no longer on the table. We counteroffered in a letter in early January, asking to do this extensive pre-polygraph interview. The defense said——

Senator SPECTER. Was there any response for their pre-indictment offer before indictment?

Mr. BAY. I don't think so because what happened—I mean, I actually just don't know, but I do know that that offer did not stay on the table. I know that——

Senator SPECTER. Well, Mr. Bay, the offer was made in the context of trying to avoid indictment. So would it be surprising that the offer would be withdrawn once the indictment was returned?

The point I am coming to is a very direct one, and I think that is the point Judge Parker made, and that is that in order to try to seek the avoidance of an indictment, the defense was prepared to do a fair amount at that stage. After the indictment was returned, there had been a material change in circumstances, so it wouldn't be surprising that that offer would be withdrawn. So my question really goes to whether the Government responded to that pre-indictment offer before the indictment.

Mr. BAY. Just to clarify with respect to the portion of the record where the court noted that there had been this exchange between counsel, Mr. Chairman, that is on page 57 of the sentencing tran-

script, lines 8, 9, and 10, where the court notes, after Mr. Stamboulidis objects, "Nothing came of it and I was saddened by the fact that nothing came of it. I did read the letters that were sent and exchanged."

Senator SPECTER. Well, what in what you just read suggests a difference between the portion of Judge Parker's statement that I read at the outset?

Mr. BAY. Well, what it shows is that there was a response by the Government, that it wasn't simply a case where there was a letter sent on December 10 and the Government, you know, never responded. And you have to keep in mind the history of the discussions between——

Senator SPECTER. When did the Government respond?

Mr. BAY. The Government responded, I believe, in early January.

Senator SPECTER. Well, that was after the indictment.

Mr. BAY. It was after the indictment, but my understanding is that the defense took this offer off the table once the indictment came down. They weren't willing to let their client submit to a polygraph. They weren't willing to provide the kind of proffer that we had been seeking all along.

Senator SPECTER. Well, I could understand that, but I come back to the suggestion I made earlier as to a material change. If Dr. Lee could avoid indictment, he was prepared to do certain things. Once the indictment was returned, then he was not prepared to do that.

I have just been handed a transcript which purports to be at page 57 where the court says, "Nothing came of it and I was saddened by the fact that nothing came of it. I did read the letters that were sent and exchanged. I think I commented one time that I think both sides prepared their letters primarily for use by the media, not by me. Notwithstanding that, I thought my request was not taken seriously into consideration."

Did Judge Parker say anything beyond that which would support your contention that the judge was really not faulting the Government for not taking the deal pre-indictment which was essentially the same that they got on September 13, 2000?

Mr. BAY. I think in those comments there, the judge realizes that the parties had discussed this issue and that there had been this exchange of letters, but the——

Senator SPECTER. Well, this language that I just read back to you—frankly, Mr. Bay, I don't see anything there which undercuts in any way what the judge had said earlier that the deal could have been obtained pre-indictment with an explanation of the missing tapes and a polygraph.

Mr. BAY. But, Mr. Chairman, that December 10 letter does not contain an offer to resolve the charges. All it does is to say that he is willing to provide a proffer and take a polygraph. But this was an illusory offer. You have to keep in mind the context of the discussions.

Senator SPECTER. Well, was the judge wrong when he said that the offer was to explain the missing tapes?

Mr. BAY. I don't believe that the judge was wrong, but—and let me say this: I have got great respect for Judge Parker, but I don't know if he was aware of all the discussions that had occurred between the parties in the preceding 9-month period. And surely he

could not have been aware of the June 21, 1999, meeting between Dr. Lee and his lawyers and lawyers of the Department of Justice at the U.S. Attorney's Office in Albuquerque.

Senator SPECTER. Was Judge Parker told about that after he made this statement that he was saddened because the Government didn't take up the offer for the explanation of the missing tapes and a polygraph?

Mr. BAY. I am not aware—I don't think he has been told or was told, but it would be very unusual to—you couldn't bring the judge into any kind of plea negotiations before the case was decided. You can't do that. That is barred under the Federal Rules of Criminal Procedure, so we could not have informed him.

Senator SPECTER. I understand that, and I wouldn't expect you to. But when he faults the Government and he is about to make a decision in the case as to what is going to happen to Dr. Lee, at that juncture you could have told him that, what happened in June.

Mr. BAY. I don't know about that, Mr. Chairman. We try very hard not to do anything that would involve the judge in pre-indictment discussions between the parties. And I think if we tried to do that, the defense could argue that we were somehow trying to taint the judge. I don't think we can involve the judge in pre-indictment negotiations between parties.

Senator SPECTER. I quite agree with that while he is presiding over the case. But at a time when he is making a disposition of the case and sentencing Dr. Lee to time already served and accepting a plea bargain, at that time you can tell the judge what has happened if there is some material fact which contradicts a strong stand he took on expressing his disappointment that you hadn't taken the pre-indictment deal, which is what he said you ended up with on September 13.

Mr. BAY. Mr. Chairman, if I had known that the court had these concerns, I would have wanted to try to address them before he made the statement. But it is not like he called the parties into chambers and said, Government, could you tell me what happened here because I am very concerned? I know that there is the December 10 letter, but could you tell me something about what happened in the preceding 9-month period? Could you tell me anything about whether or not the Government tried to get Dr. Lee to cooperate and what efforts the Government made?

But the fact of the matter is he never said anything like that. So when we were sitting in the courtroom at sentencing, his comments came as a complete surprise to us. And we wish, we dearly wish, Mr. Chairman, that we had had the opportunity to talk to the court beforehand and to see what his specific concerns were and to see whether or not we could allay them. But we went through this mediation process, and part of mediation is you resolve a case in the spirit of mediation. And so to be honest with you, I was very much blind-sided by the judge's comments.

Senator SPECTER. Well, Mr. Bay, you don't have to be meeting in chambers and you don't have to have the judge making a specific inquiry. You can say it in open court at that stage of the proceeding, but let's go on with what you have talked about.

You said you had a year to question Dr. Lee, that there were penalties involved and there was a 10-day period. Is there any other difference between what you got on September 13 and what was offered pre-indictment?

Mr. BAY. Well, we also got some sworn proffers from him on the day of the plea itself. We got two sworn proffers from him. These were statements given by him under oath. We got the promise of his cooperation for a year. We got the sworn debriefings, 10 days' worth, over a 3-week period. We got a year's worth of cooperation, and we got some penalties put into the agreement to guarantee that he would tell us the truth.

Senator SPECTER. And what were the penalties?

Mr. BAY. Well, the penalties are pretty severe, Mr. Chairman. If he lies to us, we can prosecute him for false statements, perjury, and obstruction of justice. In addition, we can move to set aside the plea agreement. And if that happens, the remaining counts in the indictment that were dismissed are reinstated.

Senator SPECTER. Mr. Bay, is there any reason to conclude that you couldn't have gotten all of that—the year of cooperation, the penalties, the 10-day briefing, the sworn proffer—had you pursed the matter pre-indictment?

Mr. BAY. And he pled to a very serious felony, a felony in the indictment.

Mr. ROBINSON. Mr. Chairman, perhaps I could answer, because I was there and Mr. Bay wasn't in the early stages with regard to the history. I think it is very important to see the correspondence between counsel and the meetings that occurred between counsel. And I think it is quite clear this December 10 letter that was sent was sent the very day that the grand jury was returning its indictment, as Mr. Bay pointed out at the hearing on yesterday. And it is quite clear that what was envisioned by that letter was very, very limited, yes or no polygraph to very limited questions without the ability of the Government to test any of those things.

But the history of the discussions between Dr. Lee's attorneys and the Government extended back for many, many months, and included give-and-take which at various times indicated that Dr. Lee was willing to provide this information only in exchange for immunity, at times only in exchange for possible pleas to misdemeanors.

This arrangement, in our judgment, that was worked out as a result of this mediation with Judge Levy was never available before it was finally resolved as a result of very difficult negotiations brokered by Judge Levy. But they were extensive discussions, and I know that from early on the Government sought this information from Dr. Lee pre-indictment; in effect, as the correspondence between counsel indicated, pled for this information from Dr. Lee because it was obviously critical to the prosecution decision as to whether to proceed and what to proceed on.

There were extensive submissions by counsel that were carefully examined by the Government. There were several meetings, one in Albuquerque where Dr. Lee was in another room and counsel back and forth in an effort to get at this issue. And so the notion that this December 10 letter was something that, A, was satisfactory or, B, that the arrangement finally worked out as a result of these ne-

gotiations would have been available before, in my opinion, based upon the discussions and the correspondence, simply was not possible.

Senator SPECTER. Well, Mr. Robinson, what you have described is jockeying which goes on where defense counsel seeks to get the very best deal they can.

Mr. ROBINSON. Sure.

Senator SPECTER. That happens all the time and their positions change.

Mr. ROBINSON. Of course.

Senator SPECTER. And the moment of truth—just like when the jury comes back on the settlement of a case, the moment of truth or the real pressure comes when the indictment is returned. And that was the time that defense counsel was going to make you their best offer, and at that time they made you an offer which did not have all of the elements that you have described about the year of cooperation and the penalties and the 10-day briefing. But it did have, at least as Judge Parker stated it, explaining the missing tapes. And one of the points that Director Freeh made very emphatically yesterday was the very high premium the Government placed on finding those missing tapes.

Mr. ROBINSON. Right.

Senator SPECTER. And there had to be very substantial value to finding them 10 months earlier, in December, as opposed to the following September.

Now, you did get one additional element on a guilty plea.

Mr. ROBINSON. We got much more than that. The arrangements with regard to this December 10 letter, which was a very short letter which envisioned basically an up or down, yes or no, did you destroy the tapes, did you share them with anyone else—those were the things they were willing to deal with, and we didn't get the details which we had numerous discussion about, about the consequences of going forward, the ability of the Government to verify these things, the ability to deal directly with Dr. Lee.

These were all subjects of extensive discussion, and the correspondence, I think, speaks volumes about the efforts of the Government. And you are quite right. Defense counsel obviously tries—to the extent that they can, they would like to get immunity. They don't want their client subject to additional exposure.

But what you have in this situation is if, during the debriefing process, Dr. Lee provides information that is false—and we are going to obviously do everything we can to verify everything we learn and to probe all of the elements of it—he can be right back to where he was before the plea, the way this worked.

I am confident—and you can ask Mr. Holscher if he comes here to testify—that this was not an arrangement that they were ever willing to engage in. And we had extensive discussions in an effort to try to get this information, obviously, which was critical information.

Senator SPECTER. Well, we will ask Mr. Holscher and Mr. Cline. We have them tentatively scheduled to come before the subcommittee on October 11. I think we have pursued this question about as far as we can usefully.

I have a question which remains as to your——

Mr. ROBINSON. I want to make one other point here. The December 10 letter also makes a representation we know not to be true about the tapes never leaving the X Division, and this is the dialog that has been back and forth in which we have sought information, got representations. I mean, counsel are doing the best they can, but they are obviously doing it based upon the information their client provides.

And so we had very serious concerns about the reliability of the information that we were getting, and I think it is important to evaluate the whole series of correspondence and the meetings that occurred. And I can tell you I sat in one meeting with counsel for Dr. Lee in which I said we want to learn everything we can about Dr. Lee's intent. We are not interested in charging Dr. Lee with a crime that he didn't commit, and we want to know whatever you can provide on that subject.

And they obviously made—and it is understandable—a tactical decision that they didn't want to share certain information with the Government. They wanted to save it for trial, and we weren't able to work this out and the stakes obviously were high to their client. I think ultimately it took a very skillful effort by Senior Circuit Judge Levy between the parties to come up with this final agreement which I think does give us the best hope for getting the kinds of answers that will address the national security concerns that we all share here about these tapes, their whereabouts, and whether they were exposed to anyone else. And that has obviously been a critical matter.

The correspondence makes it clear and the meetings make it clear that this was the $64,000 question about where these tapes—why they were created, where they were, did anyone else see them. If they were destroyed, as represented, how were they destroyed, how we could verify that. Those are all questions that I think we all are very interested in knowing the answer to.

Senator SPECTER. Well, as I had said earlier, I don't think it would be useful to pursue the matter beyond this. I do not see the import of a yes or no. This is a negotiation and the defense offer—it seems to me you had the opportunity to come back and say no on your terms, but if we get A, B, C, D and E, we will agree with it.

Mr. ROBINSON. We had been doing that for months and months. I mean, that dialog had occurred. It continued to occur.

Senator SPECTER. Well, that is true. Now, I am repeating myself, but on the day of indictment, it is all different. But at any rate, the judge, Judge Parker, who is right there—we are going to have Mr. Holscher and Mr. Cline, and we will ask them the questions you have posed. But Judge Parker lays it rather flatly.

Mr. ROBINSON. Judge Parker didn't have the information about the meetings, the correspondence, and the dialog. Just as Mr. Bay points out, Judge Parker wasn't involved in this process. It was Judge Parker who, in effect, urged the parties from the time he got into this case to engage in mediation to resolve the issues of both bail and disposition of the case.

And, in effect, what happened is he encouraged us to do this. We did it in good faith. We achieved a result which we think will advance the national security. And, frankly, with all due respect to

Judge Parker, the notion that he put us in that position and encouraged us to do it, we do it in good faith and reach a result—and he made a comment, I think, without the benefit of all the information concerning the efforts that had been made by the Government, which are extensive, to try to get answers to these questions—extensive meetings, extensive correspondence, extensive discussions.

And it wasn't easy even when we got the parties together. These negotiations broke down on a number of occasions. We learned things at the 11th hour that were very disturbing to us about copies. This was something that was difficult and carefully negotiated in good faith, and as a result of Judge Levy's efforts we achieved a result at the end that we think is in the national interest.

Senator SPECTER. I understand that. That is essentially what Mr. Bay said. But when Judge Parker makes the statement that I am sad and it could have been resolved a long time ago, that was an opportunity for the Government to stand up and say, no, it couldn't have, Judge, and to give all the reasons you have given.

I have been at a few of these proceedings, and when a judge says something which is material and is bothering him and he is wrong, then the Government tells him so.

Mr. ROBINSON. Well, he said that after the deal had been made. The agreements had been signed. We were putting this on the record in court. There was a meeting, as I understand it——

Senator SPECTER. Well, the judge had to accept it, didn't he?

Mr. ROBINSON. Well, he didn't have to accept it, but——

Senator SPECTER. Well, he had to make a ruling as to whether he would accept it. Of course, he did.

Mr. ROBINSON. Sure, he did. At the end of the day, he did.

Senator SPECTER. He had to accept it if it was going to be final. So this is a proceeding to get the judge to say yes or no to the plea bargain.

Mr. ROBINSON. Right, and we were in favor of the plea bargain at that point. And he did approve it, and these were statements that he made, frankly, afterwards.

Senator SPECTER. OK, Mr. Robinson. Why not say to the judge all the explanations you have just tendered here when he says he is sad and, in effect, you could have gotten the same deal last December? Why not tell the judge he is wrong? This is not an immaterial factor. Why not tell him?

Mr. ROBINSON. Well, I wasn't in the courtroom at the time, but I have been in courtrooms where I have sat there where judges have ruled and they are making these comments for the galleries at this juncture. And I think that is what was happening, but the Government, as I understand it——

Senator SPECTER. You think Judge Parker was making that comment for the galleries?

Mr. ROBINSON. Galleries, including the Government, obviously. He made these statements in court——

Senator SPECTER. What do you mean, "the galleries," Mr. Robinson?

Mr. ROBINSON. Well, obviously he was making this public statement about this matter. I think the fact that Judge Parker made this statement was a little unusual under the circumstances, his

comments with regard to this matter. I think it was a little unusual.

Senator SPECTER. Well, then he went beyond that when he talked about an apology. If he was moving from a factual basis where he was incorrect, the Government had a responsibility to correct him, to say so.

Mr. ROBINSON. Well, I do understand that the Government has had a meeting with Judge Parker after this matter and has had discussion of a number of his comments in his chambers.

Mr. BAY. Mr. Chairman.

Senator SPECTER. Well, that doesn't bear on the underlying question as to whether the Government could have gotten the same deal in December if you had pursued it. That doesn't bear on that at all.

Mr. ROBINSON. I don't have any doubt in the world—and the record, I think, demonstrates it to a fare thee well—that the Government could not have gotten this arrangement any time before it was negotiated in this very extensive way over this very extensive period of time at the request of Judge Parker.

Senator SPECTER. Well, our next step is to talk to Mr. Holscher and Mr. Cline, but let me move on to another subject, and that is the subject about——

Mr. ROBINSON. Senator, I am sorry to interrupt, but I just want to make sure—I do understand, I am told—I wasn't there—that the attorney did object or stand up to object in connection with this. Perhaps Mr. Bay can enlighten us on your point of whether the Government tried to say anything in response to this.

Senator SPECTER. We would be interested to hear about that, Mr. Bay.

Mr. BAY. That is correct, and this is in the record, sir. Mr. Stamboulidis did stand up——

Senator SPECTER. What page are you on so I can follow you?

Mr. BAY. Page 57, lines 4 through 7. On line 1 on page 57, Judge Parker says, "At the inception of the December hearing, I asked the parties to pursue that offer made by Mr. Holscher on behalf of Dr. Lee, but that was to no avail." Mr. Stamboulidis stood up and objected. He said, "Your Honor, most respectfully, I take issue with that. There has been a full record of letters that were sent back and forth to you and Mr. Holscher withdrew that offer."

So we did attempt at the hearing to correct the court's impression.

Senator SPECTER. But then the judge goes on to say, "Nothing came of it and I was saddened by the fact that nothing came of it. I did read the letters that were sent and exchanged. I think I commented one time that I think both sides prepared their letters primarily for use by the media and not by me. Notwithstanding that, I thought my request was not taken seriously into consideration."

So when Mr. Stamboulidis makes the comment, the judge comes right back and doesn't change his position.

Mr. BAY. But, Senator Specter—and I know you have the correspondence that we produced for your committee, and when you go through it, for example, there is a letter dated August 4, 1999, where the U.S. Attorney at the time says, "I assure you that I have absolutely no desire to prosecute an innocent man. I have used

what tools prosecutors have to try to gather all the facts. Those facts establish your client's guilt. If additional facts that only he can provide would explain his actions and point to his innocence, I would sincerely like to know that before embarking on a course of action that will have a profound impact on many people. Once again, I extend to you the invitation to have your client tell his side of the story."

And it continues, "If you let me know soon whether he will accept the invitation, I can be available for his interview or grand jury testimony with very little advance notice. I will not present the matter for indictment this week, but I simply cannot delay it indefinitely."

These were the kinds of communications that were going back and forth. The Government all summer long kept asking for the participation, and this was even after the June 21 meeting where Dr. Lee gets caught in this misrepresentation. A month later, you have got this letter dated September 3, 1999, where the U.S. attorney at the time asks for detailed information, "succinct, verifiable, factual information responding to my concerns by Monday, September 13, 1999."

And we know that proffer was never provided. But what we asked for there was information regarding the tapes. "We know that Dr. Lee copied both classified and unclassified information onto 6150 tape cartridges. We know that he didn't have a tape drive on his computer. We found some of the unclassified cartridges in his T Division Office when it was searched earlier this year, but we do not know what happened to the tapes containing classified information. We want to know the complete chain of custody for the tapes from the moment they were created until today. We want to know how and where he created them, where they have been physically located over the last 5 or 6 years, who other than Dr. Lee knew of their existence, and why no one in the X Division was told about the tapes. We want to know whether he gave the tapes to a third person. If he did, we want to know to whom, when, where, how, and why. If the tapes were lost or destroyed, we need those details as well."

This is indicative of what we were trying to learn from Dr. Lee. This was indicative of the kind of cooperation we sought from him in the pre-indictment period, a period which lasted for 9 months. He had 9 months to try to cooperate with the Government, and at the last minute, on the day that the indictment is returned, he is sending us a fax saying, you know, stop the train, I am ready to talk now, where even that letter contains a misrepresentation, as Mr. Robinson pointed out.

Senator SPECTER. Well, when you talk about a prosecutor not wanting to go after an innocent man in the opening part of your statement, I can understand that. It doesn't bear on the question of the tapes. When you read in detail this letter from September 3, 1999, there is no doubt that U.S. Attorney Kelly is posing the questions which you want answered. But all of that, with all respect, begs the question as to whether the offer that the defense made right before the indictment might have been expanded to all of the items that you have explained here today, all of the reasons you have given. And the judge's statement still stands.

To repeat for the third time, I think we have explored this to the extent we can. And we will pick it up with Mr. Holscher and Mr. Cline, but the dominant statement remains the one on the record by the judge that you could have gotten this deal a long time earlier.

Let me move, as I had said earlier, to the question acting on the downloading, and let's pick up with you on this, Mr. Curran. There were indications that the Department of Energy had noticed massive downloading by Dr. Lee back in 1993, and then again in 1994 there was extensive downloading noted by the Department of Energy by Dr. Lee.

What were the specifics of that downloading?

Mr. CURRAN. Sir, I have no knowledge of that downloading. My tenure at the Department of Energy started in April 1998.

Senator SPECTER. Well, does anyone here know about the details of that downloading, Mr. Parkinson?

Mr. PARKINSON. We at the FBI learned about the details of the downloading in 1999 through the detailed forensic work that we did last year.

Senator SPECTER. When in 1999, Mr. Parkinson?

Mr. PARKINSON. It began primarily in March with the search of his office and then continued from that point forward.

Senator SPECTER. Well, Mr. Curran, we need somebody here from the Department of Energy who can explain that because the records show that the Department of Energy did know about it. They also show that the FBI did not know about it, and that is a question we have.

But let's move to April, Mr. Parkinson, a question which I posed to Director Freeh yesterday. There were a lot of activities by—well, backing up to December 21, where internal memos show that Secretary of Energy Richardson had contacted the FBI—and I believe Director Freeh had expressed concern about the pending release of the Cox Committee Report—what were the specifics of that, Mr. Parkinson?

Mr. PARKINSON. I don't know the specifics of that, Mr. Chairman, and maybe one of my colleagues can assist me in that, if you could indulge me.

Senator SPECTER. Take your time, Mr. Parkinson.

Mr. PARKINSON. We will explore that and get back to you. I have a very extensive chronology of all relevant events here. There is no indication in my briefing materials that there is any kind of correspondence between Secretary Richardson and the Director on the 21st.

Senator SPECTER. Well, there is a memo from Mr. Craig Smith to the Director dated December 21, 1998, which references Secretary Richardson's concern about the pending release of the Cox Committee Report.

Mr. CURRAN. Sir, can I perhaps add to that?

Senator SPECTER. You may.

Mr. CURRAN. If it is the conversation between Secretary Richardson and Director Freeh, we had planned action against Mr. Lee upon his return from Taiwan which led up to the ultimate interview and polygraph of Mr. Lee on December 23.

I remember being beeped in Washington, DC, by Mr. Kilroy, who is the Unit Chief of the China Section, where this activity that we were planning to do which was fully coordinated with the FBI headquarters in Albuquerque was given in a note to Director Freeh. Director Freeh had a question on that note. My conversation with Mr. Kilroy resolved that issue.

That same day, I saw Secretary Richardson and he told me he talked to Director Freeh and everything was on track for December 23. So if that has something to do with it, I know that conversation did take place.

Senator SPECTER. That conversation occurred on December 21?

Mr. CURRAN. It would have been shortly before the activity. I know it was around that time. I can't remember the specific——

Senator SPECTER. Well, the memo from Craig Smith to the Director specifies concern about the pending Cox Committee Report.

Mr. CURRAN. Well, I have no knowledge of the Cox Committee Report. I know in my conversations with the unit at that time there was an issue with Director Freeh. He misunderstood the information in there. That was immediately corrected.

Senator SPECTER. What did Director Freeh misunderstand?

Mr. CURRAN. Again, I don't like to speak for Director Freeh, but it is my understanding at the time that when the note went up to Director Freeh explaining what was going to happen on December 23, he misunderstood the note, indicating he did not want DOE to take that action. That then was confirmed and later went up——

Senator SPECTER. He did not want DOE to run a polygraph?

Mr. CURRAN. There was a whole series of events that were going to take place. My understanding is he misunderstood that the unit was agreeing with it. He thought they were disagreeing with that activity, and that was the misunderstanding. That was immediately clarified.

Senator SPECTER. When you say the unit, you mean the FBI unit?

Mr. CURRAN. Yes; the FBI unit that was running this investigation, yes. And that was immediately clarified, and I spoke to Secretary Richardson upon the return that day. He said he had spoke to Director Freeh and everything was fine. I don't know of any conversation about a Cox Report conversation.

Senator SPECTER. The polygraph was taken on December 23. The reports are, Mr. Parkinson, that there was some difficulty between the FBI and DOE on having access to the tapes. What did happen with respect to that?

Mr. PARKINSON. There was some difficulty, Mr. Chairman, and particularly on getting timely access to the results of the polygraph. And, frankly, I think the Director has indicated that this was the place where the FBI should have pushed harder.

We didn't get the polygraph results until late January from DOE, all of the results that could be analyzed by an independent polygrapher. And so several weeks went by after the December 23 contractor polygraph done by the DOE contractor before our polygraphers could independently assess the results.

And I think there was probably some brandishing on both sides, but I think we have stated, and I will state again, we should have pushed harder to make sure that we got those in a more timely

fashion. And when we did get them, they were immediately reviewed by our own polygraphers as well as another independent polygrapher at DOE's initiative, and that, of course, led to the results that we have testified about that indicated that he did not pass the polygraph. At best, it was inconclusive.

Senator SPECTER. When the results announced by Wackenhut, who ran the polygraph on December 23, 1998, were disclosed, there was, in fact, a decision by the FBI field office to close the investigation, right?

Mr. PARKINSON. It was under consideration. They had not reached the decision.

Senator SPECTER. Well, had they at least recommended the investigation be closed?

Mr. PARKINSON. They had recommended consideration of closing it following the January 17 interview with Dr. Lee. That, of course, was a snapshot in time which changed dramatically when we actually did see the Wackenhut polygraph results and did the independent analysis.

Senator SPECTER. Why have someone like Wackenhut run the polygraph when the FBI is so much more proficient at it?

Mr. PARKINSON. I think that is a fair question, and we were working jointly with DOE. We knew that they were going to do this, and on the ground they concluded that we would permit DOE to go ahead and conduct the polygraph.

Mr. CURRAN. Sir, could I add to that, because I am the one who made the decision to polygraph the person? My position as an FBI employee assigned to DOE as the counterintelligence person—I was obviously very, very concerned about this entire case that was being worked. Through coordination with the FBI, the interview that we conducted was a cursory interview. It was an interview to suspend him from access to the X Division upon his return from Taiwan.

I asked my people to ask him if he would voluntarily take a polygraph. It would be noncoercive, nonthreatening, and the bottom line in all this activity was not to compromise the FBI investigation in this thing. The FBI investigation was coming to a conclusion. I had an immediate decision. This person had just left the country. He had been out of the country for 4 months. He is the subject of a full FBI investigation. There is good indication that he was aware of the FBI investigation.

I did not know where he was, who he was talking to. I had assumed the worst at that point, and that is when we made the decision that upon his return he would not have access to the X Division. And we suspended his clearance without any prejudice whatsoever. Because the FBI was going to come in and do their interview and polygraph, there was a good likelihood that he could have turned down a polygraph for the FBI because you have brought it to a different level at this point.

I had asked that he be polygraphed so if that did occur that I have some idea whether this person is telling the truth, not telling the truth, whatever, and not faced with a problem where I have a significant breach in security and I have no clue where it was coming from.

Senator SPECTER. Well, let's move ahead here to——

Mr. PARKINSON. Mr. Chairman, if I might, I just want to quickly add one point. There was a very good investigative reason to allow the DOE polygraphers to do the initial polygraph, and that is we were concerned that even though there was talk about the investigation, we didn't have reason to think that he knew very much about what we were doing.

And the polygraph on the 23rd coincided with his return from foreign travel as well as a five-year reinvestigation at DOE. So in an effort to be nonalerting to the extent that we could, it made sense to do it in the ordinary course. And, of course, if the FBI had come in and done it, that certainly would have been more alerting.

Senator SPECTER. Well, OK. You have the December 23rd polygraph. You don't get the results. You have conceded that you should have been more aggressive; faults on both sides; polygraph incorrectly read. You finally found out about it on January 17 that he did not pass the polygraph, or at least inconclusive, but the indicators were that he did pass the polygraph.

Then Dr. Lee, without going into the details—we are going to run out of time and I want to yield in just a minute here to Senator Torricelli, who has consented to my questioning beyond our customary 5-minute period. A lot of erasing by Dr. Lee. He is not terminated until March 8, 1999. A search warrant is not obtained until April. In April, you go in and you find the diary that they testified about yesterday, so you know that there is a lot of downloading which he has done at that time.

Now, it takes from early April 1999 until December 1999 to bring an indictment, an indictment which carries a life sentence, and a request to the judge that he hold this man in solitary confinement. We will get into the details of that later.

I understand it is a national security case and I understand there are a lot of factors to be considered, and I didn't have the chance to get into the details with Director Freeh yesterday. But why does it take from early April to the end of December when you have a matter where the Government contends there are crown jewels involved and that Dr. Lee can transmit this information to someone else and the most extraordinary steps are taken to stop him from talking to anybody, including his wife? What is the justification? Could that not have been expedited?

Mr. Parkinson.

Mr. PARKINSON. Let me begin, and my colleagues can add to this, but as the Director pointed out yesterday, which is absolutely accurate, this was an extraordinarily complicated case to put together. I think we knew the broad outline in the spring after we did some initial forensic analysis, but the forensics and the working with DOE to figure out what, if anything, we could expose in a public trial was an extraordinarily complicated and difficult process.

Senator SPECTER. Well, how long did the forensic evidence take?

Mr. PARKINSON. The forensic examination continued for well over a year. Even after the indictment, we continued to do forensic work.

Senator SPECTER. Well, you didn't have the meetings with Mr. Berger and the other principals until when, early December, late November?

Mr. PARKINSON. December 4, 1999.

Senator SPECTER. December 4. What I would like you to do, Mr. Parkinson, without taking the time now is to give the subcommittee a detailed chronology of what you did. We want to know exactly what you did and how long it all took.

I am not unfamiliar with criminal investigations, and neither is Senator Torricelli or Senator Sessions or the others on the subcommittee. We want to know what you did and why it took so long to have this emergency, to confine Lee the way you did.

I am going to come back to the classified information Act, CIPA, and others, but let me yield at this point to my distinguished colleague, Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman. I am afraid I am a little under the weather, so you are all going to be spared the full extent of my interest in the case. But let me try for a few minutes to do the best that I can.

Yesterday, Senator Leahy noted that many people on the committee were in the extraordinary position of having been critical some months ago that the Government was not sufficiently aggressive in dealing with this case and now we return to be critical that the Government was too aggressive in aspects of the case. I am one of those people.

Initially, in what I now regard as an unfortunate exchange with the Attorney General in private session, I was very critical that a wiretap was not granted in dealing with Dr. Lee. While my tone may not have been appropriate, I believe my conclusion was. It should have been granted, and I believe the FBI should have put greater resources on the case. In hindsight, I think with regard to the initial investigation of Dr. Lee almost every division of the U.S. Government at every level of responsibility probably would have handled the case differently. It is not given to us to do that again, but to learn from the experience.

But now I return with a different perspective in what is a remarkable bipartisan concern for how the case was handled after Dr. Lee was detained and prosecuted, and what I think has touched an extraordinary raw nerve in the country. I do not believe from my own cursory review of the evidence that Dr. Lee was innocent. Even if you accept the single charge to which he pled—it is serious, it should be dealt with seriously and the Government should respond to it seriously—I am not at all convinced that that is all that he is guilty of. Nor do I have much sympathy for the fact that he was vigorously prosecuted and pursued. The anecdotal evidence suggests inappropriate contacts. The consequences to the United States are so enormous that I think a vigorous prosecution was warranted.

But let me get beyond the prosecution to my new concerns, those I amply stated in the past when we revisited this case with concern that the Government wasn't dealing with it sufficiently, to what is now a remarkable undercurrent in this Congress.

I will begin it with a friend of mine who is a senior official at the Justice Department who went recently to a conference of young prosecutors and returned saying he was unnerved and concerned that there was a "win at any cost" attitude, that sometimes the Constitution seemed like an inconvenience, a sense that the Government held a monopoly on truth, and that the professional

boundaries of our profession and the traditions of the Justice Department were not respected as they might have once been respected.

Dr. Lee, to me, is not a terribly sympathetic figure, given some of the things that he even now has admitted that he did. But that shouldn't change how he is approached by the Government. There are several things about this case that are inexplicable and should have consequences.

First, Mr. Parkinson, I do not regard a citizen lying before a court of the United States an an official of the United States lying before a court of the United States on the same scale. The Government being untruthful and misleading is not a threat to a case, but to our entire system of justice. The people of the United States have a right to expect that, without exception, the Government will be truthful and accountable when under oath and dealing with a case. Sometimes, we forget this is not the Department of Prosecutions; it is the Department of Justice. The only Government stake in the outcome is fairness, not the scorecard.

And so when I conclude my opening remarks, I would like your response to how the Bureau intends to proceed in this individual case where it appears by statement of a Federal judge that he was not dealt with forthrightly, if not truthfully. That matters.

Second, Mr. Robinson, it is not enough that we regard ourselves as a civilized Nation because we do not force things under people's fingernails if we simply replaced it with new, sophisticated methods of using incarceration as a means of intimidation. Incarceration of a person who has not yet faced justice is to prevent flight, or the damaging release of information in his case. It is not to psychologically break an individual, put him in untenable circumstances so that he might admit to something that he did not do or otherwise wear upon him. That is, in my mind, unconscionable against a guilty person, no less one who has not yet had a case proven against him.

Yesterday, this was reviewed at length. We need not do so again, but I think the simple truth is there is not an adequate explanation for keeping the lights on in a cell all hours of the night. There is not a reason for shackling an individual in these circumstances, in private moments, within a jail, given his history. There is not a reason to deny reading materials or to not be more accommodating with family visits. There are bounds of reason.

If I thought that Dr. Lee was the only person now facing justice who dealt with these circumstances, I would be concerned, but I would think a lesson had been learned and we would move on. But I return to my friend who went to a Justice Department conference, to be shaken himself. These tools can be misused. This is extraordinary power.

My sense increasingly of the Justice Department is that it is run from the bottom up, not the top down, by people with lesser experience who, like all of us in early stages of life, have excessive enthusiasm for our objectives rather than the wisdom of experience and age. Some of that, I believe, is involved in these circumstances.

I find this a difficult case. I find myself like anyone conflicted, because I believe that Dr. Lee did a great disservice to the United States. But it is not Dr. Lee I fear alone. You can be in law school

no more than a few days, in your first lessons on the American Constitution, when you discover to your great surprise that the American Constitution seems primarily designed to protect the American people from the American Government. The moment we begin to take some of these restraints less seriously, we are changing the nature of our country. That, Mr. Robinson, is my major concern coming out of this case, and I am concerned about it.

That leads to something I have never understood about the Department, and it is really the question I ask of Mr. Parkinson. If a citizen of the United States were to go before this Federal judge and lie, I understand the consequences. They would be prosecuted, and they should be.

I understand in private industry, or even in American politics, if you wage an effort and you fail and you are found to have dealt with it inappropriately, the consequences are on you professionally. I don't understand what happens in the Department. There were enormous misjudgments here by line prosecutors. A Federal judge asked that the circumstances of Dr. Lee's confinement be altered. It did not happen for 9 months. What are the professional consequences of this within the Department to ensure that people really respect the guidelines of the Department, and respect you and Ms. Reno?

I know you fairly well. I know Ms. Reno better. If someone had told you that a Federal judge had said, alter these circumstances of confinement, it would have happened that minute. Somebody didn't. In this Department, how does that work? What are the consequences of someone who didn't bring that to your attention and didn't respect the judge and did misuse that power, misused an enormous power, admittedly not putting anything under anybody's fingernails, but using a 21st century version of it?

Those are my concerns, and at this point I would like to open it to Mr. Robinson and Mr. Parkinson to at least answer specifically the questions I posed, if not the general proposition of what I presented.

Mr. PARKINSON. Let me begin, Senator Torricelli, since the first question related to our agent, and I assume you are talking about Agent Messemer who testified, the case agent on this case. I think it is very critical, in fairness to everyone at the outset, to put this in proper context.

He did not say he lied. The judge did not say he lied. And even though it is being portrayed in some press accounts as he is a perjurer, that is simply not the case, at least not at this stage in time. He said he made an honest mistake. The judge did not take issue with that characterization at any point in these proceedings. I think it is important to keep in mind that he was dealing with enormously voluminous amounts of material. He was on the stand for probably literally hours and he made a mistake, and that is what he says.

Now, it was an important mistake and it is something that we take absolutely seriously. The Director emphasized that yesterday. It had a consequence to this case. It undermined the prosecution because even if it was an honest mistake, it was on an important fact and it undermined the credibility of the lead case agent. So I don't want to minimize the conduct and the mistake that he made.

But I think it is fair to him, in particular, to let this play out and see what the conclusion is.

Senator TORRICELLI. What were the judge's operative words in characterizing his testimony?

Mr. PARKINSON. The judge—and maybe Mr. Bay can help me with the transcript itself, but he, as the Government pointed out——

Senator TORRICELLI. I think the word was "misled," was it not?

Mr. PARKINSON. Mischaracterization or erroneous testimony. Hold on. I can probably lay my finger on it. This is from the judge's order: "During his recent testimony, Agent Messemer admitted that incorrectly testified earlier." That was the phrase that he used.

Senator TORRICELLI. Admittedly, Mr. Parkinson, "incorrectly testified" is this side of a lie, but it is on the other side of what is acceptable by a representative of the U.S. Government.

Mr. PARKINSON. Well, even representatives of the U.S. Government sometimes make mistakes. But this is an important thing, and for the lead case agent he should have had that right. I don't think there is any question about it, and nobody is shrinking from that. And we are following up. This has been referred for investigation, not by the Criminal Division at this stage but by the Office of Professional Responsibility, which is——

Senator TORRICELLI. Within the Bureau?

Mr. PARKINSON. Within the Bureau. We take this very seriously, and I don't quarrel at all with your comments about the nature of the Government testimony and agents of the U.S. Government. It is qualitatively different for any Federal agent of any sort, or Federal officer of the court, to make any kind of a false statement before the court. While we ought to take it seriously even if it is a citizen who is not a Federal employee, it is qualitatively different and we recognize that.

I will say this, that Director Freeh has had many initiatives since he became Director, and I can't think of any initiative that has received more attention from him than ethics. He has incorporated ethics training at Quantico, and our entire training system is devoted in large part to the teaching of ethics and devotion to the Constitution, and to demonstrate to everybody who works for the FBI that the process is more important than the result.

Sometimes, bad guys get away even, but that is no reason to shade testimony, or in particular obviously it is not any excuse to make any calculated misrepresentation. But I think it is important, having said that, for the process to play out. I know Agent Messemer has been condemned in a lot of quarters as a liar, and I think that is flatly unfair to him and I think we need to keep that in context, and we will see how that plays out.

Senator TORRICELLI. I think that is helpful. I also agree that I think Mr. Freeh has brought a new level of professionalism to the Bureau, and I think that is admirable. I nevertheless simply leave this exchange with the thought that I don't know this agent. He may have done great service to our country for which we would be grateful, but we also, like the law itself, administer the Government by precedent. And the precedent of how this case is dealt with is important.

He should not be made an example of if he is innocent or if it was an honest error, but I forget the operative word again—misstatement or mischaracterization, whatever the operative word may have been, is also not an acceptable standard, to which I know you agree.

Mr. Robinson.

Mr. ROBINSON. Well, first of all, let me fully agree with your statements about the fact that Federal prosecutors have enormous power, and with that comes enormous responsibility. And I think we have an obligation to continue to remind particularly new prosecutors that in appropriate cases a declination, saying no, frankly, to our friends occasionally from the FBI on intrusive investigative activities if there is a feeling that there is not probable cause—those are obligations that Federal prosecutors have. It is something that I feel strongly about.

I have Justice Sutherland's quotation from *Berger* v. *United States* in my office about the extraordinary role of the Federal prosecutor. I think we have to continue to try to make it clear that a "win at any cost" attitude is not the kind of attitude the American people want in their prosecutors, although I must say occasionally with the feeding frenzy that occurs on high-level, sophisticated cases, you know, the pressures are there. And I think that we have to be vigilant at all times with respect to it, and that message needs to come down.

Winning cases is not unimportant, but doing the right thing is more important, and we need to remind people of that and get the message out among the U.S. Attorney community and Federal prosecutors as well. And I think most Federal prosecutors believe that, believe it strongly. And when we have exceptions to it, I think they need to be dealt with, and dealt with in a way that makes it clear that that is the message.

Senator TORRICELLI. That is a little bit of what I wanted to understand. This is, after all, an oversight committee, not an investigative committee, and it is part of what I wanted to understand about the Department. In fairness to the line prosecutors involved, I will not raise their names or circumstances, but a series of errors are made, allocations of resources. A case collapses on what I think should have been the full impact based on the evidence that I have seen. A judge is angered and believes he was not dealt with honestly. There were real mistakes of judgment. They can be made by anybody. Here, they are compounded to enormous national consequence, undermining confidence in the Department, and it cost an important prosecution.

Without speaking of any of the individuals, how do you as the head of a division of the Department—is this just dealt with by notations in a personnel file? How does this impact a person's career? The seriousness with which a person handles their responsibilities in the future—other prosecutors in the Department, I am sure, are watching about the accountability of employees in the Department when they make mistakes of this magnitude.

Mr. ROBINSON. I think it is very important, however, for us not to do here what we are urging young prosecutors not to do. I mean, we are at a stage here where I think that we need to fully under-

stand the facts, and there have been facts thrown around, it seems to me, including facts about the detention that are——

Senator TORRICELLI. I agree with that. That is why this is a theoretical question. I am not applying to anybody.

Mr. ROBINSON. Right; well, obviously, what all lawyers have and Federal prosecutors have is their reputation with Federal judges, with the defense community, with the public, with their supervisors. For me, that has always been enough, and I think for most lawyers it is enough. But that isn't where it stops. Obviously, there is the Office of Professional Responsibility referral and investigation. That is no fun for anybody even who gets vindicated at the end of the day.

Congress, as we know, saw fit to make it clear with regard to McDade that Federal prosecutors are answerable to every bar that they are involved in, so there is the State bar disciplinary process. An angry Federal judge upset with you, with whom you have to practice for the rest of your life, is a very serious matter. They also have sanctionable authority. So there are a whole host of matter, including if one were to engage in criminal activities as a Federal prosecutor, that can be implicated as well. There is the media attention and all that.

So it seems to me Federal prosecutors are fairly significantly scrutinized in the scheme of things, and I think the scrutiny is healthy for people who have this much power and authority. But I think on some of these issues, what we need to do is make sure, before we make judgments about people, that we fully understand what the facts are.

The detention with regard to Dr. Lee, was as a consequence motivated solely and exclusively by the very serious concern that there was missing in action from the Government's point of view information that the experts indicated could, if falling into the wrong hands, change the balance of global power in the world, a very serious matter.

Judge Parker originally at the detention hearing agreed with that. The tenth circuit approved that. There was a hearing about it, and the process worked itself out at the end of the day to the point where things changed from the judge's point of view. And so I think it is well to explore those things for the larger picture and that is what we ought to be doing as well, and if there are mistakes that are made—obviously, the Attorney General has indicated that this matter is going to be reviewed fully within the Department as well by its Office of Professional Responsibility, also. And we have obviously the important role of Congress in its oversight as well. So I think there are plenty of levers with regard to this and they are being exercised, and I think it is appropriate that they be exercised.

Mr. BAY. Senator Torricelli, if I could say one thing for the record, sir, you have referred on two occasions to line prosecutors and mistakes they might have made. But Judge Parker specifically said that virtually all of the lawyers who work for the Department of Justice "are honest, honorable, dedicated people who exemplify the best of those who represent our Federal Government." I don't want that to be lost.

And, in addition, with respect to the line prosecutors on the case itself, he said that they are all outstanding members of the bar "and I have the highest regard for all of them." That is on pages 57 and 58 of his transcript. Now, I would respectfully disagree with his criticisms, but I very much agree with his judgment as to the people who worked on the case.

Senator TORRICELLI. Well, given that as members of the U.S. Senate our responsibilities include not the oversight of Justice alone, but the general welfare of the people of the United States, allow me to write a paragraph into this analysis.

I agree with the Department of Justice's initial assessment that the loss of this information, a compromise of the activities at Los Alamos, could change the entire strategic balance of power and jeopardize the United States. I believe from much of the evidence that I saw that there was real reason to believe that Dr. Lee was guilty of some of these offenses. Indeed, he has now pled guilty to what is a serious offense.

Yet, the prosecution of the larger case was compromised. The case clearly was not handled appropriately, or it would not have resulted in a plea to a single of 59 counts. It is not clear to me that you are ever going to fully know what happened to those tapes or who saw them. There were misjudgments from the time a wiretap was required to the almost unbelievable manner in which we failed to get access to his computer and his workspace through the prosecution.

We can be laudatory about everyone who touched this case at every stage, but the final result suggests no one deserves any enormous credit. The people of the United States have no right to be proud of how this case was handled. Their interests, and even their security was potentially compromised. I say that not knowing how this case would have resolved. Perhaps Dr. Lee would have been found innocent, but I don't think any of us can feel particularly good about anybody's role in this activity.

Mr. Robinson.

Mr. ROBINSON. I was only going to suggest that one of the things that needs to be kept in mind—and obviously everybody is entitled to their opinion at the end of the day—these cases, particularly cases that involve as a necessary item of proof the exposure of confidential Government information—the whole decision to bring a case like this has perils associated with it.

We do have the Classified Information Procedures Act that mitigates in many ways that risk. But these kinds of cases oftentimes are not brought at all——

Senator TORRICELLI. I think that is an important point.

Mr. ROBINSON [continuing]. Because the exposure of the secrets publicly will do all the damage that you are trying to prosecute, and that was absolutely true in this case. The CIPA procedures were invoked. The signals coming from the judge—and, you know, Dr. Lee had the benefit of very fine lawyers who did a very fine job for him in connection with this matter. And part of their job before indictment and during the proceedings was to push the envelope as far as they could to get the Government to the point where the cost of proceeding would be outweighed by the cost of throwing in the towel.

And talk about a worst case scenario. It seems to me the worst case scenario in this case would have been a situation in which we would have had to throw in the towel because we couldn't afford to proceed with the trial. And we would have had none of the benefit of the plea bargain, none of the benefit of trying to get to the bottom of this, to get the answers which really are far more important than punishing Dr. Lee for his very serious conduct which he has now admitted.

We have to keep in mind that we have to assume the worst and hope for the best. And, assuming the worst, maybe you have to recalculate the whole nuclear arsenal of the United States because you can't take the risk that it is in the wrong hands. So I just think it is a point that needs to be——

Senator TORRICELLI. It is a good point to add that it required a mature and sober judgment to look at the larger interests of the country, finally, and I accept that and I think it was an important point to make here.

I have another seven tabs in my notebook, but given the fact that I have very little voice left, I know the witnesses will regret this, but I am unable to——

Mr. BAY. Senator Torricelli, may I add one footnote to what Mr. Robinson just said?

Senator TORRICELLI. Sure.

Mr. BAY. I would like to tell you something that happened during the course of the case that frankly I don't think has been disclosed before. In late May, we met with defense counsel in this case. They came over to the U.S. Attorney's Office in Albuquerque; this is in late May. And the defense lawyer said that he would never take a plea to any count in the indictment—that is, "he" being Dr. Lee—and that if the Government wasn't willing to accept, the defense was going to put the United States on a, "long, slow death march under CIPA."

I still remember that phrase, "long, slow death march" because as I was sitting in our conference room, I am hearing this defense lawyer tell us that he is going to bludgeon us using CIPA.

Senator TORRICELLI. Is that in the transcript or was this a private——

Mr. BAY. This was a private meeting that we had in late May when he said, my guy is not going to take any charge in the indictment and if you don't like that, I am going to put you on a long, slow death march under CIPA. And, you know, in mid-September, had the case not been resolved, the judge would have decided whether or not the Government substitutions under CIPA were adequate.

Our sense was that the judge was going to rule against us, and had that happened, our indictment would have been gutted. We either would have had to declassify a huge amount of highly sensitive information, nuclear source codes, or we would have had to dismiss counts in the indictment. It was a very stark choice. And then I think what Mr. Robinson was talking about, that could have been the result; that is, at the end of the day we would have had nothing.

Senator TORRICELLI. Thank you, Mr. Bay.

Senator SPECTER. Thank you, Senator Torricelli.

Mr. Bay, if somebody had told me when I was a prosecuting attorney they were going to put me on a long, slow death march, I would say let's start walking. That is the kind of a threat lawyers make——

Senator TORRICELLI. I believe that. [Laughter.]

Senator SPECTER. I have even done a lot of walking in my current job. That is the kind of threat lawyers make all the time.

And on the Classified Information Procedures Act, the Government had not run out the string on the legal challenges. You had offered a substitution so that you didn't have to make disclosures. The judge hadn't ruled on that. He may have been predisposed, but you never know until you get the ruling. And then you had appellate rights, so that you were a long way in this case from ever being required to produce confidential or highly sensitive information. And I am going to come to that, but I am going to start at a more important point.

There is a limitation on proceeding beyond 11:30 today, and as I said at the outset, Senator Lott has scheduled a meeting with Speaker Hastert and those of us involved in the appropriations bill on my subcommittee. So I am going to have to excuse myself shortly before 11 o'clock, but Senator Torricelli may want to go beyond. I don't think it is possible for me to get back before 11:30, and there are a number of topics I want to cover.

First, on the comment that the Attorney General is being criticized for being too aggressive and then not aggressive enough, there are two phases of this case. One was what the Government did by way of investigation, and the second is what was done to Dr. Lee.

The Attorney General has been subjected to criticism, and as Senator Torricelli commented, her testimony was taken in a closed session back on June 8, 1999, as to why a warrant was not authorized or pursued by the Department of Justice under the Foreign Intelligence Surveillance Act. And on that matter, FBI Director Freeh sent a top assistant, John Lewis, to talk personally to Attorney General Reno.

Attorney General Reno assigned the matter to Daniel Seikaly, who had had no experience with that Act, applied the wrong standard, and the application was turned down in August 1997, which put a dead stop to this investigation. And the FBI did relatively little until December 1998, and then we know what happened with the polygraph and thereafter. But that is when the Attorney General was criticized for not being aggressive enough.

The treatment given to Dr. Lee after the fact—we do not know to what extent the Attorney General was involved there. We haven't sorted that out. The Government was too aggressive, but it is not inconsistent with the Attorney General having been not sufficiently aggressive at an earlier stage.

Let me come to a question of proofs which bears on the indictment and the pressure brought on Dr. Lee, and that is, either Mr. Parkinson or Mr. Robinson, the statute required in the disjunctive that there either be injury to the United States or be to the advantage of a foreign nation. Director Freeh testified about injury to the United States and he specified three items. First, there was the most secure information which was disclosed. Second, the informa-

tion was placed on an open system. And, third, the key information was placed on tapes.

Is there any other factual element which went into the thinking of the Government to prove injury to the United States? Mr. Parkinson.

Mr. PARKINSON. I think you have captured the broad terms of the theory. I think we have stated at the outset of the prosecution when the indictment was handed down that the theory was, and still is, and I think was solid then and remains solid that the defendant had an intent to injure the United States, at the very least by taking what was within the sole control and dominion of Los Alamos, some of the Nation's most sensitive secrets, and depriving the U.S. Government of its sole custody and control of those secrets. And while there are no cases that parallel this in precedent, we all were comfortable, particularly analyzed within the Justice Department, that this was a viable theory and an appropriate theory upon which to charge Dr. Lee.

Senator SPECTER. Well, Dr. Lee was also charged with the lesser offense of downloading and mishandling Government information, which carries a 10-year sentence. Judge Bonner, the former head of DEA and former U.S. district judge, made a comment that the Government overcharged and the suggestion that the Government overcharged to subject Dr. Lee to an indictment which carried life imprisonment as part of the argument to urge the confinement.

I personally think it is a difficult question as to whether there is a showing of injury to the United States on proof beyond a reasonable doubt when you say that it was the most sensitive information, placed in an open system, and put on tapes, and you have an explanation which I do not accept at all about wanting this information to try to get a new job.

Mr. ROBINSON. Well, let me suggest that because this a circumstantial case with regard to his intent, there is additional evidence, I think, that bears upon this that is critically important and I think that this case was not overcharged.

Senator SPECTER. What is that additional evidence, Mr. Robinson?

Mr. ROBINSON. Well, I think, first of all, you have to look at the very surreptitious way in which this was done, the fact that it wasn't accidental, the fact that he didn't have a work-related purpose for doing this, the fact that we could infer from his conduct that anything that was to be done with these tapes, and making portable copies of it, because of the very unique nature of these—this information isn't usable to build widgets someplace. This information is usable to build bombs. These are strategic military information, and one can explore the issue of an intent to injure.

There is no doubt in the world about the fact that there was injury, egregious, enormous injury to the national security. The question was whether Dr. Lee intended to do it.

Senator SPECTER. Well, Mr. Robinson, doesn't the postulate of injury to the United States really turn on having these transmitted to some foreign power?

Mr. ROBINSON. That is an alternative thing in the statute, but injury to the United States is sufficient under the statute to make out a crime. It is sufficient to make out a crime under this statute

that there be an intent to injure the United States. It is not a requirement, and it wasn't charged as an espionage case in the sense of a delivery. Nothing in the indictment said that.

As a matter of fact, it was stressed at the time of the indictment that no allegation was being made that Dr. Lee had transmitted because we weren't in a position to offer that kind of proof. There had been a lot of speculation in the newspapers about those kinds of things, but those were not alleged by the United States. But we do believe it was fair and appropriate to charge the highest provable offense against Dr. Lee, which was that this was done with an intent to injure the United States. We believe we would have proved it as to all of the counts in the indictment that required that proof.

Senator SPECTER. Well, you may be right. I wouldn't want to pass on it beyond reporting Judge Bonner's comment which he made that there was an overcharge. And I think he didn't specify this, but I wondered when Director Freeh testified if there really was adequate proof beyond a reasonable doubt in the context of Dr. Lee's looking for other jobs.

But let me pick up the thought that you are making with respect to transference to a foreign power. That is espionage and that carries the death penalty if it is transferred to a foreign power. And there are quite a few links in the evidence which Director Freeh went over yesterday about contacts which Dr. Lee had with a foreign power.

In 1992, he had contact with a person who was under investigation. It was a telephone tap on the other individual, and then Dr. Lee didn't tell the truth about it until he was confronted. There was an incident in 1994, or even before 1994, a lot of travel to the People's Republic of China and a lot of contacts with officials, nuclear scientists, where Dr. Lee did not report them, as he was obligated to report them under the DOE procedures. And then there was a 1994 incident where Dr. Lee had contact with a nuclear scientist, with the overtone and some indication of having helped the PRC. So you have quite a series of those incidents.

And then you raise the question which is not answered, and it compounds the failure to get that warrant under the Foreign Intelligence Surveillance Act as to what was going on here with other suspicious circumstances in Dr. Lee's house, much of which is classified and can't be commented about in open session, which leads me to a two-part question.

First, did you consider a charge under the Espionage Act? And, second, weren't those factors weightier on showing a transference to a foreign power than the factors on injury to the United States?

Mr. Robinson.

Mr. ROBINSON. Well, I think it would have been overcharging to charge him with the death-penalty offense of espionage for transferring this information to a foreign power without the ability to prove that beyond a reasonable doubt. And so obviously the issue of all of the charges available were considered, and it was determined that the highest provable offenses should be and were charged in this indictment.

But I think if we had charged a death-penalty espionage for transmission of the information to a foreign power without the abil-

ity to prove it beyond a reasonable doubt, then people could have reasonably criticized that kind of a decision as overcharging.

Senator SPECTER. Did you consider that charge?

Mr. ROBINSON. We considered all of the charges.

Senator SPECTER. You did consider that charge?

Mr. ROBINSON. Obviously, that was—it is right in there among the other offenses to be looked at.

Senator SPECTER. I don't think you had enough to charge espionage either, but you know more about this case than I do. And I have just enumerated a number of factors which look in that direction. When you charge espionage and it carries the death penalty, you have really got to have a very, very powerful case. But I think by the same token, when you charge an offense which carries a life sentence, you have to have a powerful case, not to the same degree because the penalty does bear on the quality of the proof. But I raise those questions.

And I know your answer to this question, but I am going to ask it. Did you seek a charge—and this is not a charge that Dr. Lee pled guilty to. He pled guilty to the lesser charge carrying a 10-year sentence, not the one where you would have to prove injury to the United States. But did you consider that major a charge as a pressure tactic, Mr. Robinson?

Mr. ROBINSON. No; we felt that that was the highest provable charge that we could bring under the principles of Federal prosecution. The standard is for the Government to seek the highest provable charge against an individual. We thought this was appropriate when we charged it. We continue to believe it is appropriate today. And we believe, as Director Freeh and the Attorney General indicated yesterday, that if we had gone to trial, we believe that assuming the CIPA problems could have been overcome, we would have been able to secure a conviction beyond a reasonable doubt as to the charges made in the indictment.

Senator SPECTER. Well, without going into great detail because you didn't come to talk about the Dr. Peter Lee case, I think you had a stronger case for charging a life sentence case for Dr. Lee on injury to the United States than you had with Dr. Wen Ho Lee. I am not going to press you for a comment on that, but if you care to make one, I would be interested.

Mr. ROBINSON. Well, as the Senator knows, you have had extensive hearings on that. I think our positions have been made clear. I wasn't involved in that particular matter, but I think we have made our positions clear that that case, in the view of the Department, was appropriately handled by the prosecutors. I know there is some difference in opinion as to your view of the matter, and that is what this healthy dialog is all about and we try to learn from each other's views on this matter.

Senator SPECTER. Well, on Dr. Peter Lee, the Assistant U.S. Attorney in Los Angeles, Jonathan Shapiro, felt that he either had to take a lesser plea or he wouldn't get one. And Mr. Dion in Washington never ruled that out, so that there was an issue of miscommunication, that Main Justice in Washington never really ruled out a tougher charge as to Dr. Peter Lee. But in putting these cases side by side, my sense is that the *Peter Lee* case was stronger than the *Wen Ho Lee* case for the life sentence charge.

Let me come to the point that has been made about the treatment and the manacles. We have requested all of the documents and all of the writings to see exactly why Dr. Lee was put in leg irons and arm irons, attached to his waist. When he talked to his attorneys, the attachments were taken off. When he went to the men's room, they were put back on.

It is understandable that you didn't want Dr. Lee to have contacts with people where he could transmit information, secrets. The light in his cell, the comment about the Rosenbergs by the agent—that was in Director Freeh's written testimony conceding that it was inappropriate. He didn't comment about it orally.

You have a highly unusual circumstance—or let me get your view on it, Mr. Parkinson, that you have, I think the testimony was, incorrect information given by Mr. Messemer. Does that happen very often, Mr. Parkinson, by an experienced agent like Mr. Messemer on a very, very important fact in a very, very high-profile case?

Mr. PARKINSON. I am happy to say it does not happen very often, but I think again I would just simply point out the circumstances of this case where we had enormously voluminous materials to master. I don't mean to excuse that. He should have mastered it, but it does happen, but not frequently.

Senator SPECTER. Well, it raises a suggestion of the FBI really being on the line and the Department of Justice really being on the line, and the Department of Energy, too, really being on the line. And without going over what happened, suddenly, with the pendency of the Cox Committee report, you really threw the book at this man on the charges, really, and on the shackles and on the Rosenberg's statement and on the light, raising an inference—I am not saying that you were trying to coerce a guilty plea out of him, but that is a question you have to answer.

What was the purpose, Mr. Robinson, of having the light in Dr. Lee's cell?

Mr. ROBINSON. Well, I think we need to get to the bottom of that question because I learned about it only in connection with these proceedings. We have to find out whether it is a night light or whether it is burning light bulb.

I do know this, as was indicated by the Attorney General yesterday, that a jail monitor visited Dr. Lee in March at his facility where he was there because of the expressions of concern about the conditions of his confinement. And in a memorandum at the facility, he interviewed Dr. Lee and the jail monitor says that he personally met with Dr. Lee for about 20 minutes in his jail cell. He explained his role as jail monitor and the calls that he had received about Dr. Lee's condition.

Other than being incarcerated, he had no complaints. The staff was treating him very well, and he singled out Warden Barerras and Deputy Warden Romero as treating him great. "He told me that he had seen a doctor when requested, and he has not been sick or ill at any time during his incarceration. His only request was for additional fruit at the evening meal, which I relayed to Warden Barerras. I gave him my business card and told him to contact me through his attorney if there was any mistreatment or other issues regarding his incarceration. At no time did we discuss

his case or any fact relating to it," and he emphasized his role as a jail monitor.

There was a conversation, and Mr. Bay can indicate it, between the U.S. Attorney's Office and counsel for Dr. Lee about his conditions, and a number of things were done, obviously, to mitigate those. Whether some of them could have been done more efficiently, effectively or sooner, the key about the special administrative measures was to deal with his ability to communicate.

Senator SPECTER. How did the manacles relate to his ability to communicate?

Mr. ROBINSON. As I understand it—and I think we need to lay this out carefully so we understand exactly what happened. As I understand the situation, the conditions at this particular facility for prisoners in segregation, which Dr. Lee was in, are procedures that apply to all prisoners who are in segregation. So if this is a problem, perhaps it should be addressed on a systemic basis because there are certainly other prisoners in administrative segregation being treated exactly the same way.

Senator SPECTER. Did the monitor tell Dr. Lee he needed to have those manacles and leg irons?

Mr. ROBINSON. Did the what?

Senator SPECTER. Did the monitor tell Dr. Lee he had to have those leg irons and those wrist irons?

Mr. ROBINSON. No; as I understand it, the monitor was finding out from Dr. Lee whether these claims that he was being mistreated—whether he had concerns about that. There were efforts early on to get a Mandarin speaker to assist Dr. Lee in his communications. There were efforts to effect visiting times. There were efforts made later on particularly to remove any shackling during exercise.

The U.S. Marshals Service has also procedures for how they handle the transfer of all prisoners in custody from the facility to court, and those are standard procedures as well. But I think these are things that we ought to make sure we understand exactly all of the specific facts concerning these.

Perhaps Mr. Bay would also be able to enlighten us.

Senator SPECTER. Mr. Robinson, it is not uncommon for the prosecution to seek a jail sentence to induce somebody to testify, turn State's evidence.

Mr. ROBINSON. I think it would be inappropriate to have a pretrail detainee put in prison for that purpose. That was not the purpose of the detention here. And I would also point out that in the memorandum, Dr. Lee is purported to have said—Mr. Lee was very surprised about the calls concerning his treatment and stated, "I haven't complained to anyone about the jail because I am being treated very well." That is what he said in March 2000.

Mr. BAY. Mr. Chairman.

Senator SPECTER. Well, we intend to pursue this to find out if everybody is treated this way, or about the light and about the whole panoply of arrangements as to how he felt about it. It is not uncommon for someone in detention not to want to anger the custodian. You don't want to make your custodian mad. Who knows what is going to happen next?

Mr. BAY. Mr. Chairman.

Senator SPECTER. Mr. Bay, do you want to make a comment?

Mr. BAY. I have some information with respect to the light. I first learned of this a few days ago when I read about it in the newspaper. I have since made inquiries back in New Mexico and I am told that the light was a dull blue light, kind of like a night light, in Dr. Lee's room, and that the jail would use that just to make sure that if someone walked by and looked inside his cell that they could make sure that he was there and that he was doing OK.

I do know from having reviewed the correspondence in this case that we never received a complaint from defense counsel about the light. The main thing, though, is I don't want you, Mr. Chairman, to be left with the impression that there was some sort of bright light that was left on in his room 24 hours a day.

I also get the impression, Mr. Chairman, that this blue light was something that individuals in the administrative segregation part of the jail had in their cells, that this was not something special with respect to Dr. Lee.

Senator SPECTER. Well, we are going to pursue that to really find out exactly what happened, what the defense lawyers have to say about it, Mr. Holscher and Mr. Cline, and what was done specifically to Dr. Lee.

On the issue of racial profiling, there was supposed to have been a submission to the court, as I understand it, on September 15. And the judge commented that he regretted not being able to see those documents, but the case was concluded on the 13th.

How long will it take, Mr. Robinson, for the subcommittee to have access to those documents?

Mr. ROBINSON. I am not sure offhand. I do understand that the prosecutors did meet with Judge Parker and indicated that if he was interested in seeing any of this material, there was going to be no effort to not give it to Judge Parker if he was interested in it.

Am I correct, Mr. Bay?

Mr. BAY. That is correct. The lead prosecutor met with Judge Parker a few days ago.

Senator SPECTER. Have those materials been all collected?

Mr. BAY. I don't know. You would have to ask the Department of Energy. But we asked Judge Parker if he still had an interest in reviewing those materials and he indicated to the lead prosecutor that he no longer had that interest.

Senator SPECTER. Well, they were moot as far as he was concerned.

Are those materials all collected, Mr. Curran?

Mr. CURRAN. Sir, that is the first I am hearing of it, so there must be somebody else in the Department handling those. I know the Secretary had a racial profiling task force which put together most of——

Senator SPECTER. Well, Mr. Curran, Mr. Robinson, Mr. Parkinson, and Mr. Bay, would you give the subcommittee a response as to what is collected and how soon we can have access to them?

Mr. CURRAN. Sure.

Senator SPECTER. On the Classified Information Procedures Act, Mr. Robinson, when a decision was made to proceed with this case you knew that you faced that risk.

Mr. ROBINSON. We did.

Senator SPECTER. And you were prepared to go to trial, notwithstanding that problem. Did anything ever occur to change your view if you had an adverse ruling under CIPA?

Mr. ROBINSON. I think this is an important point to deal with because during the discussions with the Department of Energy, and particularly the classifiers there, obviously prosecutors who want to put the best case in would like to have as much information available, particularly given the circumstantial nature of this case.

The more light that could be shed on the critical importance and the strategic importance of this information, and the less usable that information is for other purposes, the better your case on intent is. So we were pushing to get as much information consistent with the national interest as possible. The Department of Energy understandably wants to protect that information. We made it clear——

Senator SPECTER. You thought you could put enough on to get a conviction?

Mr. ROBINSON. Assuming we could hold the line that we had established in connection with the declassification, which obviously there were very strong signs was not going to be held. But we also made it clear that this subject, as in all of these cases—whenever you bring one of these cases, you have to constantly reevaluate based upon CIPA rulings whether or not the cost/benefit analysis is going to tilt the other way.

Senator SPECTER. But you had not crossed that line.

Mr. ROBINSON. Not yet.

Senator SPECTER. You had made an offer of substitution so you wouldn't have to produce the sensitive material. The judge had not ruled on it.

Mr. ROBINSON. Right, that is quite right, and we didn't reach that.

Senator SPECTER. And you also had appellate remedies to take it to a higher court if you got an adverse ruling from Judge Parker.

Mr. ROBINSON. We did. Let me also suggest, however, that I understand your point about getting on that long death march, and I believe to a moral certainty that you would do it and I know you were a very skilled and forceful prosecutor. The only thing that I would suggest there is that I know that you would have made the same kind of sound judgment, assuming these facts.

If you ever lose the CIPA battle completely to the point where you have to throw in the towel, you would get nothing in return from the defense because you would have to dismiss your case. And as I said, the worst case scenario here would have been to have gone all the way and lost, at a point when we would have had to have made this very difficult decision as to whether the gray mail worked and we couldn't proceed because we couldn't expose those. We didn't get to that point, but I suggest that going all the way to the end to lose would have been a very, very bad scenario for the national security of the United States.

Senator SPECTER. Well, we are going to pursue that, but in closed session. We are going to want to know what it was on the worst case scenario you would have had to have produced, and get into the details as to what substitution was offered, and make an

evaluation as to whether you could have won that with Judge Parker or won it on appeal.

The imminence of the release of Dr. Lee is a factor which raises speculation that that was a critical factor in your decision to come to terms at that particular time; that once Dr. Wen Ho Lee would have been released by the court of appeals, had they done so, had their affirmed Judge Parker's order, there would have been a really very significant psychological loss for the Government, and also an ability to have an effective monitor on Dr. Lee, and that the real strength of your position lay in getting that detention and even if the pressure was not intended, to have that pressure.

How significant was the order releasing him to your final decision, Mr. Robinson?

Mr. ROBINSON. Well, obviously it was a factor because our reason for the special administrative measures was because of our concern about the national security. And we did make the point with Judge Parker that we did not feel the conditions—and the other thing that needs to be remembered is although Judge Parker was granting bail, he was granting bail with the most severe restrictions I have ever seen on a person who is not in custody with regard to what could have been done.

It would have been done at enormous expense of time and effort by the FBI and, in our view, at the end of the day would not have been satisfactory to protect our concerns. So it was obviously one factor, along with many others, that was also going along with this mediation process that Judge Parker has put in place to create, I think, the dynamics for the possibility of a resolution which, like all resolutions—I am sure that Dr. Lee and his attorneys would have preferred a different result, a nonfelony result that perhaps didn't involve the kind of cooperation.

We might have preferred something different as well, but we felt, and the Director and the Attorney General felt that this was the result that made the most sense to protect the national security, and I certainly agree with that.

Senator SPECTER. I have one final question from Dobie McArthur, who I will put on the record as having done an extraordinary job. He is a one-man task force. We don't have a budget, but we have McArthur, which is better than a budget.

With respect to CIPA, the question which Mr. McArthur poses is wouldn't the Government have been secure in not having to put on the input decks, which even Dr. Richter concedes was sensitive? So weren't those at least secure?

Mr. ROBINSON. Perhaps Mr. Bay can answer that.

Senator SPECTER. OK, Mr. Bay, you have the last word.

Mr. BAY. Mr. Chairman, with respect to the indictment, almost every count references the source codes, and that is the classified information that was under greatest attack in the CIPA ruling. And the judge had accepted an argument by the defense that the source codes were relevant to the defense, for reasons I don't want to get into here. But those sources, when you go through the indictment, are listed in almost every single count.

Senator SPECTER. We are going to have a hearing bringing in the scientists and make a determination as to whether these were the crown jewels or whether they were not and to what extent they

were sensitive. And to the extent we can, we are going to do an open hearing on that. We may have to go into closed session, but we are going to pursue that line.

Gentleman, thank you very much for coming.

Mr. Parkinson, do you want the last word?

Mr. PARKINSON. Mr. Chairman, I just wanted to add on that point that I think it is very significant we did have a major development, at least potentially, since yesterday, and that is that Dr. Richter's testimony in large part appears to have been retracted. And there is an account in the New York Times this morning about how he says when he testified that 99 percent of this was out there and unclassified, he was only referring to certain pieces of this. He said his comments did not apply to most of the data, or at least other data that Dr. Lee removed.

Senator SPECTER. Well, maybe you would have found that out if you had proceeded under the Classified Information Procedures Act and had further proceedings.

Mr. PARKINSON. Yes, we may have.

Senator SPECTER. You might have found that out before Judge Parker. I don't know that you could find out as much as the New York Times did, but you might have.

Thank you very much, gentlemen.

[Whereupon, at 10:59 a.m., the subcommittee was adjourned.]

CONTINUATION OF OVERSIGHT OF THE WEN HO LEE CASE

TUESDAY, OCTOBER 3, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. The hour of 9:30 a.m. having arrived, the Judiciary Subcommittee on Department of Justice Oversight will now proceed.

This is our fifth hearing into the issues involving the investigation and prosecution of Dr. Wen Ho Lee and today we are going to concentrate on a number of issues, including the seriousness of the information which was compromised by Dr. Lee and also the issue of racial profiling.

A very significant backdrop on our hearings relates to the statements made by Judge Parker on September 13 where he said, among other things, "With more complete balanced information before me I felt the picture had changed significantly from that painted by the government during the December hearing." And continuing, "I find it most perplexing, although appropriate, that the executive branch today has suddenly agreed to your release without any significant conditions or restrictions whatsoever on your activities. I note that this occurred shortly before the executive branch was to have produced for my review in camera a large volume of information that I previously ordered it to produce." The subcommittee intends to examine that information—even though the court could not because the matter was closed—to find what its import is.

Judge Parker then continued: "What I believe remains unanswered is the question of what was the government's motive in insisting on your being jailed pretrial under extraordinarily onerous conditions of confinement until today, when the executive branch agrees that you may be set free essentially unrestricted. That makes no sense to me." This subcommittee is determined to find out what the government's motives were.

The judge then continued somewhat later in this statement: "Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the executive branch." And he later said, "We will not learn why because the plea agreement shields the executive branch from disclosing a lot of information that it was under order to produce that might have supplied the answer." And here again the subcommittee intends to find what that answer is.

That is a very brief overview, necessarily curtailed by the fact that we have two votes scheduled at 10 o'clock. Those are beyond the power of the subcommittee. In fact, nobody knows what votes are going to be scheduled until they actually are on the day in question. And the subcommittee has also been restricted, as it was last week, by objections raised to having any hearings proceed 2 hours after the Senate goes into session, so that may restrict us, as well. We will endeavor to complete our list of witnesses today but we will just have to see how that goes.

I want to now yield to my distinguished colleague, the chairman of the subcommittee in its ordinary function, Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I thank you, Senator Specter, for your leadership in this whole area, holding these hearings and doing it in a timely and thorough manner and particularly the obstacles you have had to overcome to get to where we are today and maybe even obstacles to get to where we have to go further, sometimes obviously fighting even Members of Congress in our constitutional oversight—Democrats who, for obvious reasons, maybe do not want some of this information out but even sometimes fighting with Republican members of the Senate to do our job, and always having to work with the executive branch dragging its feet.

Now you are holding these under very difficult circumstances and I appreciate that very much. I think there is one thing that I want the public to keep in mind during these hearings, particularly one thing, and that is the public is only getting one side of the story. For now, Dr. Lee's side of the story is on hold. That is because his attorneys have asked that his side be told only after he is debriefed by the Government. We also asked to interview Judge Parker about his views of the case but Judge Parker declined our invitation, so the public is not going to get the full picture, which may not come into view for some time yet.

This case can only be described as a colossal blunder and when I say that, I am taking you back to 1996 when Dr. Lee was investigated for divulging the W–88 warhead data. That investigation was fundamentally flawed from the beginning. The Bellows Report confirms this point of view. So does any fair reading of the thousands of pages of documents that we read about this case.

Also throughout this case there has been lots of finger-pointing going on; it is still happening—the FBI, the Justice Department, the Energy Department, Congress, even the judge—and I imagine that we will see some of that even here at this very hearing. It all started when the Federal Government pointed its rather substantial finger at Dr. Lee without sufficient basis.

One thing that I agree with Mr. Vrooman about in his written testimony that is prepared for today's hearing, he says that Dr. Lee was singled out as having "the means and motivation" to compromise the W–88 information. Mr. Vrooman goes on to say, "Every time Lee's motive was discussed, it came down to ethnicity. There was no other motive ever suggested."

Now I was not privy to any discussions involving ethnicity but the issue of a motive was not discussed in the documents we received in this investigation. It was mentioned but was not discussed in any convincing way, and I think that is one of the more troubling aspects of this case. The job of this subcommittee and particularly this investigation is to learn what went wrong and why; then fix it so it does not happen again. And in regard to that, that is why today's hearing is so very, very important. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much.

Will Mr. Trulock, Mr. Wilkins, Dr. Richter, Dr. Younger, Mr. Vrooman all step forward? Would you gentlemen all raise your right hands?

Do you solemnly swear that the testimony you will give before this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God? Mr. Trulock?

Mr. TRULOCK. Yes.

Senator SPECTER. Mr. Wilkins?

Mr. WILKINS. Yes, sir.

Senator SPECTER. Dr. Richter?

Mr. RICHTER. Yes, sir.

Senator SPECTER. Dr. Younger?

Mr. YOUNGER. I do.

Senator SPECTER. Mr. Vrooman?

Mr. VROOMAN. Yes, sir.

Senator SPECTER. OK, Mr. Vrooman is at the far end of this table; Dr. Younger is next, Dr. Richter, and Mr. Wilkins, Mr. Trulock.

And for the record, Mr. Trulock is represented by Mr. Larry Klayman, who is seated next to him.

Dr. Richter, let us begin with you. We would be pleased to hear your opening statement at this time.

STATEMENT OF JOHN RICHTER, SCIENTIST, DEPARTMENT OF ENERGY

Mr. RICHTER. I would like to make one.

I assume that this hearing is to explore whether the case against Wen Ho Lee was conducted properly and whether congressional action is warranted. In 1958, about the time that Julius and Ethel Rosenberg were executed for atomic espionage, the most recent amendments to the Atomic Energy Act were enacted. Since then, the United Kingdom, France, China, Israel and perhaps India have built nuclear arsenals, in addition to those of the United States and the Union of Soviet Socialist Republics. Later, the Soviet Union collapsed, the Cold War ended. Also ended were such terms as mutual assured destruction.

In the Lee case, the out-of-date Atomic Energy Act, which included overly harsh criminal penalties, together with unrealistic

damage assessments from DOE, spurred the FBI and the prosecution team to actions that a large sector of the public found unacceptable. I urge the Congress to keep volatile laws, such as the Atomic Energy Act, current and not leave it to the courts. I would like to elaborate on some of these views next.

I have held various security clearances since 1958, including DOE, military and NSI. While not a very attractive aspect of employment, security is a condition of employment and I have never willfully violated it. Anyone who finds it onerous to work in a calcified environment should seek employment elsewhere.

Regarding the data that Wen Ho Lee downloaded on the unclassified computer, there are three categories of information: computer codes, material properties information, and problem setups, which include the W–88.

The first are only slightly classified because they describe physics that date back as far as the 17th century.

Senator SPECTER. Dr. Richter, are you now on the three categories of the nominated input decks, data files and source codes?

Mr. RICHTER. Right. The source codes I mentioned, they are very slightly classified. The materials properties information and then the problem set-ups.

The second, the materials properties information, is classified because it contains properties of high atomic number elements, like plutonium, et cetera.

Senator SPECTER. Now which are you referring to? Are you talking about data files or input decks?

Mr. RICHTER. Data files.

The third, the problem set-ups, the input decks, as you call them, are truly classified because they contain numerical descriptions of some of our nuclear weapons, including the W–88.

Let me consider what harm might have accrued to the security of the United States if the subject information had gotten into the hands of nations not necessarily friendly to the United States.

The United States exploded its first nuclear device in 1945, Russia 1949, the United Kingdom about 1951, France about 1958, China in 1964, India in 1974 and Pakistan in 1998. So clearly there is a lot of information worldwide regarding nuclear weapon technology. It has been around a long time.

We know that the Union of Soviet Socialist Republics, via Klaus Fuchs, got information from the United States. We also know that Russia gave China information. And we further know that China mentored Pakistan. The governments of the majority of the people on earth know how to build nuclear weapons that could cause serious harm to the United States and they have known it for a long time.

The problem set-up data in question can be compared with a partial cooking recipe. In addition to the recipe, the user must have an adequate kitchen, all of the ingredients, and considerable skill as a Chief. If he can already broil a steak, why should he attempt to prepare, say, Chateaubriand from an incomplete Cordon Bleu recipe?

The United States built nuclear weapons to maximize the Nation's chances for survival in case the Cold War turned hot. Those were the largest of MIRV's—multiple independently targeted re-

entry vehicles—on a missile, the largest yield together with the utmost safety.

No one now needs to build nuclear weapons the way we did. Indeed, if START–III happens, then MIRV will be outlawed. Tens of thousands of ready-to-shoot nuclear weapons are unnecessary now. It would be risk and expensive folly for another nation to build weapons now the way the United States has and especially without hands-on testing.

We are very concerned about the nuclear weapons of other nations. We look for vulnerabilities, technological surprises, but we do not copy their designs because we know how we prefer to build them. I suggest that other nuclear powers, particularly the more mature ones, have decided how they wish to construct nuclear weapons.

Recent cases similar to Lee's suggest that revocation of security clearance and termination of employment might suffice for the offense. In another case, the defendant also got a year in a halfway house. Inside the beltway, leaks to the media can best be described as an on-going hemorrhage of classified information of all categories, certainly not limited to DOE, yet there is no attempt to apprehend the perpetrators. This raises the specter of selective enforcement of the laws.

Lee was discharged from the laboratory in March 1999 but not arrested until December. Indeed, he was under surveillance for this period but he was free. After arrest, he was held incommunicado, which many felt was cruel and unusual punishment for a person awaiting trial.

At the August bail hearing Lee had been incarcerated for 8 months. The judicial industry standard is 6 months for the constitutional speedy trial. The almost-daily publicity would have made jury selection extremely lengthy, further delaying Lee's day in court from the proposed November trial date. Lee might have spent well over a year in jail before the case was settled. Apparently Judge Parker came to similar conclusions and settled the case and I salute him. Thank you.

Senator SPECTER. Dr. Richter, you testified at the bail hearing for Dr. Lee?

Mr. RICHTER. Yes, sir.

Senator SPECTER. And what was the essence of the testimony which you gave at that time about the nature of the classified information that Dr. Lee downloaded?

Mr. RICHTER. I tried to maintain the three categories that we have discussed. The codes, I think there has been discussion of whether it is 99 percent unclassified, et cetera. But, of course, the materials data are classified and the problem set-ups are certainly classified.

Senator SPECTER. Well, let us move to the input decks. What testimony did you give at Dr. Lee's bail hearing about what he did with the input decks?

Mr. RICHTER. Well, as far as I think the way we handled it there, it was all handled together—the codes, the materials properties and the input decks.

Senator SPECTER. Well, you testified at that time, "These codes and their associated databases and the input file, combined with

someone who knew how to use them, could, in my opinion, in the wrong hands, change the global strategic balance. 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."

Is that an accurate statement?

Mr. RICHTER. I did not say that. It probably was said but I did not say that.

Senator SPECTER. Well, we may have Dr. Younger's statement on that.

Dr. Younger, is that, in fact, your testimony?

Mr. YOUNGER. That is, Senator.

Senator SPECTER. Before responding to questions, would you care to make an opening statement?

Mr. YOUNGER. I would.

STATEMENT OF STEPHEN YOUNGER, SCIENTIST, DEPARTMENT OF ENERGY

Mr. YOUNGER. Thank you, Chairman Specter, for the opportunity to discuss facts related to the case of Dr. Wen Ho Lee.

The United States developed the most advanced nuclear arsenal in the world through a combination of complex computer calculations, laboratory experiments, and nuclear tests. Key to the design process was a series of sophisticated computer codes, supported by databases that describe the behavior of materials under extreme temperatures and pressures. These codes allow us to make reasonably accurate predictions of the performance of nuclear devices, predictions that were validated by nuclear tests.

I can say based on my review of the contents of the tapes made by Dr. Lee that he did systematically collect a set of nuclear weapons design tools that would enable the possessor to perform sophisticated calculations of nuclear explosives. Further, Dr. Lee's tapes contained the actual designs of a number of nuclear explosives, including some weapons currently in the U.S. arsenal.

It has been said that much of the information contained on the tapes made by Dr. Lee is available in the open literature. I believe this to be misleading. First, while much of the fundamental physics used in nuclear explosives design is unclassified, the specific combination of physics required to produce an adequate approximation of nuclear weapons performance is a secret. Indeed, one of the most sensitive pieces of knowledge in nuclear weapons design is what is good enough to adequately model a weapon. It is always better to put in more detail, to be more accurate, but even the largest computers in the world cannot handle all of the complexities involved in a nuclear explosion. Experienced physicists could waste a great deal of time trying various approximations before they found ones that were sufficiently accurate and sufficiently fast for practical calculations. United States design codes are the result of decades of work involving hundreds of people who had access to data from over 1,000 underground nuclear tests and atmospheric nuclear tests.

Second, some of the information on plutonium and uranium and other materials contained on the tapes was obtained through nuclear testing. It is not found in the open literature. Some of the

data contained on the tapes cannot be obtained by any means other than nuclear testing.

Third, the tapes that Dr. Lee made contained the designs of actual nuclear devices, some of which have been successfully tested. These designs are certainly not available in the open literature. Providing unauthorized persons with the designs of our nuclear weapons could enable them to advance their own weapons program and to identify and exploit weaknesses in our nuclear defenses.

Based on my knowledge of foreign nuclear weapons programs, I think I can say with confidence that our computer codes and databases are the finest in the world. No other country had the technology base that was necessary to perform some of the measurements that we made in our nuclear tests, measurements that were used in the calibration and validation of the computer codes downloaded by Dr. Lee.

In my opinion, it would be impossible, at least on a time scale yielding strategic surprise, for any country in the world to duplicate the information contained on those tapes without doing nuclear tests, regardless of how much money they were wiling to spend or the intelligence of their scientists. There are simply too many unknowns that cannot be resolved without extensive nuclear testing.

During my testimony at Dr. Lee's detention hearing in December 1999, I stated that the information that he downloaded could, if placed in the wrong hands, change the global strategic balance. I believed that then and I believe it now. Although the information itself does not convey all of the technology required to build deliverable weapons, it could advance the design effort enormously. Production of a weapon that would be a realistic threat still requires special nuclear materials, special engineering and fabrication skills and a capable scientific cadre.

Nuclear weapons are the most destructive weapons ever created by humankind. They are the only devices that can threaten the conventional military superiority of the United States. In the wrong hands, the information downloaded by Dr. Lee could enable a proliferant nation to design relatively crude but nevertheless effective nuclear weapons without nuclear testing. Those weapons would certainly not be as sophisticated as the weapons contained in the U.S. arsenal but they would be credible enough to influence other nations, including our own.

A nation that already had nuclear weapons could use the codes to help maintain their weapons or to improve them. The information contained on the tapes could also be used to find and exploit potential vulnerabilities in U.S. weapons.

The United States expects our existing nuclear weapons to last a long time. As other countries advance in their military capabilities, we must be prepared and be careful that our nuclear deterrent is not placed at risk by a compromise of our designs.

In summary, it is my opinion that the information contained on the tapes made by Dr. Lee could, in the wrong hands, pose a grave danger to the national security of the United States. Thank you.

Senator SPECTER. Dr. Richter, you have been quoted as testifying before Judge Parker that at least 99 percent of the nuclear secrets

that Dr. Lee downloaded to tapes were unclassified. Is that an accurate statement?

Mr. RICHTER. An accurate statement regarding the codes. I still maintain that. The materials properties, I do not think I was referring to that at that time. If I did say it that way then I did not mean it and I erred.

Senator SPECTER. So you were referring only to the codes and not to the data files or the input decks?

Mr. RICHTER. That is what I was referring to.

Senator SPECTER. Dr. Younger, what was the factual basis for your statement as to what Dr. Lee had, in fact, downloaded?

Mr. YOUNGER. I looked at detailed listings of the codes, the names of the files. I obtained information on the contents of those files and I knew by the names of the files what they indicated in terms of a design capability.

Senator SPECTER. So you could determine all that information from the files and you knew which files Dr. Lee had downloaded?

Mr. YOUNGER. I knew which files Dr. Lee had downloaded, yes.

Senator SPECTER. So that was your basis for determining what the information was?

Mr. YOUNGER. That is correct.

Senator SPECTER. Dr. Richter, as you hear Dr. Younger describe what Dr. Lee had downloaded, specifically when he says that information on plutonium and uranium and other materials contained on the tapes obtained through nuclear testing, it is not found in the open literature; some of the data contained on the tapes cannot be obtained by means other than nuclear testing, would you agree or disagree with what Dr. Younger said?

Mr. RICHTER. I would certainly agree with that, yes, sir.

Senator SPECTER. And Dr. Younger further testified, "Third, the tapes that Dr. Lee made contained the designs of actual nuclear devices, some of which have been successfully tested. These designs are certainly not available in the open literature."

Do you agree or disagree with that?

Mr. RICHTER. Yes, I agree, and I would like to elaborate.

Senator SPECTER. Please do.

Mr. RICHTER. It takes about—I am guessing—a foot-foot shelf of drawings, specifications, material processes and so forth to build one of these nuclear weapons, and that is not on the tapes. The basic dimensions are but nothing else. I mean the metallurgical processes of the materials, and so forth is not anywhere in there.

These are thought by many experts that I work with to be very, very important and could possibly defeat our efforts to maintain our nuclear stockpile, particularly the very sophisticated designs, such as the W–88.

Senator SPECTER. Dr. Younger, Dr. Lee's lawyers maintain that information he is accused of downloading was classified at the secret level. Is that accurate or inaccurate?

Mr. YOUNGER. That is accurate.

Senator SPECTER. Is it true that secret information can be sent through the mail?

Mr. YOUNGER. That is correct.

Senator SPECTER. Well, if it has only that classification, not even top secret, and can be sent through the mail, is there some problem

with our classification system that you characterize that material as sufficiently sensitive to change the global strategic balance?

Mr. YOUNGER. Well, Senator, it is not only secret data; it is secret restricted data. So in addition to——

Senator SPECTER. Could you define the difference between that and top secret data?

Mr. YOUNGER. Secret is a category which will cause serious damage to the United States. Top secret will cause even more grave damage to the United States. Restricted data concerns data associated with nuclear weapons and the procedures for the shipment of classified information are determined by the Department of Energy.

Senator SPECTER. Well, if the information is so valuable as to change the strategic global balance, why is it classified only at the secret restricted level?

Mr. YOUNGER. Secret restricted data was considered to be a category sufficiently high to protect the information. Access to a secret clearance does not guarantee access to nuclear weapons information. There is a further level of clearance required, specifically a Q clearance.

Senator SPECTER. Is it not true that the Department of Energy regulations say that restricted data can be sent through the mail, as well as secret data?

Mr. YOUNGER. Correct.

Senator SPECTER. You mentioned the Q clearance. Would you define what that means?

Mr. YOUNGER. That is a full background check in addition to a normal secret clearance.

Senator SPECTER. We are going to have a vote soon and there is a great deal to be covered, but at this time I want to yield to my distinguished colleague, Senator Grassley.

[Discussion off the record.]

Senator SPECTER. Dr. Younger, of the classified information on the computer systems that Dr. Lee had access to at Los Alamos, was there anything that was classified as top secret?

Mr. YOUNGER. Not on that system, no.

Senator SPECTER. Dr. Younger or Dr. Richter, do you gentlemen have any insights as to what Judge Parker was referring to when he said that he had been misled by the government? Dr. Younger?

Mr. YOUNGER. I do not.

Senator SPECTER. Dr. Richter.

Mr. RICHTER. I believe that what Judge Parker was referring to was the fact that the testimony that upset the world's strategic balance, he felt, was misleading. And I do not believe that the information there would upset the world's strategic balance.

Senator SPECTER. Why do you feel that the information would not upset the world's strategic balance?

Mr. RICHTER. Because I think so many people in the world know how to build nuclear weapons right now and they can build them their way and they would say, "Hmm, isn't this interesting how the Americans do it?" and let it go at that. That is an opinion, of course.

Senator SPECTER. Why do you believe that Judge Parker found that particular factor to be misleading?

Mr. RICHTER. As I understand it, the only sorts of information a court has is testimony and if the only testimony they have is that it is upsetting the world's strategic balance, then that would be misleading. And then somebody can come wandering in, for example, myself, and says it really is not that serious, and he would say, "Gee, I only heard one side of the story."

Senator SPECTER. Well, when you testified, Dr. Richter, that 99 percent of it was unclassified, you were talking about the source codes and not about the data files and the input decks, correct?

Mr. RICHTER. That is exactly right.

Senator SPECTER. Well, focusing for just a moment on the input decks, what was there about that classification which was restricted or very serious data?

Mr. RICHTER. This is some of the details of how we build our front-line nuclear weapons. Now, I spent a good deal of my career in the latter days trying to figure out what other nations' weapons are.

Senator SPECTER. Well, are you saying as to the material in the input decks that although classified, it was available to other nations?

Mr. RICHTER. It should not be. It should not be.

Senator SPECTER. Well, a few moments ago you said that so many nations know how to build nuclear weapons that it does not change the global strategic balance.

Now as to the input decks, would that be something known to other nations?

Mr. RICHTER. No, it should not be. This is the way the United States chooses to build its nuclear weapons.

Senator SPECTER. Well, as to the input decks, to what extent did Dr. Lee make disclosures on input decks which were not available, disclosures not available to other nations?

Mr. RICHTER. He should not have done it.

Senator SPECTER. Well, was that among the materials that Dr. Lee did, in fact, disclose?

Mr. RICHTER. I am afraid yes. Yes, indeed. I saw one of the input files myself.

Senator SPECTER. And what was that input file which you saw?

Mr. RICHTER. It shows the primary of the W–88.

Senator SPECTER. And to the extent that you can specify in this open hearing, and we can adjourn to a closed hearing for any portion of this or other testimony which may require that, can you amplify what you just said about the W–88?

Mr. RICHTER. It shows the dimensions, but none of the specifications that go into all of the rest of it, and that is just not there.

Senator SPECTER. It shows the dimensions but not the specifications?

Mr. RICHTER. Of the materials and the processes to produce them, the quality controls, surface finishes, machine surface finishes, and all the things it takes to build a mechanical object. And as you go to the more advanced weapons that we have, for example, the W–88, these things become ever more important.

Remember we nuked Hiroshima in 1945 with an untested device, so that is the other extreme. You can build an old clunker that will go bang, but I am saying that when you get to the maximum num-

ber of MIRV's on the missile and the largest yield you can get out of it, you have to be ever more careful, and that is not all there.

Senator SPECTER. Well, you have testified that as to the input decks, that was important information.

Mr. RICHTER. Oh, yes.

Senator SPECTER. And it did have a number of items as they related to the 88.

Mr. RICHTER. Yes, sir.

Senator SPECTER. But you are saying that it did not have all the information.

Mr. RICHTER. It lacked a great deal. It is like the recipe I was telling you about.

Senator SPECTER. Well then, what would your evaluation be as to what damage there was to the United States in having that information from the input decks available to a foreign power?

Mr. RICHTER. It would let them know how the United States goes about its nuclear weapon business. If they wish to emulate that, they can try.

Senator SPECTER. And with respect to the third category of the data files, what did you find as to what Dr. Lee had disclosed, if anything, as to data files?

Mr. RICHTER. It would certainly help them. The point is that, for example, China has been working on nuclear weapons since 1964. They have a pretty good idea of what the plutonium equation of state is.

Senator SPECTER. So then is the long and short of it, Dr. Richter, that when you were quoted as saying that 99 percent was unclassified that you were really referring to the source codes only and that, in fact, on the information from the input decks and the data files, that those disclosures certainly were harmful to the United States?

Mr. RICHTER. They did not help.

Senator SPECTER. Well, that is different from being harmful. How about my question? Were they harmful or not?

Mr. RICHTER. The answer to the question is when I was looking at other nations' information, we mainly took the view of "Isn't this interesting, to see what they are doing?" But we did not rush to the laboratory and put it into practice.

And I do not think the mature nations, for example, China, which has been in the business since 1964, would say, "Gee, isn't that interesting?" and let it go at that. I would say it is marginally harmful, at worst.

Senator SPECTER. Marginally harmful at worst.

Mr. RICHTER. Yes.

Senator SPECTER. We have not called all of the people who have expressed opinions on this, and we may, but Dr. Richard Krajek was quoted as saying that in the files I had the "crown jewels of the U.S. nuclear arsenal."

Was that an accurate statement in your opinion, Dr. Richter, or an overstatement?

Mr. RICHTER. I think it was an overstatement to the effect that we were building a Cold War weapon and the Cold War is over now and the Cold War ended when the Soviet Union collapsed, I believe in 1989.

So all of a sudden the terror, the balance of terror changed and you do not have to build a weapon that way anymore. It is very expensive, very costly.

Senator SPECTER. Well, while it is true that the Cold War is over, or so we hope, with the Soviet Union and now with Russia, there are other major threats to national security in the world.

Mr. RICHTER. Yes.

Senator SPECTER. So the question then becomes whether that information in the wrong hands could pose a major threat to the United States.

What we are trying to get a handle on here and these are very complex subjects, we are trying to get a handle on just how serious this information was. When you talk about changing the global strategic balance, that is cataclysmic. When you talk about crown jewels, you are talking about the most important information.

Dr. Paul Robeson stated that the information posed a truly devastating risk to national security. Would you agree or disagree with that, Dr. Richter?

Mr. RICHTER. I do not agree with it.

Senator SPECTER. Why not?

Mr. RICHTER. In order to develop the kind of nuclear weapons that the United States, Russia, China and Britain and France have, you need to have four nuclear materials—plutonium, uranium, tritium, and lithium-6. Now if you go into the more recent aspirants to it, like India and Pakistan, they do not have all of those and without those, they do not have the ingredients. They do not even have the kitchen.

So what I am saying is that there is a large dichotomy between the participants in this nuclear stand-off and the big four I have named—the United States, Russia, Britain and France. The rest of them, it is not going to help them much.

Senator SPECTER. Can other countries develop the so-called kitchen?

Mr. RICHTER. Yes, they can.

Senator SPECTER. And would this information then be of great significance to them if they develop the kitchen?

Mr. RICHTER. It could be, if they want to spend the national resource on it.

Senator SPECTER. Dr. Younger, do you agree or disagree with the statement attributed to Dr. Richard Krajek that the information in the files constituted the crown jewels of the U.S. nuclear arsenal?

Mr. YOUNGER. I agree.

Senator SPECTER. And do you agree or disagree with what Dr. Paul Robeson said, that the information posed a truly devastating risk to national security?

Mr. YOUNGER. I agree.

Senator SPECTER. Dr. Younger, what is your response to what Dr. Richter has said with respect to those four items? Are they indispensable ingredients for another nation to pose a really serious threat to U.S. national security?

Mr. YOUNGER. A nation needs at least a capability to produce enriched uranium or plutonium and beyond that, the additional materials will improve the efficiency of the weapons. But a basic capability can be obtained with either uranium or plutonium.

Senator SPECTER. So you are saying, contrary to Dr. Richter's assertion, that you do not need all four of those elements.

Mr. YOUNGER. You need all four elements for a sophisticated nuclear weapon. However, you can make a basic nuclear weapon with only one or two.

Senator SPECTER. We are now 15 minutes into the vote, a 20-minute vote, so I am going to have to recess the hearing temporarily. There is a second vote and we shall return as promptly as we can.

The hearing is now recessed.

[Recess.]

Senator SPECTER. The hearing will now resume.

Dr. Younger and Dr. Richter, what we are struggling with here is to understand the sequence of events which led Judge Parker to change his view. And you, Dr. Younger, and others testified before Judge Parker in December at the bail hearing and you, Dr. Richter, came to testify in August after there was later consideration as to whether the bail ought to be changed.

And there is another element here and that is the element about whether Dr. Lee continued to have possession of the tapes and there has never been a showing that the tapes continued to be in existence, at least at this point, with Dr. Lee's contention that the tapes have been destroyed, so that had Dr. Lee not had dominion over the tapes, there is no reason to keep him in custody because he cannot tell somebody where the tapes are and have them disclosed to some third party.

And Judge Parker said he found clear and convincing evidence to keep Dr. Lee in detention but then apparently that had slipped by the time Dr. Richter testified.

Dr. Richter, you work for Department of Energy, of course, right?

Mr. RICHTER. I am a retiree and I go back to the laboratory a couple of days a week as a laboratory associate.

Senator SPECTER. And you have worked for DOE?

Mr. RICHTER. I worked for——

Senator SPECTER. And you still do to the extent you have just described.

Mr. RICHTER. Exactly.

Senator SPECTER. And Dr. Younger, of course, you are an employee of the Department of Energy.

Mr. YOUNGER. I am an employee of the University of California, which is a contractor to the Department of Energy.

Senator SPECTER. OK; so your working for the Department of Energy is subject to the contract through the university.

Mr. YOUNGER. Yes, Senator.

Senator SPECTER. Dr. Richter, were you consulted by the government for an evaluation of the damage that this information would have done to the United States prior to the December bail hearing?

Mr. RICHTER. No, sir. You mean August, I hope.

No, I was not consulted by the government. I had one interview with the prosecution team and that is all.

Senator SPECTER. When?

Mr. RICHTER. Perhaps April, sometime in that time frame.

Senator SPECTER. Did you tell them essentially the same things you have testified here today?

Mr. RICHTER. Pretty much, yes, sir.

Senator SPECTER. Dr. Richter, do you know if the government, the Department of Justice, made an effort prior to the December bail hearing to develop a point of view such as you have testified, which downplays the importance of this information?

Mr. RICHTER. I have no idea because I was not consulted.

Senator SPECTER. Dr. Younger, do you know if the government made any effort to obtain, as Judge Parker put it, a more balanced view prior to the bail hearing in December 1999?

Mr. YOUNGER. Senator, I was not privy to all of the discussions of the prosecution. I merely provided a technical opinion when we were asked for it. I do not know that.

Senator SPECTER. Describe briefly just what the government said to you. Who contacted you for the Department of Justice?

Mr. YOUNGER. I was contacted by the U.S. Attorney's Office in Albuquerque and I was asked to provide my opinion on——

Senator SPECTER. Who specifically in the U.S. Attorney's Office?

Mr. YOUNGER. Mr. Kelly, U.S. attorney, and Robert Gorence, the assistant U.S. attorney.

Senator SPECTER. And what did they say to you?

Mr. YOUNGER. They asked me to provide my opinion as to the importance of the information that Dr. Lee downloaded from a technical perspective. They also asked for a primer on nuclear explosives design and a history of the codes that were on the tapes.

Senator SPECTER. You are not the judge, Dr. Richter, but do you think that there was clear and convincing evidence that the information Dr. Lee had rose to the level of being the crown jewels or extraordinarily sensitive for the United States government?

Mr. RICHTER. They are certainly sensitive but not by any stretch of the imagination crown jewels.

Senator SPECTER. Dr. Younger, again you are not the judge but in your view, do you believe that taking the totality of the evidence, your statements, Dr. Richter's statements, the other opinions rendered, that there is clear and convincing evidence that this information amounted to the crown jewels?

Mr. YOUNGER. If the design of the most sophisticated nuclear weapons on the planet are not the crown jewels of nuclear security, I do not know what is.

Senator SPECTER. OK. I take that to be a yes?

Mr. YOUNGER. It is a yes.

Senator SPECTER. OK; we have not talked to—Senator Grassley has indicated an interest in getting Judge Parker's views and I think that is a solid line. So far, what has been done is to talk to his law clerk and it may be that by the time we pursue this matter further, that we will want to talk to Judge Parker. Whether Judge Parker will want to talk to us is up to Judge Parker but if we cannot find the answers as to what Judge Parker had in mind, it may be a direct route to talk to Judge Parker.

I just want to make that comment because Senator Grassley had made a reference to Judge Parker, so that the information would be explicit as to what we have done and what we have not done.

Mr. Vrooman, thank you for joining us. You are now an ex-employee of the Department of Energy.

Mr. VROOMAN. Yes, sir.

Senator SPECTER. And you are living in——

Mr. VROOMAN. Bozeman, Montana.

Senator SPECTER. Montana, and you have come a long distance, so we appreciate your being here and we look forward to your opening statement.

STATEMENT OF ROBERT VROOMAN, FORMER COUNTERINTELLIGENCE OFFICER, DEPARTMENT OF ENERGY

Mr. VROOMAN. Thank you.

Chairman Specter and members of the committee, I am honored to have the opportunity to testify before this committee about the investigation of Wen Ho Lee.

In this opening statement I will address three issues: ethnic profiling, FBI and Los Alamos cooperation during the Kindred Spirit investigation, and the 1994 FBI investigation of Dr. Lee.

Many people have questioned shy the investigators into the original allegations of Chinese nuclear espionage failed to look beyond Los Alamos National Laboratory and Dr. Lee. Those asking this question include such distinguished people as former Senator Rudman, Senators Thompson and Lieberman, and recently FBI Director Louis J. Freeh. It is my opinion that the Kindred Spirit investigators had a subtle bias that the perpetrator had to be ethnic Chinese. I base my opinion on their comments and actions prior to and during the investigation.

These comments include noting something nefarious about the number of Chinese restaurants in Los Alamos, the number of Chinese postdoctoral employees and suggesting that DOE should not allow ethnic Chinese to work on classified programs.

In April 2000, a Los Alamos scientist who worked on intelligence programs wrote a letter to the employee news bulletin. He said, "While I was assigned to NSI–9"—that is the Intelligence Division—"I supported on a part-time basis the counterintelligence investigation into the alleged Chinese espionage at Los Alamos. Based on my experience and observations, I concluded that racial profiling of Asian-Americans as a result of the investigation indeed took place, but principally at the Department of Energy. Further, DOE personnel directed some Los Alamos National Laboratory staff to undertake research that profiled Asians and Asian-Americans at the laboratory. I do not believe any of us were happy with this. I feel insulted personally and professionally that the DOE is seeking to spread the tarnish that belongs on it by having the weapons complex undergo the mandatory diversity stand-down by May 5."

Now the author of the above letter is referring to a request from DOE headquarters to Los Alamos and Livermore for a list of Chinese-Americans and the programs that they were working on. Both laboratories refused to provide such a list because the request was clearly in violation of Executive Order 12333.

Director Freeh recently testified to a joint hearing of the Intelligence and Judiciary Committees that the FBI opened a case on Lee based on the DOE administrative inquiry which stated that, and I am quoting now, "Wen Ho Lee appears to have the opportunity, means and motivation" to compromise the W–88 information. Director Freeh is correct that the DOE inquiry stated this, but

I would like to add that every time Lee's motivate was discussed, it came down to his ethnicity. There was never any other motive discussed.

I would also like to note that the DOE inquiry was flawed because Lee did not have ready access to all the W–88/Mark 5 reentry system or other U.S. system that was similarly compromised. He would seem, at best, to be only one source of the complete leak. The FBI, of course, had no way of knowing this unless the DOE inquiry was a complete and rigorous investigation.

In spite of our reservations about the Kindred Spirit investigation, we cooperated fully with the FBI in all subsequent investigations involving Dr. Lee. From the day the FBI informed us that they intended to conduct an investigation into Dr. Lee, FBI representatives expressed similar reservations about the Kindred Spirit analysis. In my opinion, the FBI should not have accepted this case until certain issues were resolved, and I am willing to elaborate on these issues in any closed session if the committee desires.

As a result of serious questions about the DOE inquiry, the FBI did not assign an agent to the case full-time. It was added to one agent's already full caseload. The failure to aggressively resolve the allegations against Dr. Lee was a great source of frustration both to Los Alamos Director Sig Hecker and to me.

On February 14, 1997 I had an acrimonious meeting with the FBI counterintelligence squad chief in Albuquerque and he agreed to assign an agent to the case full-time. After this occurred we saw some progress on the case, including a FISA request.

On October 15, 1997 that agent told me that he had to stop working on the Wen Ho Lee case to work on the Peter Lee case and he requested our assistance in that investigation. Once again we had no agent assigned full-time to the Wen Ho Lee case and that was the situation when I retired from Los Alamos on March 13, 1998.

On February 23, 1994, during an officially approved six-person Chinese delegation to Los Alamos, Dr. Lee met with a member of that delegation. This meeting occurred in the presence of all the United States and Chinese participants, however, and was reported in writing to the FBI by a U.S. participant. This document is classified but is available to the committee from the author if they would like to have it.

I was not aware that this meeting resulted in an FBI investigation until Director Freeh testified to that on September 26, 2000. For the record, let me state that this investigation occurred without any request for assistance from Los Alamos. We were not aware of any renewed FBI interest in Dr. Lee until July 3, 1996.

We should not lionize Dr. Lee. He has much to answer for. On the other hand, he was not treated fairly. There are many examples, but I am most disturbed by the leaking of the investigation, along with his name, to the media. This single act destroyed the integrity of the investigation, as well as adversely impacting Dr. Lee. As a result of this, I doubt if we will ever solve the mystery of how the Chinese obtained U.S. nuclear weapons secrets.

Finally, I am concerned about the collateral damage from the Lee case, particularly the adverse impact it has had on our weapons labs. Former Senator Howard Baker and former Representative

Lee Hamilton recently reported that the arbitrary security changes at the national labs has damaged morale, productivity and recruitment.

In my opinion, this is all the more outrageous because the national labs have had and continue to have good security. If you look at what really counts, which are results, not audits of paperwork and procedures, security at the labs has been better than all other government agencies. The results are reflected in the number of people in the last 50 years who have been convicted, confessed to or fled the country to avoid prosection for espionage. When we look at this by organization, the results reflect favorably on the DOE complex. We have two cases in the DOE and neither case involved the compromise of nuclear weapons. During the same time period there were 10 cases in the CIA, three in the FBI and seven in the National Security Agency and over 80 in the Department of Defense. When one considers that the DOE population is at least an order of magnitude larger than all but the DOD, the record is impressive.

I believe that we must act quickly to repair the damage to our national labs so that the talent in these labs is available to meet the challenges of the 21st century. Thank you.

Senator SPECTER. Thank you very much, Mr. Vrooman.

Before we go to questions, if it is all right, Senator Grassley, we will hear an opening statement from Mr. Notra Trulock.

Mr. Trulock, let me say for the record that if there are any questions asked of you which you prefer not to answer, there has been some publicity about your being under investigation, so there may be some sensitive matters. We appreciate your being here but because of what we had heard about an investigation, we decided not to call on you but we appreciated your call and your willingness to come forward, but I want you to feel entirely comfortable. If something gets close to the line and you are represented by counsel, so he is here to protect you and I discussed the ground rules with Mr. Klayman yesterday to be clear that you would say only what you felt comfortable saying.

So within those guidelines, you may proceed.

STATEMENT OF NOTRA TRULOCK III, FORMER INTELLIGENCE CHIEF, DEPARTMENT OF ENERGY, ACCOMPANIED BY LARRY KLAYMAN, COUNSEL

Mr. TRULOCK. Thank you, Senator. I appreciate that.

Senator Grassley, good morning. My name is Notra Trulock. I am the former director of intelligence at the Department of Energy. I wish to thank the members of the Senate Judiciary Committee and Senator Specter, you personally, for providing this opportunity to speak out on the facts of the administrative inquiry into what is known as the Kindred Spirit Chinese espionage case.

For months I have remained silent while my role in the investigation was discussed in the media, in the course of Dr. Lee's detention hearings and up here on Capitol Hill. I must tell you that neither my family, my friends, nor I can recognize the individual that has been portrayed and depicted in these very public proceedings. And I wish to thank the committee for providing me this opportunity to try to set the record straight.

Much of what you have heard or read about DOE's conduct of the administrative inquiry into Chinese nuclear espionage is just plain wrong. Much of what you have heard or read about my role in that inquiry is worse than wrong; it is defamatory. Indeed, I have been forced to file libel and slander lawsuits against Mr. Charles Washington, Mr. Robert Vrooman, Energy Secretary Bill Richardson and Dr. Wen Ho Lee.

I have prepared a formal statement for the record. I request that it be entered at this time.

Senator SPECTER. Without objection it will be made a part of the record.

Mr. TRULOCK. I will confine myself to three main points. First, what was the administrative inquiry? How was it conducted, and by whom?

The DOE administrative inquiry was conducted with the full cooperation and participation of the Federal Bureau of Investigation. The FBI approved our methodology and approach, provided an experienced agent to participate with DOE during site visits to the DOE labs, reviewed and approved our draft final inquiry report, and enthusiastically accepted our report in June 1996.

The DOE/FBI's team's first visit to the laboratory occurred in January 1996. DOE at that point, at least DOE, had no preconceived ideas or notions about possible suspects. Indeed, DOE first learned of Dr. Wen Ho Lee when he was brought to our attention by Robert Vrooman in January 1996, not in October 1995, as the FBI has told Congress and the President's Foreign Intelligence Advisory Board.

The administrative inquiry was a records check, a records check as is performed in routine security reviews on a daily basis in Washington, nothing more, nothing less. DOE, by statute, is prohibited from conducting anything more than a record check and then only at DOE facilities. By law, we were not authorized to examine records at Department of Defense facilities or at Department of Defense contractors. We repeatedly told the FBI that W–88 information might reside at these facilities but that we at DOE were unauthorized to extend our inquiry to those facilities.

Furthermore, we did not limit our search to Los Alamos. The DOE/FBI team visited Los Alamos, Sandia National Laboratory in Albuquerque and Livermore National Laboratory outside of San Francisco. Further, we had records checked at Rocky Flats in Denver, CO and Pantex in Amarillo, TX, both industrial facilities that would have been involved in the production of the W–88.

Our final report listed 12 investigative leads for the FBI, not just from Los Alamos but also from Livermore. Not just Asian-Americans but also Caucasians from both laboratories. In fact, it was the FBI that focussed solely on Dr. Lee. DOE believed that the FBI would pursue all 12 leads with equal vigor and diligence.

Robert Vrooman and Charles Washington have alleged that in 1996 they told me that no evidence concerning Dr. Lee existed and that ethnic profiling had governed my actions. Let me state this clearly, recognizing that I am under oath. At no point in 1996, 1997 or 1998 did Robert Vrooman or Charles Washington express any concern, disagreement, dissent or protest with the conduct of the administrative inquiry or the conduct of the inquiry's report.

Mr. Washington was the acting director of the Department of Energy's Office of Counterintelligence during the conduct of the administrative inquiry. He supervised the DOE individuals conducting the inquiry. He reviewed and approved DOE's proposed administrative inquiry methodology. He reviewed and approved the inquiry team's travel. He reviewed and approved the inquiry team's report and approved its transmission to the FBI.

One of the most absurd allegations surfaced thus far, which was reported in the Washington Post, the Los Angeles Times and elsewhere, concerns the contents of a memo purportedly sent to me by Mr. Washington in 1996. Mr. Washington has repeatedly claimed that he warned me in the memo there was no evidence against Dr. Lee and the case should be closed. The Post even claimed to have a copy of the memo. In fact, I have seen a copy of that memorandum and I recall clearly its contents. The memorandum was dated May 16, 1996. The memo makes no mention of Dr. Lee. It recommends that we transmit the record of our inquiry to the FBI and it notes that DOE is "close to becoming involved in an espionage investigation, which we do not have the authority to do."

In February 2000, I wrote to Secretary Richardson requesting that he make this memo available to the Justice Department to clear up these spurious allegations. My information is that DOE has refused to provide that memo to Justice or to the appropriate oversight committees on Capitol Hill, as it has been with so many documents over the past two years that are relevant to the oversight function of this and other committees on Capitol Hill.

Mr. Vrooman was present at our initial briefings for the FBI. He assisted our team during their visit to Los Alamos in January 1996. He was the first to identify Dr. Lee to our team during that visit and recommended that we focus our attention on him. He was present at our briefing for the FBI in the late spring of 1996 and I personally saw Vrooman at least six times over the course of the next three years. My secretary kept careful records of in-coming phone calls throughout this period. At no time did Vrooman call me to discuss his concerns.

He was a key participant in a DOE/FBI Los Alamos meeting in April 1997 held at Los Alamos that focussed on the FBI's handling of the Lee investigation to that point. At no time during that or any other meeting did Vrooman protest or express any dissent or concern to the FBI or DOE's participants about the FBI's investigation of Lee. In each instance, as the resident Los Alamos counterintelligence official, Vrooman willingly cooperated with the FBI in its handling and approach to Dr. Lee.

Finally, Vrooman and especially Mr. Washington have alleged that my actions were motivated by my racist views toward minority groups—quote, closed quote. In fact, the facts of my management tenure at DOE put the lie to this allegation. I repeatedly opened new career opportunities for women and minorities during my tenure and twice received awards in recognition of my efforts on behalf of women and minority employees within my office from the DOE chapters of Federally Employed Women and Blacks in Government. I have brought with me today one photograph that was taken during one of those award ceremonies. I would be happy to provide it to the committee.

The Director of Central Intelligence, George Tenet, awarded the highest intelligence community medal for distinguished service to one of the key participants and managers in the counterintelligence aspects of the Kindred Spirit case. He also awarded and rewarded other DOE managers and laboratory scientists, including Dr. John Richter, for their contributions to the U.S. intelligence community in the Kindred Spirit case during my tenure as director of intelligence.

Allegations made by disgruntled employees from the DOE Office of Counterintelligence against me were investigated by the department and repeatedly found to be baseless. Time after time the conclusion of independent outside investigators, "that complainant was not discriminated against with respect to the matters raised in his complaints."

Mr. Washington has alleged that he won his complaint but the settlement arrived at after I left the department clearly states that it shall not constitute an admission of liability by the Department of Energy. Secretary Richardson's willingness to settle this case has caused great discontent within the department. Clearly the settlement serves Secretary Richardson's larger purposes.

Mr. Washington has alleged that I assaulted him and this allegation has been repeated in the national media. I have with me today the 1997 police report of the final action on that allegation. The conclusion of that report is, "Based on the facts of the case, no assault occurred." I repeatedly requested the department to take action on this false allegation but the department declined to do so.

Robert Vrooman has alleged that I stated no ethnic Chinese should be allowed to work on U.S. nuclear weapons program. That statement is categorically false. In fact, I stopped efforts by senior DOE managers, including Assistant Secretary Victor Reese and Director of the Office of Nonproliferation and National Intelligence Kenneth R. Baker, including several others still at the department, to compile a database on the ethnicity of American citizens—American citizens with access to classified nuclear weapons information. I thought this was an outrageous overreaction to a very serious problem.

In fact, we were concerned about our ability to sustain counterintelligence safeguards in light of the explosion in the numbers of foreign nationals at the laboratories, particularly those from countries on the sensitive country list, like Russia, India and China. But we were hardly alone in our concerns. The Government Accounting Office repeatedly cited DOE for its lack of counterintelligence and security safeguards to protect sensitive information in light of the ever-increasing numbers of sensitive country foreign nationals at our labs.

A 1997 FBI report on DOE counterintelligence made the same observation and recommended a number of fixes. Sadly, DOE management resisted these recommendations.

In 1997 FBI Director Louis Freeh told DOE managers that if DOE failed to address its security vulnerabilities, then the Congress would do it for DOE. He was right. While many now decry the heavy-handed security regime imposed by the Hill on the labs, they only have DOE managers to thank for the state of affairs in the laboratories today. These officials resisted internal reforms in

1997 and even delayed implementation of the mandates of the 1998 presidential decision directive until well into 1999 and the year 2000.

In conclusion, I would point out that it is now fashionable to express doubts about whether Chinese nuclear espionage even occurred. I would remind the committee that the unclassified intelligence community damage assessment, published in May 1999, concluded that the Chinese had indeed obtained through espionage U.S. nuclear weapons design information, including on the W–88 Trident D–5 warhead.

Further, the assessment concluded that information probably accelerated China's efforts to develop modern nuclear weapons. That conclusion mirrors very accurately the conclusion arrived at by a prestigious group of laboratory nuclear weapons scientists in 1995. I would add that Dr. John Richter was an important member of the group that formulated and developed that assessment.

The CIA reiterated their judgments about Chinese espionage later in 1999 in an estimate on ballistic missile developments. I am not aware that the DCI or any other intelligence community spokesman have contradicted or revised this estimate.

So for 5 years now we have been aware of the Chinese acquisition of some of our most sensitive nuclear weapon secrets. Are we any closer today to determining the source of this compromise? I am afraid that the answer is no.

That concludes my statement. I am happy to take questions.

[The prepared statement of Mr. Trulock follows:]

PREPARED STATEMENT OF NOTRA TRULOCK III

My name is Notra Trulock, III, and I am the former Director of Intelligence at the Department of Energy. I wish to thank the members of the Senate Judiciary Committee, and Senator Arlen Specter, for providing this opportunity to speak out on the facts of the Wen Ho Lee investigation. For months, I have remained silent while my role in the investigation was discussed in the media, in the course of Dr. Lee's bail hearings, and on Capitol Hill. Neither my family, my friends, nor I can recognize the individual portrayed in these very public proceedings. I wish to thank the Committee for providing me this opportunity.

Much of what you have read or heard about DOE's conduct of the Administrative Inquiry into Chinese nuclear espionage is just plain wrong. Much of what you have heard or read about my role in that inquiry is worse than wrong, it is defamatory. Indeed, I have been forced to file libel and slander lawsuits against Mr. Charles Washington, Mr. Robert Vrooman, Energy Secretary Bill Richardson, and Dr. Wen Ho Lee.

I request that my formal statement be entered for the record. Let me discuss three main points.

1. What was the Administration Inquiry, how was it conducted and by whom?

The DOE Administrative Inquiry was conducted with the full cooperation and participation of the FBI. The FBI approved our methodology and approach, provided an experienced agent to participate with DOE during site visits to the DOE labs, reviewed and approved our draft final inquiry report and enthusiastically accepted our report in June 1996. The DOE–FBI team's first visit to a lab site occurred in January 1996; DOE, at least, had no preconceived ideas or notions about possible suspects. Indeed, the DOE team first learned of Dr. Wen Ho Lee from Robert Vrooman in January 1996, not in October 1995 as the FBI told Congress and the PFIAB.

The AI was a records check as is performed in routine security reviews on a daily business. Nothing more, nothing less. DOE by statue is prohibited from conducting anything more than a records check, and then only at DOE facilities. By law, we were not authorized to examine records at DOD facilities; we repeatedly told the FBI that W88 information might reside at these facilities, but that we DOE were unauthorized to look there.

We did not limit our search to Los Alamos. The DOE–FBI team visited Los Alamos, Sandia, and Livermore. We had records checked at Rocky Flats and Pantex. Our final report listed 12 "investigative leads" for the FBI, not just from Los Alamos but also from Livermore. In fact, it was the FBI that focused solely on Dr. Lee; DOE believed that the FBI would pursue all 12 leads equally.

2. It is alleged that Robert Vrooman and Charles Washington told me in 1996 that no evidence existed concerning Dr. Lee and that ethnic profiling governed my actions.

Let me state this clearly: at no point in 1996, 1997, or 1998 did Robert Vrooman or Charles Washington express any concern, disagreement, dissent, or protest with the conduct of the Administrative Inquiry or the content of the Inquiry's report. Mr. Washington was the Acting Director of DOE/CI during the conduct of the Administrative Inquiry; he supervised the DOE individuals conducting the inquiry, he reviewed and approved DOE's proposed AI methodology, he reviewed and approved the inquiry team's travel, he reviewed the inquiry team's report and approved its transmission to the FBI.

One of the most absurd allegations thus far, which has been reported in the Washington Post, LA Times and elsewhere, concerns the contents of a memo sent to me by Charles Washington in 1996. Mr. Washington has repeatedly claimed that he warned me in the memo that there was no evidence against Dr. Lee and that the case should be closed. The Post even claimed to have a copy of the memo. In fact, I have seen a copy of the memorandum, dated May 16, 1996.

Suffice to say the memo makes no mention of Dr. Lee, it recommends that we transmit the record of our Inquiry to the FBI, and it notes that DOE is "close to becoming involved in an espionage investigation, which we do not have the authority to do." In February 2000, I wrote to Secretary Richardson requesting that he make this memo available to the Justice Department to clear up these spurious allegations. My information is that DOE has refused to provide that memo to Justice or to the appropriate oversight committees on Capitol Hill. As it has with so many documents over the past two years that are relevant to the oversight function of this and other committees on Capitol Hill.

Mr. Vrooman was present at our initial briefings for the FBI, he assisted our team during their visit to Los Alamos in January 1996, he was the first to identify Dr. Lee to our team during that visit and recommended that we focus our attention on him, he was present at our briefing for the FBI in late Spring 1996, and I personally saw Vrooman at least six times over the course of the next three years. My secretary kept records of incoming phone calls throughout this period; at no time, did Vrooman call to discuss his concerns with me. He was a key participant in a DOE–FBI–Los Alamos meeting in April 1997 that focused upon the FBI's handling of the Lee investigation to that point. At no time during that or any other meeting did Vrooman protest or express any dissent or concern to the FBI or DOE participants about the FBI's investigation of Lee. In each instance, as the resident Los Alamos CI official, Vrooman willingly cooperated with the FBI in its handling and approach to Dr. Lee.

3. Finally, Mr. Vrooman and especially Mr. Washington have alleged that my actions were motivated by my "racist views toward minority groups."

The facts of my management tenure at DOE put the lie to this allegation. I repeatedly opened new career opportunities for women and minorities during my tenure and twice received awards in recognition of my efforts on behalf of women and minority employees within my office from the DOE chapters of FEW and Blacks in Government. The Director of Central Intelligence awarded the highest Intelligence Community medal for distinguished service to one participant in KINDRED SPIRIT case; he also rewarded other DOE managers and Laboratory scientists for their contributions to the U.S. Intelligence Community during my tenure.

Allegations made by disgruntled employees from the DOE Office of Counterintelligence against me were investigated by the Department and repeatedly found to be baseless. Time after time, the conclusion of independent outside investigators: "that Complainant was not discriminated against with respect to the matters raised in his complaints."

Mr. Washington has claimed that he won his complaint, but the settlement, arrived at after I had left the Department, states clearly that it "shall not constitute an admission of liability" by DOE. Secretary Richardson's willingness to settle this case has caused great discontent in the Department, but the settlement served Richardson's larger purposes.

Mr. Washington has alleged that I assaulted him and this allegation has been repeated in the national media. I have the Federal Protective Service's 1997 final report of the incident. The conclusion: "based on the facts of the case no assault oc-

curred." I repeatedly requested that the Department take action on this false allegation, but the Department refused to do so.

Robert Vrooman has alleged that I stated that no ethnic Chinese should be allowed to work on U.S. nuclear weapons programs. Again, categorically false. In fact, I stopped efforts by senior DOE managers, including several still at the Department, to compile a database on the ethnicity of American citizens with access to classified nuclear weapons information. I thought this an outrageous overreaction to a serious problem.

We are concerned about our ability to sustain counterintelligence safeguards in light of the explosion in numbers of foreign nationals at the labs, particularly those from countries on the sensitive list like Russia, India, and China. We were hardly alone in our concerns; the Government Accounting Office repeatedly cited DOE for its lack of safeguards to protect sensitive information in light of the ever-increasing numbers of sensitive country foreign nationals at our nuclear weapons labs. A 1997 FBI report on DOE CI made the same observation and recommended a number of fixes; sadly, DOE management resisted these recommendations.

FBI Director Louis Freeh told DOE in 1997 that if DOE management failed to address its security vulnerabilities, the Congress would do it for DOE. He was right; while many now decry the heavy-handed security regime imposed by the Hill on the labs, they only have DOE management to thank for the state of affairs in the labs today. These officials resisted internal reforms in 1997 and even delayed implementation of the mandates of the 1998 Presidential Decision Directive until well into 1999 and 2000.

In conclusion, I would point out that it is now fashionable to express doubts that Chinese nuclear espionage even occurred. I would remind the Committee that the unclassified Intelligence Community Damage Assessment, published in May 1999, concluded that the Chinese had indeed obtained through espionage U.S. nuclear weapons design information, including on the W88 Trident D5 warhead. Further, that information probably accelerated China's efforts to develop modern nuclear weapons. That conclusion mirrors very accurately the conclusion arrived at by a prestigious group of laboratory nuclear weapons scientists in 1995. The CIA reiterated their judgments about Chinese espionage later in 1999 in an estimate on ballistic missile developments. I am not aware that the DCI or any other Intelligence Community spokesmen have contradicted or revised this estimate.

So, for over 5 years now, we have been aware of the Chinese acquisition of some of our most sensitive nuclear weapons secrets. Are we any closer today to determining the source of this compromise?

Senator SPECTER. Thank you very much, Mr. Trulock.

Senator Grassley.

Senator GRASSLEY. Mr. Vrooman, I would like to have you elaborate on your comment that whenever Dr. Lee's motive was discussed it came down to ethnicity. Could you be specific about what was said and by whom?

Mr. VROOMAN. The first example that comes to mind is during the Thompson-Lieberman hearings. They were in closed session. Can I do that here or would you prefer I——

Senator GRASSLEY. I will let the chairman make a ruling as to whether or not he can say something here that was said in the closed Lieberman hearing.

Senator SPECTER. Well, I think that depends upon Mr. Vrooman's assessment as to the propriety of the statement in open hearing. That is really best judged by the witness.

Senator GRASSLEY. OK; I would ask you to tell us if you feel like you can because I would like to get as much of this out in the open as we can.

Mr. VROOMAN. Well, the Department of Justice representative asked the FBI what Lee's motive was because it was not clear to him and the response was an elaboration on how the Chinese focus their efforts on ethnic Chinese. That is one example. And there are others, conversations over the years since this investigation proceeded, that that was the only motive.

Senator GRASSLEY. OK; could you point to any documentation that would back up the point that you just made?

Mr. VROOMAN. No, sir, I cannot.

Senator GRASSLEY. Or the points that you are making about ethnicity being of prime concern?

Mr. VROOMAN. I do not believe there are any documents.

Senator GRASSLEY. You state, Mr. Vrooman again, you state that the leaking of Dr. Lee's name had an adverse impact not only on Dr. Lee but also on the integrity of the investigation into how the Chinese obtained U.S. nuclear secrets. It is understandable how the leak would have had an adverse impact upon Dr. Lee but I would please like to have you explain to me how it hurt the integrity of the investigation.

Mr. VROOMAN. Well, it limited the investigative tools available to the FBI. For example, a wiretap is hardly useful if the subject of the wiretap knows he is under investigation. A false flag operation has the same problem. If the individual knows he is under investigation, he is not going to bite. And if there are other people or one other person out there, they are certainly aware that there is an investigation now.

So what it did is limit the availability of investigative tools to the FBI.

Senator GRASSLEY. I would like to ask you, Mr. Vrooman, and then Mr. Trulock if either of you could shed any light on which agency and who in that agency was behind leaking Dr. Lee's name to the media.

Mr. VROOMAN. I do not have a clue, Senator Grassley.

Senator GRASSLEY. Do you, Mr. Trulock?

Mr. TRULOCK. I can only provide to you second-hand information but my information indicates that Dr. Lee's name came out of the Office of the Secretary at the Department of Energy.

Senator GRASSLEY. Mr. Vrooman, you mentioned one way in which Dr. Lee was treated unfairly, that his name was leaked to the media. What are other ways that you would refer to that he was treated unfairly?

Mr. VROOMAN. Well, the conditions of his confinement I thought were excessive and that is basically it. This is just my personal opinion. I thought we could have granted him bail, given the fact that if he had not given away that information in 6 years, it was highly unlikely he was going to do it at this time.

Senator GRASSLEY. Now Mr. Trulock, the documents that we reviewed as part of this investigation confirm what you say about the FBI giving its blessing to the administrative inquiry, so I want to state for the record that that is the case because the FBI has tried to absolve itself of that concurrence.

Mr. TRULOCK. Thank you, Senator.

Senator GRASSLEY. Mr. Trulock, before the administrative inquiry began there was a panel of scientists convened to reach a consensus as to whether the W–88 was compromised. Was there a consensus and if so, what was it?

Mr. TRULOCK. Let me talk about the process and be careful about the conclusions of the panel that was convened. They are still classified, to the best of my knowledge.

But in April 1995, two scientists from Los Alamos brought to me their concerns that a modern nuclear warhead in our inventory had been compromised. I considered the allegation to be sufficiently serious to bring in an individual that I considered to be the preeminent nuclear scientist in our laboratory complex, Dr. John Richter. Richter came back, joined us in May of 1995, brought forth yet another paper indicating that it was their concern that, in fact, it was the W–88 evidence that had been compromised.

At that point I considered the allegations sufficiently serious enough to brief my superiors, Undersecretary Charles Curtis, Mr. Baker, who I mentioned earlier. We also informed at that point John Lewis, who was then the assistant director of the National Security Division of the FBI.

It is customary within the laboratory complex to conduct a peer review of such conclusions of such enormity. I asked Michael Henderson from Los Alamos National Laboratory to put together a peer review group. He assembled a group, including Dr. Richter. The group had decades of experience in the design, production, development and testing of nuclear weapons. Among them they had nearly 100 nuclear tests in Nevada to their credit. Dr. Richter alone had 40.

The group met over the summer 1995. Initially the debate was contentious and there were conflicting views as to whether the Chinese had benefitted or the extent to which they had benefitted from acquisition of the information.

At that point the CIA made available to us what has become known as the walk-in document. Again the contents of the walk-in document are classified but I will tell you that at that point it is my recollection that the group coalesced and came to a set of conclusions that were briefed to Undersecretary Curtis in September of 1995 and briefed again to Undersecretary Curtis in March 1996.

It is alleged that there were minority views within that group. During the presentations to Mr. Curtis, both in September and March, I encouraged, as if I would need to, the laboratory scientists to speak out. The presentations were made by the scientists themselves. I can recall no dissent being expressed during the meetings with Mr. Curtis. I do know if Dr. Richter has a dissent from that. That is my recollection and it was on the basis of that conclusion and Mr. Curtis's direction that we referred the case initially to the FBI.

The FBI refused to take it, asserting that it was too old and the trail was too cold. This would be in the fall of 1995.

Senator GRASSLEY. So it was your opinion then that there was a sufficient basis upon the conclusion of the panel's work to move ahead with the investigation?

Mr. TRULOCK. It was the conclusion of the Department of Energy, as expressed by Mr. Curtis, the undersecretary, that indeed there was sufficient basis to refer the case to the FBI.

Senator GRASSLEY. Dr. Richter, I saw you shaking your head. You are in concurrence with everything that Dr. Trulock said, or at least the conclusion?

Mr. RICHTER. I agree with the conclusion, yes, but there are some details, but I do not think they are very important.

Senator GRASSLEY. My last question is to Dr. Younger. Quite frankly, based upon just press reports that we have, but we were told in these press reports that Dr. Lee was not even required to lock this restricted data in his desk overnight. Is this true? And if it is true, then doesn't that say something about that either the restricted data is not as important as what people thought it was or it was not properly handled by not having it locked up?

Mr. YOUNGER. The material was kept in a Q area—that is, a secret restricted area—which was behind a fence at the laboratory. It was in a limited access area, a further level of protection. And further, it was behind a locked door.

Senator GRASSLEY. So then the press reports are wrong.

Mr. YOUNGER. That is correct.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Grassley.

Mr. Vrooman, the documents were provided to this subcommittee just last night that I want to start with, which is a memorandum from Craig Schmidt of the FBI Albuquerque office. "On August 25, 1995, Bob Vrooman, who oversees counterintelligence matters, advised the Los Alamos National Laboratory's report regarding Kindred Spirits will be provided to Notra Trulock of DOE headquarters in approximately two weeks. Further, a 'smoking gun has been found.' Vrooman learned of the information from Diane Saran."

Do you recollect that, Mr. Vrooman?

Mr. VROOMAN. No, I do not. I did have a meeting with Diane Saran, who unfortunately is deceased now, and this is puzzling to me. I do not know what they are talking about.

Senator SPECTER. Reference to a smoking gun is a pretty dramatic statement to appear in an FBI memorandum attributed to you. If there had been such a reference, do you think it is something you would recollect?

Mr. VROOMAN. Yes, if they can elaborate, but this is the first time I have seen this, obviously.

Senator SPECTER. Well, we just saw it yesterday. We wanted to make it available to you as soon as we could. But if there is some reference to a smoking gun, we would like to pursue it.

Mr. VROOMAN. Yes, so would I.

Senator SPECTER. How do you suggest we pursue it?

Mr. VROOMAN. Ask the FBI for elaboration. What is that smoking gun? I do not know what it is.

Senator SPECTER. Well, they are referring to you as the source of the information. I think if we ask them, they are going to refer us to you.

Mr. VROOMAN. Well, they had to get this from Albuquerque. When I get back home I will call the agent that was working the case at that time and ask him what the smoking gun is, if you would like me to do that.

Senator SPECTER. We will pursue that line, as well, and if you would, as well, we would like to get to the bottom of that.

Mr. Trulock, there has been a fair amount of information on the Department of Energy and Secretary Richardson responding in December when the Cox Committee was about to finish its investigation. And I refer first to an FBI document from Neil Gallagher, which says, "William Richardson, Secretary, Department of Energy,

may call Director Freeh about this investigation on Monday, December 21, 1998. On December 17 and 18, 1998, DOE counterintelligence advised they wanted to try and neutralize their employees' access to classified information prior to the conclusion of the Cox Committee hearing this month." And that is rubbed out and written in, "prior to issuance of a final report by the Cox Committee."

Then there is a deposition of Craig Schmidt, FBI agent, which was taken in July of 1999, which reads, in part, as follows from page 91. "The Department of Energy was becoming more and more concerned about how they would appear and how they were appearing during the committee meetings and it was becoming very urgent for them to look like they were doing something. Ergo, they decided on their own, we have to interrogate and interview Lee Wen Ho—that is their articulation—and we have to jerk his clearance or his access and we expect the FBI—we're begging the FBI, please resolve this investigation in the next 30 days or 60 days so we can fire the guy."

On the next page, 92, "There was a new secretary of energy there who all of a sudden had a big need to show that they were correcting all the problems and if that meant immediately firing Lee Wen Ho, regardless of whatever it was the FBI was doing, they were going to do it as soon as possible, so they were taking their own action on this."

The third document, excerpts from a DOE report of inquiry, July 27, 1999, "Mr. Schiffer informed the Office of Inspector General that he first heard Mr. Lee's name on December 21." And then skipping down, "The secretary wanted Mr. Lee to be fired."

What knowledge do you have of action taken by Secretary Richardson, if any, concerning firing Dr. Lee or taking some action as a result of the release of the Cox Committee report, which was imminent at about that time?

Mr. TRULOCK. Senator Specter, let me make two points. First of all, by this time I had been removed from my position as director of intelligence at the Department of Energy and was replaced by Mr. Larry Sanchez, a CIA employee who Secretary Richardson brought with him into the department.

Secondly, I was no longer the director of counterintelligence. I had been replaced by Mr. Edward
Curran, an FBI agent who had come over to the department in 1998.

I had no direct or even indirect participation in the discussions that went on on the seventh floor in Secretary Richardson's office on this aspect. What I will tell you is that after our initial appearance and particularly our second appearance before the Cox Committee in December 1998, there was a high level of agitation within the Office of Counterintelligence on the part of Mr. Sanchez and within the political appointees at the department.

Senator SPECTER. Well, there have been denials at our hearing that the Department of Energy acted to remove Dr. Lee, fire him or take his clearance away, and that it went right to the secretary. Do you have any knowledge of that?

Mr. TRULOCK. I know that Mr. Sanchez, who was the director of intelligence at the time, and Mr. Curran, the director of counter-

intelligence, have direct knowledge of that episode. They were involved in it and they were providing advice to him.

Personally, I will offer my opinion. It certainly is not a coincidence that after the FBI provided information to the Cox Committee on Dr. Lee and other espionage cases within the Department of Energy that for the first time in almost two years, DOE management became energized about addressing the advice we had received from Director Freeh in August 1997.

Senator SPECTER. Well, it is a fact, isn't it, that FBI Director Freeh told Acting Secretary Moler that Dr. Lee could be removed from his clearance in August 1997, just after the Department of Justice rejected the request for a FISA warrant?

Mr. TRULOCK. I was present at that conversation and my recollection is that he said that it looks like we will not be able to get a FISA; my recommendation to you is take this case off the table. Do what you need to do to protect your sensitive nuclear weapons computer codes.

Senator SPECTER. And why didn't the Department of Energy take action to remove the clearance or to protect itself instead of leaving Dr. Lee there until early 1999?

Mr. TRULOCK. I have no idea. I repeatedly asked Deputy Secretary Moler about actions that she should be taking in this but they simply were never followed through with.

Senator SPECTER. And isn't it a fact that on October 15, 1997 Director Freeh repeated the same to Energy Secretary Pena about taking action to remove Dr. Lee's access to classified information?

Mr. TRULOCK. Again I was present at that meeting. There is a copy of Director Freeh's talking points in the files in the Office of Intelligence of the Department of Energy and he did make that point. Secretary Pena did not respond.

Senator SPECTER. We only have a few minutes left because unfortunately, the rule has been invoked which requires our terminating at 11:30. It is a very awkward matter.

Dr. Richter testified about the danger of leaks and we have had the question about the leaking of Dr. Lee's name. Mr. Trulock, you have testified that the leaking of Dr. Lee's name goes right to the Office of the Secretary of Energy. What basis do you have for that statement?

Mr. TRULOCK. I have—hold on a second. I need to consult my lawyer on this.

[Witness consults with counsel.]

Mr. TRULOCK. One of the reporters involved in the publication of the stories in question told me directly that Secretary Richardson had provided to him the name of Wen Ho Lee.

Senator SPECTER. He said Secretary Richardson leaked the name of Dr. Lee?

Mr. TRULOCK. That is correct.

Senator SPECTER. And the name of that reporter?

[Witness consults with counsel.]

Mr. TRULOCK. James Risen, New York Times.

Senator SPECTER. Well, we are going to pursue that. Respecting confidentiality of source, that is something which is of the utmost importance.

Mr. Vrooman, Mr. Trulock has been very emphatic, as you heard him, at two points in his statement. "Let me state clearly at no point in 1996, 1997 or 1998 did Robert Vrooman or Charles Washington express any concern, disagreement, dissent or protest on the conduct of the administrative inquiry or the content of the inquiry's report," and this goes to the issue of being directed at ethnic Chinese.

Do you have a reply to that?

Mr. VROOMAN. Yes, sir. When we received the report, which I agree was in May 1996, I called Mr. Trulock's office; he was not in. I asked to have him call me and I was going to raise these issues. And I must admit I was a bit angry. So he did not return my call. My staff called me down.

My supervisor, who was the lab's director, told me he wanted me to improve my relationship with Mr. Trulock and what I was about to say would not have done that.

So we decided, as a matter of course, to let the FBI have this case. We had worked with them for years. They have always protected people's civil rights and did the case well and we thought they would quickly come to the same conclusions that we had.

Senator SPECTER. OK; and on the next page Mr. Trulock says, "At no time during that or any other meeting did Vrooman protest or express any dissent or concern to the FBI or DOE participants about the investigation of Dr. Lee."

Is that accurate?

Mr. VROOMAN. Well, I met with FBI agents weekly on this case and yes, we always discussed reservations about this case. They came to a head in roughly December 1998 and we were basically thinking that Lee was not the right man.

Senator SPECTER. We are going to enter into the record your declaration concerning your statement about Agent Messemer, "I believe that he regularly distorts information" and your statement that "Agent Messemer deliberately mischaracterized the nature of my comments to him regarding the concerns about Dr. Lee's travel to the PRC."

And the whole issue of racial profiling is one which the subcommittee is going to look at in great detail. We cannot at this moment.

Judge Parker had documents produced to him which were due to be produced actually on September 15, which were not because of the plea bargain. And it may be that that was one of the motivating factors for the plea bargain, so the government would not have to produce those. We are going to take a look at that.

Mr. Wilkins, we have had you sitting around all morning and before we adjourn I think it appropriate to ask you the couple of questions which we could not get at our last hearing from DOE officials who were present, and that is why wasn't the downloading which Dr. Lee undertook in 1993 and 1994 flagged and reported to the FBI?

STATEMENT OF RON WILKINS, COMPUTER NETWORK SPECIALIST, LOS ALAMOS LABORATORY

Mr. WILKINS. That downloading was detected by monitoring tools at Los Alamos. There were a lot of similar activities at the time

that were investigated and there were reasonable explanations for them.

I can go into details on how that worked in a closed session.

Senator SPECTER. Well, it is true, is it not, that the downloading by Dr. Lee of a lot of material was noted by the Department of Energy?

Mr. WILKINS. It was noted by our monitoring tools.

Senator SPECTER. And it is also true that that was not transmitted to the FBI, correct?

Mr. WILKINS. That is correct.

Senator SPECTER. Well, in a context where an investigation had been started on Dr. Lee in 1982 and there were investigations going on in 1995 and we are now faced with a situation where there is a major alleged catastrophe—maybe it is not alleged; it really is—about his downloading, why wasn't that information conveyed by DOE to the FBI?

Mr. WILKINS. The fact that Dr. Lee was of interest was not information that was available to the computer monitoring intrusion detection operations.

Senator SPECTER. Well, were there so many people downloading so much information that the fact itself of the downloading would not warrant alerting the FBI to the possible importance of that conduct?

Mr. WILKINS. During that time frame it was common for unclassified computing to take place in the classified environment and then results to be downloaded. So indeed there was a lot of activity, some greater than Dr. Lee's, that was investigated and dismissed because it was found to be innocuous.

So yes, there was a——

Senator SPECTER. We are going to have to go into that at a later time. We have come to the bewitching hour, regrettably. It is kind of hard to understand how we can have a rule that interrupts a hearing of this sort, which is calculated to deal with the way the Senate is run on collateral issues, but that is the rule we live under.

So thank you all very much for coming and for the moment, that concludes this facet of our inquiry. Thank you.

[Whereupon, at 11:35 a.m., the subcommittee was adjourned.]

[Submissions for the Record follow:]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

DEPARTMENT OF ENERGY CHRONOLOGY—MAY 6, 1999

1995 SPRING–SUMMER

Reporting indicates that PRC probably had access to sensitive nuclear information.

Under Secretary Curtis briefed; directs that DOE/CI, FBI, CIA and Los Alamos National Laboratory Director be informed.

Initial meetings with DOE/CI personnel begin to discuss possible compromise, and review DOE CI program.

DOE forms a Review group to conduct technical review of relevant intelligence.

FBI National Security Division and CIA elements briefed.
LANL Director Sig Hecker briefed.
DOE Secretary O'Leary, Under Secretary Curtis, NN Director briefed.
Secretary briefs OVP staff.
Under Secretary Curtis discusses with DCI Deutch.
FBI updated.
First meeting of Review Group.
Second meeting of Review Group.
Sep.—Final meeting of Review Group.
Oct.—FBI briefed on Review.

Nov.—DOE Assistant Secretary for Defense Programs, and Director of Nonproliferation briefed on Review conclusions. DOE Dep Sec Curtis briefed on Review conclusions.

Nov.—DOE begins Administrative Inquiry into potential loss of sensitive nuclear information. FBI assists.

Nov 20.—Director of Central Intelligence Deutch briefed by DOE Deputy Secretary Curtis.

Dec.—CIA element briefed.

Dec 1995.—DOE begins to enhance CI program. Dep Sec Curtis briefed on state of CI within national lab complex, request for enhancements. Curtis approves increase in funding of $6 million for CI program.

Jan–Feb 1996.—Briefings for CIA elements as preparation for briefing DCI.

Mar.—DCI Deutch briefed.

Mar.—Curtis initiates study of foreign visits and assignments to labs. Study led by Dep Director of DOE Office of Intelligence.

April 11.—DOE Office of Intelligence begins second Administrative Inquiry.

April 13.—Deputy National Security Adviser Berger first briefed on potential compromise.

April.—Office of the Vice President (Fuerth) briefed.

May.—DOE brings a CIA counterintelligence expert to staff of DOE's office of counterintelligence.

May.—FBI opens full field investigation.

June.—First DOE Administrative Inquiry completed. Bell/NSC and DOD Undersecretary Kaminski briefed.

July 11.—SSCI (Senate Intelligence Oversight Committee) staff briefed by FBI and DOE.

July 7.—Second DOE Administrative Inquiry completed.

July.—DOE Office of Nonproliferation briefed on Second Inquiry.

August 1.—HPSCI (House Intelligence Oversight Committee) staff briefed jointly by FBI/DOE.

Oct.—DOE office of CI reorganized, CIA CI expert designated to run office.

Oct 23.—Commander in Chief of Strategic Command (Gen. Habiger) briefed.

Nov 21, 1996.—DOE Dep Sec Curtis meets with Lab Directors and heads of DOE Field Offices to review foreign visitors and CI programs. DOE HQ, Field Offices and Labs directed to begin implementing new measures to strengthen foreign visits and CI program, undertake further assessments.

March 12, 1997.—Federico Peña confirmed as Secretary of Energy.

Apr 4.—FBI completes SSCI-mandated assessment of DOE CI program and makes recommendations.

Apr 7.—Secretary Peña meets with FBI Director Freeh. Freeh indicates that FBI review of DOE counterintelligence program has been completed.

Apr 28.—First meeting of CI Senior Advisory Group formed at DOE to review China CI issues. Members included Dick Kerr, Adm Shapiro, Jack Downing, Jim Williams, Rich Haver, Ken O'Malley.

June 11.—NSC/Gary Samore briefed by DOE Notra Trulock.

June 16.—DOE Dep Sec Moler sworn in.

June 16–17.—DOE CI Advisory Group (Kerr, Shapiro et al) meets at Sandia to receive briefings on FBI investigation.

June 24.—Second and final meeting at DOE's CI Advisory Group. Senior lab weapon scientists attend.

July 3.—NSC/Rand Beers briefed by DOE Trulock on CI issues concerning PRC.

July 7.—Initial briefing to DOE Deputy Secretary Moler by Notra Trulock.

July 11.—Second briefing to Dep Sec Moler by Notra Trulock.

July 14.—Initial briefing to Secretary Peña.

July 29.—Assistant to the President for National Security Affairs Berger briefed by DOE/Trulock on CI issues concerning PRC.

Aug 7.—Secretary of Defense Cohen briefed by Dep Sec Moler and Notra Trulock.

Aug 12.—FBI Director Freeh briefed by Dep Sec Moler and Notra Trulock.

Aug.—Attorney General briefed.

Aug.—NSC requests CIA assessment of DOE China briefing.

Aug 26.—Second briefing to NSC/Samore by DOE/Trulock.

Aug.—National Counterintelligence Policy Board tasks interagency working group to study DOE counterintelligence program.

Sept 1997.—Interagency working group completes DOE counterintelligence review, proposes Presidential Directive for addressing DOE counterintelligence improvements.

Sept 5.—NSC-directed CIA assessment of DOE China briefing delivered.

Oct 15, 1997.—Secretary Peña, Dep Sec Moler meet with FBI Director Freeh, DCI Tenet, and staffs meet at DOE to discuss actions to be taken to improve DOE counterintelligence. Freeh outlines recommendations. All agree to develop action plan which will serve as basis for PDD. DOE/NSC staff to collaborate on drafting.

Oct. 17, 1997.—Secretary Peña, Dep Sec Moler, Director Freeh, Defense Secretary Cohen, DCI Tenet, Attorney General Reno meet at DOD to discuss development of PDD.

Feb. 11, 1998.—PDD–61 issued.

Feb 19.—HPSCI and SSCI briefed on PDD–61 by DOE (Gottemoeller, Trulock and Curran).

Feb-March.—Office of counterintelligence staff develops budget request, submits supplemental appropriations request to Congress.

March 3.—DOE Dep Sec Moler convenes meeting with staff to discuss PDD implementation.

March 16.—Moler and Curran (newly designated CI director) meet.

March 17, 1998.—Peña, Moler and Curran meet with DOE Weapons Lab Directors to discuss PDD implementation.

March 30.—Freeh, Tenet, DOE Dep Sec Moler, Trulock and Curran meet with Lab Directors at FBI to discuss importance of complying with PDD requirements.

April 1, 1998.—FBI CI Expert Curran formally instated as head of DOE CI Office.

April 6-May 15.—DOE CI Office begins 90-day Study with team visits to eight DOE Operations Offices and nine National Laboratories.

June 30.—Peña resigns, Moler Acting.

July 1, 1998.—90-Day Study completed and delivered to Secretary of Energy.

July-August.—DOE Dep Sec Moler leads review of 90-Day Study recommendations and develops plan to implement. Key participants include relevant HQ offices and DOE labs. Numerous meetings occur. Detailed Secretarial Action Plan drafted.

Aug 18.—Secretary Richardson sworn in.

Sep 10.—Sec. Richardson and Dep Sec Moler meet with staff to discuss Counterintelligence.

Sep 18.—DOE Sec. Richardson meeting with FBI Robt Bryant and DCI Tenet re DOE Counterintelligence Action Plan.

Oct 1.—Secretary Richardson meeting with Dep Sec Moler on intelligence.

Oct 6.—Secretary Richardson and Director Freeh meet.

Oct 6.—Sec Richardson briefed by Dep Sec Moler, Notra Trulock and staff. DOE CI Action Plan discussed.

Oct 6.—House Committee on National Security (Subcommittee on Military Procurement) hearing on the Department of Energy's Foreign Visitor Program.

—Open session on foreign visitors with Lab Directors and GAO;

—Closed session with Dep Sec Moler, DOE Office of Intelligence Acting Director Trulock, and DOE Director of Counterintelligence Curran.

Oct 19.—DOE Dep Sec Moler resigns.

Nov 2.—Sec Energy appoints advisor for Counterintelligence.

Nov 12.—DOE gives full brief to Cox Committee.

Nov 13, 1998.—Sec Energy Richardson submits Counterintelligence Action Plan to the NSC, National Security Advisor.

Nov 27.—National Counterintelligence Center Threat Assessment for DOE Labs Published.

Dec-Jan.—Counterintelligence Implementation Plan drafted with input from relevant HQ offices, laboratories and field elements.

Dec 7.—DOE briefs Cox Committee Members.

Dec 9.—Secretary Richardson meets with laboratory CI Directors, and Directors of Intelligence and Counterintelligence Offices re implementation of Counterintelligence Plan.

Dec 15.—Secretary Richardson, Under Secretary Moniz meet with five weapons Lab Directors and Directors of the Offices of Intelligence and Counterintelligence to discuss importance of CI initiatives.

Dec 16.—DOE Curran, Sanchez and Trulock testify before Cox Committee.

Dec 21.—Sec Energy meeting on counterintelligence with staff. Richardson phone call to Director Freeh.

Dec 29.—DOE Counterintelligence Director Curran meets with NSC staff regarding Cox Report.

Jan 4, 1999.—Cox Committee Releases Report.

Jan 22.—FY 2000 Counterintelligence budget request submitted—doubles budget over FY 99 levels.

Feb 3.—Counterintelligence Implementation Plan completed and delivered to Secretary of Energy Richardson.

Feb 10.—Secretary Richardson briefs House Armed Services Committee.

CHRONOLOGY OF SIGNIFICANT EVENTS BETWEEN 12/23/98 AND 2/10/99

December 23, 1998 (Wednesday)

2:18 p.m.

DOE polygraph of Lee is completed

5:00 p.m. (approx.)

Lee is advised that his access to secure areas of X Division and to both his secure and open X Division computer accounts has been suspended

9:36 p.m.

Lee makes 4 attempts to enter secure area of X Division (through Stairwell 2)

9:39 p.m.

Lee attempts to enter secure area of X Division *(through South elevator)*

December 24, 1998 (Thursday)

3:31 a.m.

Lee attempts to enter secure area of X Division *(through S Stairwell 2)*

December 24, 1998 - January 3, 1999 (Thursday through Sunday)

Los Alamos National Laboratory closed for holidays

January 4, 1999 (Monday)

9:42 p.m.

Lee succeeds in having his "open" computer account reactivated and deletes 3 computer files

January 12, 1999 (Tuesday)

Lee deletes 1 computer file

January 17, 1999 (Sunday)

1:00 p.m. - 5:00 p.m.
FBI conducts interview of Lee at his residence

January 20, 1999 (Wednesday)

11:45 a.m. - 12:05 p.m.
Lee deletes 47 computer files

January 21, 1999 (Thursday)

10:09 a.m.
Lee asks computer "help desk" why files he is deleting are not "going away"

10:46 a.m.
Lee attempts to enter secure area of X Division *(through Stairwell 3)*

January 30, 1999 (Saturday)

2:54 a.m.
Los Alamos officials deactivate Lee's "open" computer account in secure area of secure area of X Division after discovering that it has been improperly reactivated

February 2, 1999 (Tuesday)

4:52 p.m.
Lee attempts to enter secure area of X Division *(through South Door)*

February 3, 1999 (Wednesday)

9:42 a.m.
Lee attempts to enter secure area of X Division *(through South Door)*

1:11 p.m.
Lee attempts to enter secure area of X Division *(through South Door)*

1:46 p.m.
Lee makes 4 attempts to enter secure area of X Division *(through South Door)*

February 8, 1999 (Monday)

Between 1:00 and 1:30 p.m.
FBI contacts Lee and asks to meet with him to discuss conducting interview and polygraph

1:11 p.m.
Lee attempts to enter secure area of X Division *(through Stairwell 2)*

4:00 p.m. - 6:00 p.m.
FBI meets with Lee and arranges for interview and polygraph over the next two days

6:34 p.m.
Lee attempts to enter secure area of X Division *(through South Door)*

February 9, 1999 (Tuesday)

11:30 a.m. - 12:00 p.m.
Lee deletes approximately 93 computer files

1:00 p.m.
FBI interviews Lee and obtains his agreement to undergo polygraph

9:03 p.m.
Lee attempts to enter secure area of X Division *(through South Door)*

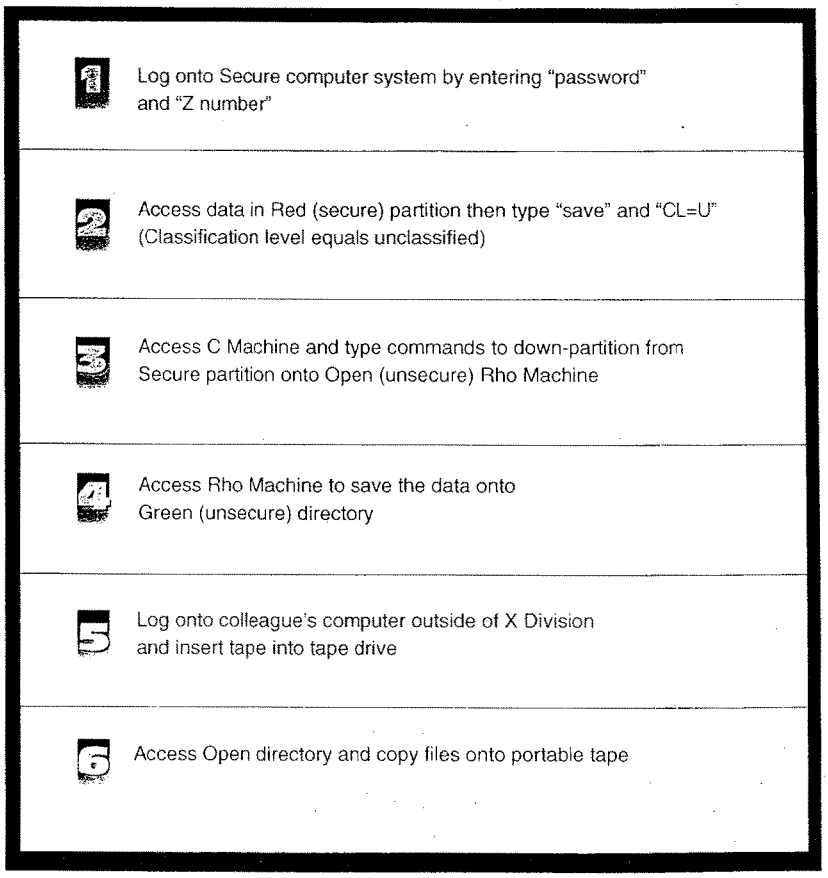
February 10, 1999 (Wednesday)

9:00 - 4:00 p.m.
Lee undergoes FBI polygraph

4:10 p.m. - 9:30 p.m.
Lee deletes approximately 310 computer files

5:01 p.m.
Lee attempts to enter secure area of X Division *(through South Door)*

Steps Required to Down-Partition, Download, and Create Tapes



Failed Attempts by Wen Ho Lee to Enter LANL X Division After His Access Had Been Terminated at 5:00 p.m. on December 23, 1998

DATE	TIME	LOCATION
DECEMBER 1998		
23	9:36 PM	Second Foor Stairwell 2
23	9:36 PM	Second Foor Stairwell 2
23	9:36 PM	Second Foor Stairwell 2
23	9:36 PM	Second Foor Stairwell 2
23	9:39 PM	Elevator South
24	3:31 AM	Second Foor Stairwell 2
JANUARY 1999		
21	10:46 AM	Second Floor Stairwell 3
FEBRUARY 1999		
2	4:52 PM	First Floor South Door
3	9:42 AM	First Floor South Door
3	1:11 PM	First Floor South Door
3	1:46 PM	First Floor South Door
3	1:46 PM	First Floor South Door
3	1:46 PM	First Floor South Door
3	1:46 PM	First Floor South Door
8	1:11 PM	Second Floor Stairwell 2
8	6:34 PM	First Floor South Door
9	9:03 PM	First Floor South Door
10	5:01 PM	First Floor South Door

NUCLEAR WEAPONS RESTRICTED DATA DOWNLOADED BY DR. LEE ONTO PORTABLE TAPES

The Department of Energy has classified this information and never released it to the public

Input deck/input file information including:

- [redacted] electronic blueprint of the exact dimensions and geometry of this nation's nuclear weapons, including our most sophisticated modern warheads

Data files including:

- [redacted] nuclear bomb testing protocol libraries reflecting the data collected from actual tests of nuclear weapons
- [redacted] data concerning nuclear weapons bomb test problems, yield calculations, and other nuclear weapons design and detonation information
- [redacted] information relating to the physical and radioactive properties of materials used to construct nuclear weapons

Source codes including:

- [redacted] data used for determining by simulation the validity of nuclear weapons designs and for comparing bomb test results with predicted results

MEMORANDUM

To: Senator Specter
From: Carlton Hoskins
Date: September 26, 2000
Re: Summary and Chronology of the conditions of WHL's confinement

—Shackles were used because he was a segregated inmate.

—On December 10th, the jail's warden issued a memorandum outlining the procedures for the confinement of Wen Ho Lee as a segregated prisoner. (Tab #1)

—The jail's operator Cornell Corrections, Inc. wrote the US Marshal on January 4th, outlining their policy for segregated inmates. (Tab #2)

—The US Marshal on January 6, 2000, wrote back stating the Marshal's agree with this treatment and that "with some additional restrictions, the standard segregation policy currently in place at your facility would adequately confine Mr. Wen Ho Lee." (Tab #3)

—The additional restrictions all dealt with his ability to communicate. These additional terms evolved into DOJ's Special Administrative Measures (SAM) for Lee's confinement. The SAM (Tab #4) signed by AG Reno required: (1) use of English or interpreters must be present; (2) no attorney use of interpreters unless necessity shown and attorney is present; (3) phone calls limited to attorneys and any potential defense communication; (4) attorneys may provide docs to inmate; (5) family may call/be called, calls must be in English; (6) no phone calls overheard by third party; (7) family calls monitored and recorded by FBI; (8) visitors limited to immediate family; (9) all legal mail must be marked to/from attorney and marked privileged, all non-legal mail must be copied and forwarded to the FBI; (10) all mail is prescreened and analyzed before forwarding/dispersal; (11) if mail is determined to contain overt or covert discussion, it is to be seized. (Tab #4)

—Restraint policy discussed (Tab #5)

CHRONOLOGY

December 10 and 14, 1999, Senior Warden Barreras of the Santa Fe County Correctional Facility issues memorandums outlining the procedures for the supervision of Wen Ho Lee.

December 21 Holscher writes USA Kelly questioning limited visits, English only, and limited attorney calls.

Dec 27, 1999 Sec. Richardson writes certifying to the AG that Special Administrative Measures (SAM) on Wen Ho Lee's confinement are necessary to protect national security.

Dec 30, 1999 Judge Parker issues his Memorandum Opinion and Order denying Lee's pretrial release.

Jan 4, 2000 Cornell Corrections, Inc. sends memo that outlines policy for segregated inmates.

Jan 5, USA Gorence writes memo to AG requesting she issue the SAM.

Jan 6. 2000 US Marshal Sanchez writes Warden Barreras asking the jail to especially adapt its inmate segregation policy for WHL to include that Lee can only be transported by US Marshals.

Jan 6, 2000 Cline writes Gorence for additional time outside the cell, daily showers, a TV and a radio.

Jan 13, 2000 DOJ review of the SAM request is sent to the Deputy Attorney General.

Jan 13, 2000 AG issues memo to Director, US Marshal Service (USMS) directing the SAM be implemented. The SAM must be certified every six months.

Jan 14, 2000 USMS sends Gorence the Jail's response to Cline's requests of Jan. 6th.

Jan 18, 2000 Gorence forwards jail's memo to Cline.

Apr 21, 2000 Gorence writes USMS requesting Saturday family visits for WHL.

May 2, 2000 SAC Kitchen writes Bay about national security concerns of relaxing the SAM.

May 4, 2000 Sec. Richardson recertifies request for SAM.

May 12, 2000 AG memo to USMS extends SAM.

Jul 17, 2000 Bay to Warden Barreras making 3 modifications to conditions of Lee's confinement: no restraints while exercising; exercise daily; and extra fruit.

Jul 18, 2000 Barreras memo to Stamboulidis confirming he will comply with 2 of 3 requests.

Jul 26, 2000 Cline to Stamboulidis confinement modifications requested not yet made.

Jul 30, 2000 Bay forwards to Barreras that confinement modifications not yet made, asks about conditions.

Aug. 1, 2000 Barreras to Stamboulidis stating Lee was out of restraints during exercise on Jul 18 and on Aug 5 Lee will get exercise time on weekends.

Sept 7, 2000 Bay to AG requests SAM be extended again.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, June 22, 2001.

Hon. PATRICK J. LEAHY,
Chaiman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to recent correspondence from you and Senator Arlen Specter requesting a written chronology of the Department of Justice's actions with respect to Wen Ho Lee investigation during the period between his termination from employment at Los Alamos National Laboratory, on March 8, 1999, and the return of the indictment against him on December 10, 1999. Senator Specter also requested a copy of the report on the case by the Attorney General's Review Team (the Bellows Report), and you have requested the status of the declassification of that Report.

The requested chronology is attached. As for the Bellows Report, the Central Intelligence Agency is currently reviewing a redacted version for any remaining classification issues. The Agency has advised that their review will be complete by June 29, 2001, after which we will be able to provide you with a copy of an unclassified version of the report.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

WEN HO LEE CHRONOLOGY

March 8, 1999.—Wen Ho Lee terminated by Los Alamos National Laboratory (LANL)

March 9, 1999.—Meeting between FBI–Albuquerque Division (AQ) and U.S. Attorney (USA) John J. Kelly, District of New Mexico.

March 10, 1999.—Letter from Mark Holscher, counsel for Wen Ho and Sylvia Lee, to First Assistant U.S. Attorney (FAUSA) Robert J. Gorence, D.N.M., and FBI–AQ Special Agent John Hudenko, offering to surrender Lee's passport and asking whether Lee is target or subject of investigation.

March 12, 1999.—Letter from USA Kelly to Holscher confirming Holscher's offer to advise government of travel by Lees and Holscher's representation that Lees will not leave the country during the investigation.

March 15, 1999.—Telephone conversation between USA Kelly and Holscher.

March 19, 1999.—Letter from Holscher to USA Kelly asking that investigation of Lee end, asking for security clearances in order to counsel Lee, and requesting a meeting.

March 23, 1999.—LANL scientist assisting FBI–AQ in conducting consensual search of Lee's former X–Division LANL office, advises FBI–AQ of discovery in office of printout of computer directory "kfl." Based on names of files in directory kfl, it appears that files are classified. Also believed by LANL scientist that directory kfl was maintained on open, unsecured part of LANL computer know as Common File System (CFS).

March 25, 1999.—Telephone conversation between FAUSA Gorence and Holscher.

March 26, 1999.—LANL scientist advises FBI–AQ that Lee had typed up and stored in a CFS directory, letters seeking employment overseas. LANL scientist advises FBI–AQ that Lee had created "kfl" directory on open part of CFS, that file names on directory suggest files contained classified information, and that "kfl" files had been deleted from CFS on February 11, 1999 by individual using Lee's computer access number.

March 29, 1999.—Letter from Holscher to FAUSA Gorence confirming government's representation that Lee was a subject, not a target, of the investigation

March 30, 1999.—Draft rule 41 search warrant affidavit re Lee's White Rock, N.M. residence presented by FBI to U.S. Attorney's Office, D.N.M.

April 1–8, 1999.—FBI agents, and attorneys from the Criminal division and the USAO work on affidavit in support of application for rule 41 warrant to search Lee's residence in White Rock, N.M.

April 5, 1999.—LANL scientist advises FBI–AQ that Lee had transferred classified Department of Energy information from the closed CFS to the open CFS.

April 7, 1999.—Meeting between FBI and Office of Intelligence Policy and Review.

April 9, 1999.—As required by statute, Attorney General Janet Reno approves use of information derived from the Foreign Intelligence Surveillance Act of 1978 in rule 41 search warrant application. Later same day, FBI–AQ special agent, accompanied by FAUSA Gorence, applies for and obtains warrant from Magistrate Judge William W. Deaton, D.N.M., to search Lee's White Rock residence.

April 10, 1999.—Search warrant executed by FBI–AQ. Lee provides written consent to search motor vehicle.

April 16, 1999.—Letter from FAUSA Gorence to Holscher providing inventory of items seized during search and requesting meeting to discuss Lee's 1986 and 1988 travel to the People's Republic of China.

April 18, 1999.—LANL provides two reports of LANL computer officials. One concerns the deletion of files, during January and February 1999, from directories maintained by Lee on open CFS. The other concerns the earlier transfer of eleven of these files from closed to open CFS.

April 23, 1999.—Conversation between Holscher and FAUSA Gorence.

April 28, 1999.—The New York Times reports that Lee transferred classified nuclear weapons files onto a non-secure computer while at LANL.

May 5, 1999.—LANL scientist advises FBI–AQ that notebook recovered during search of Lee's residence contains handwritten instructions on how to transfer classified files from computer at LANL to a Sun Sparc computer workstation and from there onto portable DC6150 computer tape cartridges.

May 9, 1999.—LANL computer official provides report to FBI–AQ describing how Lee moved files from closed to open CFS.

May 11, 1999.—Letterhead Memorandum on Lee case prepared by FBI–AQ.

May 13, 1999.—Letter from Holscher to FAUSA Gorence asserting that search of Lee's residence was illegal and offering to continue to cooperate.

May 16, 1999.—Written status report on Lee case from USA Kelly to Deputy Attorney General Eric H. Holder and AG Reno.

May 17, 1999.—LANL computer official provides FBI–AQ with report on potential movement of files on Lee's CFS directories from LANL computers to outside computers.

May 27, 1999.—Meeting in Washington, D.C. among FBI, Criminal Division, and USAO.

May 29, 1999.—FBI–AQ presents written prosecutive report to USAO.

June 9, 1999.—Letter from Holscher to USA Kelly and FAUSA Gorence complaining that government has not advised him what it wants to discuss with Lee and has not sought to schedule a meeting.

June 15, 1999.—Letter from USA Kelly to Holscher stating that government is considering serious charges, but not espionage under 18 U.S.C. § 794, and suggests meeting on June 21 at USAO in Albuquerque.

June 21, 1999.—Meeting in Albuquerque among USAO, FBI, Criminal Division, counsel for Lee, and Lee. During meeting counsel for Lee assert that he only downloaded unclassified data onto an unsecure computer and then onto tapes. Subsequently, counsel advised that if Lee had done so with respect to classified data, any such tapes had been destroyed.

June 22, 1999.—Written status report on Lee case from USA Kelly to DAG Holder and AG Reno.

July 1–2, 1999.—Written presentation by counsel for Lee provided to USAO on July 1, 1999; faxed to Criminal Division by USAO on July 2, 1999.

July 6, 1999.—Written supplement to above presentation provided by counsel for Lee to USAO. Letter from Holscher to USA Kelly and FAUSA Gorence.

July 15, 1999.—LANL scientist provides report on Lee's creation of "Tape N," in 1997.

July 1999.—LANL advises that one of six DC6150 tapes recovered from Lee's T-Division LANL office contains a classified file, and that two others did at one time, but that those files have been deleted. LANL further advises that one tape was cleansed of classified data in February 1999, on the unsecured computer workstation belonging to a T-Division colleague of Lee.

July 23, 1999.—Meeting in Washington, D.C. between USAO and Criminal Division.

July 26, 1999.—Holscher letter to USA Kelly and FAUSA Gorence arguing that Lee has not violated the Atomic Energy Act of 1954.

July 27, 1999.—Meeting in Washington, D.C. between counsel for Lee and Criminal Division.

July 28, 1999.—LANL computer official provides report describing the creation of classified "tar" (tape archive) files by Lee.

August 2, 1999.—Letter from Holscher to USA Kelly and FAUSA Gorence offering to make additional factual submission.

August 4, 1999.—Letter from USA Kelly to Holscher saying government will review anything Holscher submits, but wants a complete explanation from Lee himself. Letter from USA Kelly to Eugene Habiger, Director, Office of Security and Emergency Operations, Department of Energy, seeking to include in a proposed indictment of Lee information about Lee's downloading activity.

August 9, 1999.—Telephone conversation between Daniel H. Bookin, counsel for Lee, and Richard A. Rossman, Chief of Staff, Criminal Division.

August 10, 1999.—Letter from Holscher to USA Kelly stating that Lee will not submit to additional interview, and offering further arguments as to why Lee has not violated 18 U.S.C. § 793.

August 16, 1999.—Letter from Rossman to Bookin advising that government has not made decision whether to charge Lee, and asking for additional information, which was discussed during meeting in July, no later than August 30, 1999.

August 30, 1999.—Additional supplemental written presentation provided by counsel for Lee to USAO.

September 3, 1999.—Letter to Holscher from USA Kelly asking for information about location and custody of tapes from time of their creation until the present.

September 8, 1999.—Meeting in Washington, D.C., among Criminal Division, USAO, LANL, and Department of Energy (DOE) to discuss handling of classified information in prosecution of Lee. All DOE and LANL representatives concur as to significance of data at issue.

September 13, 1999.—Letter from Holscher to USA Kelly and FAUSA Gorence stating that Lee had work-related reason to make tapes.

October 4, 1999.—DOE prepares draft classification guide governing issues relating to Lee's illicit computer activity and the classified files involved.

October 27, 1999.—Memo from Assistant Attorney General James K. Robinson, Criminal Division, and USA Kelly recommending Lee be prosecuted under Atomic Energy Act of 1954.

November 8, 1999.—Draft agenda of upcoming National Security Council meeting on case distributed.

November 11, 1999.—Case discussed at NSC meeting in Washington, D.C.; DOJ, DOE and LANL represented at meeting.

November 14–15, 1999.—On November 14, 1999, LANL scientist writes "Draft of Input to Damage Assessment" re Lee compromises; faxed to USA Kelly on November 15, 1999.

November 24, 1999.—At request of NSC, Central Intelligence Agency prepares damage assessment regarding data on missing tapes created by Lee.

December 4, 1999.—Briefing of case at White House.

December 8, 1999.—Telephone conversation between USA Kelly and Holscher. Kelly advises Holscher that indictment is imminent, and seeks from Holscher information about whereabouts of missing tapes. As required by statute, AG Reno sends letters to Secretary of Energy Bill Richardson and USA Kelly approving charges against Lee under the Atomic Energy Act of 1954.

Late 1999, before December 10.—USA Kelly advises Holscher in telephone conversation that case might be resolved without indictment; advises Holscher to look at latter sections of 18 U.S.C. § 793.

December 10, 1999.—Letter faxed at 8:24 a.m. PT from Holscher to USA Kelly and FAUSA Gorence offering to make Lee available for a polygraph by a mutually agreeable polygrapher to verify that Lee did not mishandle the tapes or provide them to a third party. Lee later indicted in Albuquerque and arrested in White Rock by FBI–AQ.

WHL court doc 19990409

FAS Note: The following FBI affidavit was filed in support of an application for a search warrant to search the home of Wen Ho Lee. The application was filed on April 9, 1999. The affidavit when filed was classified Secret (Restricted Data) and was declassified a year later with deletions as indicated. HTML by FAS from hardcopy.

AFFIDAVIT

I, MICHAEL W. LOWE, being duly sworn, depose and say:

(1) I, MICHAEL W. LOWE, am a Special Agent of the Federal Bureau of Investigation (FBI), United States Department of Justice, assigned to the Albuquerque Division, Santa Fe Resident Agency, and have been a Special Agent for approximately 12 years. The information set forth in this affidavit is the result of my own investigation or has been communicated to me by others involved in this investigation. Among these other individuals is a Supervisory Special Agent of the FBI who specializes in counterintelligence investigations regarding the People's Republic of China (PRC). This investigator has been a Special Agent for 19 years; he has worked on counterintelligence investigations for over ten of these years, and has supervised from FBI headquarters PRC counterintelligence investigations for the past five years.

(2) I believe that probable cause exists to issue a search warrant for the residence of LEE WEN HO (hereafter known as LEE), 80 Barcelona Avenue, White Rock, New Mexico, 87544, for evidence of violations of Title 18, United States Code, Section 1924 (Unauthorized Removal and Retention of Classified Documents or Materials), Title 18 United States Code, Section 793 (Gathering, Transmitting or Losing Defense Information), and Title 18 United States Code, Section 1001 (False Statements). The basis for my belief is set forth below.

(3) LEE, who lives at 80 Barcelona Avenue (described fully in Attachment A), is a hydro-dynamicist/mathematician who was formerly assigned to the X-Division of Los Alamos National Laboratory (LANL), which is managed by the Department of Energy (DOE). LEE is a naturalized United States citizen born on December 21, 1939, in Nantow, Taiwan. Sylvia Lee, his wife, is also a naturalized United States citizen born December 6, 1943, in Hunan Province, China. Sylvia Lee worked at the Los Alamos National Laboratory from November 1980 to June 1995, where the last position held was "Computer Technician." She had a Top Secret clearance from March 12, 1991, until her departure from LANL on June 9, 1995.

(4) The FBI expert described in paragraph (1) has explained that PRC intelligence operations virtually always target overseas ethnic Chinese with access to intelligence information sought by the PRC. Travel to China is an integral element of the Chinese intelligence collection tradecraft, particularly when it involves overseas ethnic Chinese. FBI analysis of previous Chinese counterintelligence investigations indicates that the PRC uses travel to China as a means to assess closely and evaluate potential intelligence sources and agents, as a way to establish and reinforce cultural and ethnic bonds with China, and as a safehaven in which to recruit, task, and debrief established intelligence agents.

(5) Based on information supplied by DOE, the FBI began an investigation of LEE and Sylvia Lee on May 30, 1996. A review of FBI records disclosed that LEE had previously been the subject of an FBI foreign counterintelligence investigation during approximately 1982-1984, when he was in contact with a suspected PRC intelligence agent. LEE was

overheard on court-authorized electronic surveillance contacting a former employee of the Lawrence Livermore National Laboratory who had been suspected of passing classified weapons information to the PRC. On December 3, 1982, court-authorized telephone surveillance of the employee intercepted a call from LEE. LEE introduced himself, explained that he was a weapons designer at the Los Alamos National Laboratory, and commented that he had heard about the employee's "matter." LEE wanted to meet the employee and stated that he thought he could find out who had "squealed" on the employee.

(6) On November 9, 1983, the FBI interviewed LEE in Los Alamos, New Mexico. LEE was not told that the FBI had intercepted his call to the Lawrence Livermore employee on December 3, 1982. 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. LEE stated that the employee was no longer at the Lawrence Livermore Laboratory, and that he had no way of contacting him at his home. In a subsequent interview with the FBI, LEE admitted that he had called the Lawrence Livermore employee and had previously misled the FBI about the contact.

(7) On January 24, 1984, LEE passed a polygraph examination which included questions concerning whether he had ever passed classified information to any foreign government. The FBI's foreign counterintelligence investigation of LEE was closed on March 12, 1984.

(8) The X-Division of LANL, where LEE worked from 1982 through December 23, 1998, has the highest level of security of any division at LANL. It is LANL's research and development division responsible for the design of thermonuclear weapons. LEE was part of a team responsible for developing thermonuclear weapons for the United States. LEE has explained (during a February 9, 1999, interview with Special Agents of the FBI) that, while at LANL, he worked on five Lagrangian mathematical codes, also known as "source codes." LEE explained that two of these codes are classified because they are used to develop nuclear weapons. Charles Neil, Technical Staff member and Team Leader in the X-Division has informed the FBI that the mathematical codes with which LEE worked were used to develop various nuclear weapons, including a weapon known as the W-88.

(9) According to Neil, both of the classified source codes and other materials with which LEE worked represent decades of nuclear weapons testing and design. In essence, the information is more valuable to a weapons designer than an actual bomb blueprint. With source codes and other identifying information a bomb designer does not have to do any actual testing. By plugging variables (such as different materials or different dimensions) into various equations and computer programs and viewing the results a designer could build the most sophisticated nuclear weapons.

[Paragraph deleted]

[1] Hu Side became the head of the PRC weapons program in January of 1994.

(11) LEE said during his December 23, 1998 pre-polygraph interview that he had social contact with PRC visitors to LANL, including visits to his residence. Following the interview on December 23, 1998, DOE polygraphers administered a polygraph examination of LEE. The examiner's initial opinion was that LEE was not deceptive. However, subsequent quality control reviews of the results, by both DOE and by FBI Headquarters (HQ) resulted in an agreed finding that LEE was inconclusive, if not deceptive, when denying he ever committed espionage against the United States.

(12) Following LEE's 1988 trip to China he was debriefed by LANL Internal Security officer ROBERT VROOMAN. VROOMAN asked LEE if he had been asked any inappropriate questions during his trip. LEE responded in the negative. VROOMAN retained his notes from that debriefing and in February 1999 prepared a report containing his recollections based on his notes. LEE was confronted with that report during his

interview by the FBI on March 5, 1999. He offered no explanation for why he did not remember to tell VROOMAN about the incident in his hotel room. He said that the only reason he remembered the incident prior to his DOE polygraph was because he had been asked a direct question regarding espionage which for some reason prompted him to remember the question posed to him by ZHENG.

(13) On January 17, 1999, LEE was interviewed at his residence by FBI Special Agents. During this interview, LEE stated that in 1984 or 1985, he was at a conference in Hilton Head, South Carolina, where he met LI DE YUAN from the PRC's Institute of Applied Physics and Computational Math (IAPCM). (IAPCM is the PRC's Nuclear Weapons Design Institute, and is part of the Chinese Academy of Engineering Physics (CAEP), the home of the PRC's overall Nuclear Weapons Program). LEE said LI was a mathematician familiar with Lagrangian mathematics, which LEE said is one of LEE's areas of expertise. LEE also said that it was as a result of his meeting, and "developing a relationship with LI, that he was invited to the IAPCM in both 1986 and 1988.

(14) LEE further stated that when he went to the IAPCM in 1986, he was invited to speak on computational mathematics. He said he was excited and was treated very well by his PRC counterparts. LEE said he met various people during this trip, two of whom were LI WEI SHUN and WANG ZHI SHEU. LEE said WANG worked in "the same project areas" as he did, and they spent a lot of time together at the conference. LEE stated that following the 1986 trip to the IAPCM, he began to receive cards and letters from these scientists.

(15) LEE furthermore stated that he was invited to attend a second conference in the PRC in 1988,[2] where he again met PRC scientists, including one named ZHENG SHAO TONG. LEE stated that one evening after dinner he received a phone call from ZHENG asking if they could meet. LEE agreed, and shortly thereafter, ZHENG arrived at his hotel room with HU SIDE. LEE acknowledged that he knew that ZHENG was an administrator with the IAPCM. LEE stated that he thought HU SIDE was an explosives expert. LEE reaffirmed what he had said during the December 23, 1998 pre-polygraph examination that when asked a question which involved a classified response he told them he did not know the answer and did not wish to discuss this matter.

[2] This conference was the subject matter of the pre-polygraph interview referred to in Paragraph 11 of this Affidavit.

(16) LEE's contact with ZHENG and HU SIDE in 1988 should have been reported to LANL security officials pursuant to DOE regulations. A review of all the documentation that LEE provided DOE security in 1988 reveals no report of this approach to LEE by ZHENG and HU SIDE. On July 12, 1988, LEE did submit a Foreign Trip Report, as was required by LANL. In his report, LEE described the business trip that he made to Beijing in June 1988. While LEE specified ten different people with whom he met during this trip, he failed to include HU SIDE. LEE also did not disclose that anyone from the PRC had asked him about any classified matters.

(17) On February 10, 1999, the FBI conducted a polygraph examination of LEE. During this examination, the FBI asked LEE whether he had provided two classified codes (discussed in paragraph 8) to any unauthorized person and whether he deliberately obtained any W-88 documents. It was the examiner's opinion that the polygraph results were inconclusive as to those questions. The second question was rephrased to cover a broader range of activities. LEE was then asked the follow two questions:

Q: Have you ever given any of those two codes to an unauthorized person?

A: No.

Q: Have you ever provided W-88 information to any unauthorized person?

A: No.

The polygraph examiner concluded that LEE's answers to these questions were deceptive.

(18) The polygraph examiner then gave LEE an opportunity to discuss his answers further. During the discussion, LEE volunteered the following new information that he had not revealed in the prior interviews with the FBI or DOE. LEE said that during his trip to the PRC in 1986, he was approached by WEI SHEN LI, who LEE knew to be involved in the PRC's Nuclear Program. LI came to see LEE, and asked if LEE could assist him in solving a problem he (LI) was having. LEE agreed. LEE illustrated what he had provided to LI in the form of an equation to assist LI in solving his problem. The polygrapher's report states that LEE said that this equation was the same used in two classified codes. LEE admitted that his assistance to LI could have been used easily for nuclear weapons development.

(19) In the Foreign Trip Report that LEE submitted to LANL security officials following his 1986 trip, LEE failed to reveal that he had been asked to assist LI in solving a mathematical problem. LEE also did not divulge that he had helped LI solve the problem, and that the help he provided could have been used easily for nuclear weapons development.

(20) Following the polygraph examination, LEE also provided information about the trip he made to Beijing in 1988 that he had not revealed in the earlier interviews. LEE said that he was approached by ZHI SHIU WANG, a PRC scientist, following a conference he attended in China in 1988. According to LEE, WANG asked LEE to help him solve a mathematical problem. LEE admitted that his answer to WANG contained portions of equations similar to those in the classified codes referred to in paragraph 8. LEE drew notes to illustrate WANG's problem. LEE said that this information could be used in weapons development; however, he stated that he never discussed nuclear weapons with WANG. LEE acknowledged that he had fully assisted WANG with his mathematical problem even though he had assumed WANG was part of the PRC's Nuclear Weapons Program. LEE was confident that his assistance to WANG had solved or improved WANG's problem. LEE stated he assumed that WANG knew that he (LEE) worked on nuclear weapons because of LEE's association with LANL.

(21) According to NEIL, LEE, as a mathematician in the X-Division, had a "Z" number and password which enabled him to access the X-Division's most highly classified information by computer. A "Z" number is a unique identifier given to every individual at LANL who requires access to LANL's Common File System (CFS). The CFS is LANL's file storage system. It is comprised of two separate parts: the closed part of the system, on which classified information is stored; and the open part of the system, which stores only unclassified information. The open part of the system is accessible from anywhere in the world to any Internet user. The closed part of the system is accessible only to those working at LANL with the security clearances authorized by LANL. As an X-Division employee, LEE had access to both parts of the CFS.

(22) CHARLES NEIL, LEE's most recent supervisor in the X-Division, advised that there is no direct communication allowed between the closed and open parts of the CFS. Under LANL rules, unclassified information can be on the closed side of the system; however, employees are prohibited from placing classified information on the open side of the CFS. Occasionally there is a need to transfer unclassified files between the closed and open parts of the CFS. From 1980 to 1994, there were two methods of transferring files between the two parts of the CFS. One method was to use a piece of equipment with appropriate software, called "Machine C." The second transfer method involved downloading files from one part of the CFS directly onto either a 3-1/2-inch floppy disk or a larger capacity storage cartridge. The use of "Machine C" for this purpose was discontinued in 1994. In 1996 the use of a piece of equipment called "Mercury" was implemented to transfer files from the closed to the open part of the CFS. This method, which is still used, maintains a record of

the names of the files that have been. transferred. Between 1994 and 1996 the downloading method utilizing floppy discs or storage cartridges was the only method available to transfer files from the closed to the open part of the CFS. This transfer method can still be used in addition to "Mercury".

(23) LANL commonly uses 3M DC 6150 cartridges to download files for transfer between the open and closed parts of the CFS. Once files have been downloaded from one part, they can be uploaded easily into any other computer that has a compatible operating system. On March 5, 1999, LEE consented to a search of his offices at LANL by the FBI.[3] In LEE's X-Division office, investigators found a notebook with a LANL supply order form, dated December 20, 1995. This order form indicated that LEE special-ordered a box of five 3M DC 6150 cartridges in 1995. Neil stated that this was unusual because the cartridges are readily available at X-Division's supply room and do not normally have to be special ordered. In LEE's T-Division office, where he was assigned following suspension of his security authorization, investigators found six 3M DC 6150 cartridges. A preliminary examination of those cartridges by LANL personnel determined that they do not contain classified information. These 3M DC 6150 cartridges are also available from office supply stores and are not unique to LANL.

[3] 3 As described below in paragraph 29, LEE was reassigned from one LANL division (the X-Division) to another (the T-Division) following suspension of his security authorization. Hereafter, the search of both of LEE's offices will be referred to as "the March search."

(24) As an X-Division employee, LEE was permitted to create directories in the CFS and to name those directories himself. Upon its creation, every directory created by each X-Division employee is recorded in the CFS. LEE named one of the directories that he created his "KF1" directory. The KF1 directory was located in the open part of the CFS. LANL computer experts have analyzed the KF1 list, as well as two other directories that LEE created. These experts have determined that LEE's three directories listed approximately 300 files. Some of these files are library files, which contain or contained additional files. In total, the LANL experts estimate that the directories LEE created contained as many as 1600 files. Preliminary examination of the KF1 list reveals that the names of many of the files listed were the names of files known to be classified at the Secret level. The LANL experts are in the process of retrieving and reviewing the files themselves. So far, this review has revealed that 21 of the files listed in LEE's KF1 directory are indeed Secret documents. Among these 21 Secret files is one of the classified codes (described above in paragraph 8) and design contours for two additional nuclear weapons. The LANL experts have determined that LEE began transferring classified files from the CFS closed system to the open system on his KF1 directory from [several words deleted] According to CHARLES NEIL, there is no legitimate work related purpose for storing classified files on the open side of the CFS.

(25) CHARLES NEIL told me that only the LANL employee given the "Z" number and password and LANL's system administrator can access or delete files in directories created by LANL employees. Both "Z" numbers and passwords are closely guarded, non-shared pieces of information which LANL employees are required to keep confidential. LEE, or anyone with Lee's "Z" number and password could access his KF1 directory on the open CFS from anywhere in the world. In an interview conducted by the FBI on March 5, 1999, LEE refused to provide his password to allow FBI Special Agents access to his laptop computer.

(26) On April 5, 1999, during the continuing examination of papers and notes from LEE's office, investigators located instructions in a notebook on how to copy the classified code (referred to in paragraph 8) onto a floppy disk. These instructions were handwritten in LEE's notebook. At the top of the notation were Chinese characters which have been translated as "method to print entire directory onto disk."

(27) As a LANL employee in the X-Division, LEE was permitted to use LANL computers at home. LEE had two computers assigned to him, and recorded on his personal properyy log. These two computers were a MacIntosh laptop and a MacIntosh desk top.

(28) During the January 17, 1999, interview of LEE at his residence, an interviewing Special Agent observed a desktop computer located in the living room. The Agent observed that the computer was the focal point of a work area that contained documents and other items. During a later interview of LEE, conducted on March 5, 1999, LEE stated to FBI Special Agents that he kept at his residence a MacIntosh desktop computer which belonged to LANL. LEE admitted that he used this computer "because I sometimes work at home." LEE also stated that he used this desktop computer to connect to the LANL computer in his office. LEE also stated that he used the computer in his residence to check E-mail and to do word processing. On March 5, 1999, LEE turned over to FBI investigators the LANL-owned MacIntosh desktop computer that had been in his house. LEE's LANL-owned MacIntosh laptop computer was seized on March 5, 1999 during a consent search of LEE's T-Division office. Although not specifically asked, LEE did not produce any computer discs or storage cassettes that he utilized at home on his LANL-owned computers. According to LANL experts, LEE's LANL-owned MacIntosh laptop and desktop computer utilized removable cartridges in lieu of a hard drive. LANL experts have determined that no classified information was contained on the cartridges within either computer at the time they were seized or produced.

(29) Shortly after the polygraph that DOE conducted on December 23, 1998, DOE suspended LEE's access to all classified information. LANL also reassigned LEE from the X-Division to the T-Division, which does not handle classified information. Between that time and March 5, 1999, LEE tried to gain physical access to the X-Division on two separate occasions. On at least one occasion during this time, LEE obtained unescorted access to X-Division.

(30) During the March search of LEE's X-Division office, investigators found a notebook. This notebook contained a one-page computer-generated document which listed all of the files in the KF1 directory that LEE had created in the CFS. During the search, Charles Neil, examined this list and explained that the files named in LEE's KF1 directory were contained in the open part of the CFS. The files contained highly classified information. Neil tried to access the files listed in LEE's KF1 directory. He discovered that the majority of the files had been deleted. Neil sought assistance from Thomas Stup, CFS administrator for the X-Division. Stup examined LEE's KF1 directory files and determined that the files had been deleted between February 9, 1999 and February 11, 1999, the day after the FBI polygraphed LEE.

(31) During the March search of Lee's X-Division office, FBI and DOE investigators located three multi-page documents that did not bear classification markings as required by regulation despite the fact that those documents contained classified information. The classification stamps or marks had been removed in several ways. In the first classified document, the classified stamp had been covered up while the document had been copied on a copying machine. In a second classified document, the classification markings had been physically cut from the top and bottom of each pace. In the third classified document, the classification marking had been deleted by computer command before the document was printed. According to CHARLES NEIL, there is no bona fide LANL-related employment purpose in deleting classification designations or markings from a classified document. In fact, such deletions would constitute a LANL security violation. Based on my training and experience, removing classification designations or markings is a way to minimize risk of detection or apprehension when gathering, removing, or retaining classified materials in an unauthorized fashion. Additionally, the removal of classification markings as described above from classified documents would facilitate LEE's ability to remove classified documents from LANL in an unauthorized fashion.

(32) On April 7, 1999, employees at LANL's Computer Help Desk stated that their logs reveal that LEE had made the following four requests for assistance. First, on March 2, 1998, LEE asked how to access his closed file X-Division CFS from overseas. This was just before a personal trip that LEE made to Taiwan which began on March 15, 1998. This trip lasted for 45 days. The Help Desk informed LEE that it was not possible to access the closed CFS from overseas. Second, on January 21, 1999, (which was four days after the FBI interviewed him at home), LEE asked how to hook up a laptop into GAMMA, which is a LANL processing computer used to make calculations rather than store information. Third, also on January 21, 1999, LEE sought help in deleting files. During his request for help, LEE stated that, despite his deletion efforts, the files were "not going away." The Help Desk surmised that he needed to take one last step to delete the files and told him how to complete the process. Fourth, on February 1, 1999, LEE said that he was dialing in from his LANL-owned MacIntosh computer (which was at his residence) and was getting in (obtaining access to LANL's computer system) but was getting disconnected.

(33) LEE was fired from LANL on March 8, 1999. DOE revoked LEE's security clearance that same day. Additionally, LEE certified on or about March 8, 1999 that he had returned all LANL property. Although LEE has been residing with family in the Los Angeles, California area between on or about March 9, 1999 until on or about April 7, 1999, he is not known to have any office or other location other than his residence out of which to work or which provided him computer access.

(34) Based on the foregoing information, there is probable cause to believe that there is evidence in LEE's residence that reveals violations of 18 U.S.C. ?? 793, 1001, and 1924.

(35) The affiant requests that a search warrant be issued for LEE's residence, as described in Attachment A.

(36) I believe that there is probable cause to believe that evidence of the above-described criminal activities will be found in LEE's residence. These conclusions are based on my experience and training relating to the types of records and items that persons engaged in the activities described above typically keep at their residence as well as on the facts recited above.

(37) Items to be seized are described in Attachment B of this Affidavit, and include but are not limited to computer disk or other computer memory storage devices, records, documents and materials including those used to facilitate communications, electronic data, and computer equipment and peripherals.

ATTACHMENT A

80 Barcelona Avenue
White Rock, New Mexico 87544

80 Barcelona Avenue is a one story, brown brick, maroon framed, ranch-style house with a two car garage. The brick covers only the front portion of the house, the sides of which are brown stucco and the roof is a maroon color. Directly in front of the house and adjacent to Barcelona Avenue are five evergreen trees and a white mailbox. Beneath the mailbox is a receptacle for the "Monitor," a local Los Alamos, New Mexico, newspaper. Barcelona Avenue runs roughly east and west. The house is on the north side of the street in approximately the center of the block, facing south.

The house has been verified to be the personal residence of LEE and his wife by other persons living in the area as well as by two Special Agents of the FBI who interviewed LEE

at this location.

ATTACHMENT B

Items to be seized:

Computer hardware is described as any and all computer equipment, including any electronic devices which are capable of collecting, analyzing, creating, displaying, converting, storing, concealing, or transmitting electronic, magnetic, optical, or similar computer impulses or data. These devices include but are not limited to any data processing hardware (such as central processing units and self-contained "laptop" or "notebook" computers); internal and peripheral storage devices (such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, optical and compact disk storage devices, and other memory storage devices) ; peripheral input/output devices (such as keyboards, printers, scanners, plotters, video display monitors, and optical readers); and related communications devices (such as modems, cables and connections, recording equipment, RAM or ROM units, acoustic couplers, automatic dialers, speed dialers, programmable telephone dialing or signaling devices, and electronic tone-generating devices); as well as any devices, mechanisms, or parts that can be used to restrict access to such hardware (such as physical keys and locks).

Computer software is described as any and all information, including any instructions, programs or program code stored in the form of electronic, magnetic, optical or other media which are capable of being interpreted by a computer or its related components. Computer software may also include certain data, data fragments or control characters integral to the operation of computer software. These items include, but are not limited to operating system software, applications software, utility programs, compilers, interpreters, communications software and other programming used or intended to be used to communicate with other computer components.

Computer related documentation is described as any written, recorded, printed or electronically stored material which explains or illustrates the configuration or use of any seized hardware, software or related item.

Also included as items to be seized are any computer generated document or hard copy related to LANL, source codes, input decks, FORTRAN codes and other mathematical calculations.

Computer passwords and data security devices are described as all of the devices, programs, or data - whether themselves in the nature of hardware or software - that can be used or are designed to be used to restrict access to or facilitate concealment of any computer hardware, software, computer related documentation, electronic data, records, documents or materials within the scope of this application. These items include but are not limited to any data security hardware (such as encryption devices, chips and circuit boards) passwords, and similar information that is required to access computer programs or data or to otherwise render programs or data into a useable form.

In addition to computers and computer related hardware and software as described above, items to be seized include any books, records, receipts, notes, e-mail, ledgers, documents, agreements, worksheets, correspondence or information relating to or describing work involving the Los Alamos National Laboratory and work projects therein. These items may include classified as well as unclassified documents.

Any and all documents or records relating to travel to or correspondence with any PRC official, scientist or resident.

Due to the use of computers, this data may be in the form of paper documents or may be stored in the form of electronic, magnetic, optical or other media capable of being read by a computer or computer related equipment. This media includes but is not limited to any fixed disks, external disks, removable hard disk cartridges, floppy disk drives and diskettes, tape devices and tapes or other memory storage devices not in paper form which may have been used as a means of committing, or constitute evidence of the commission of, violations of Title 18, United States Code, Sections, 1924 and 793.

Other items to be seized include notebooks, diaries, calendars, evidence of transactions, telephone records, and credit card records.

The phrase "records, documents and materials," including those used to facilitate communications includes but is not limited to records of personal and business activities relating to Los Alamos National Laboratory, such as business documents, associate names and addresses, correspondence, e-mail, log books, diaries, telephone records, bank records, reference materials and photographs.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, December 10, 1999.

Hon. ARLEN SPECTER,
Chairman, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am in receipt of your December 7, 1999 letter regarding scheduling closed hearings next week on the FBI's Wen Ho Lee investigation. Your letter requests the testimony of nine (9) FBI witnesses, including two of the case Agents, my General Counsel, and case supervisors and managers, including the Special Agent in Charge in Albuquerque and the Assistant Director in Charge of our National Security Division. For the reasons set forth below, I respectfully request that you delay hearings on any aspect of this investigation until the conclusion of the current criminal proceedings resulting from the indictment handed down today.

As you know, in an effort to assist your Subcommittee the FBI has made available to you or your staff raw investigative files concerning the Wen Ho Lee investigation, and made available for interview a substantial number of employees. Today, however, Wen Ho Lee was indicted in the District of New Mexico, an indictment that alleges the massive misappropriation of the most sensitive nuclear weapons information possessed by the U.S. Government. Some of the violations carry potential life sentences.

In my view, the potential that your hearings could inadvertently interfere with the prosecution is substantial. Subcommittee hearings at this time risk impacting upon the Government's ability to successfully prosecute Mr. Lee by creating issues that may not presently exist. Moreover, it is critical for our national security that we have every opportunity to learn as much as we can from Wen Ho Lee in a carefully controllable setting. Given the gravity of the allegations and charges, and the potential opportunities that could be lost by hearings, I respectfully ask that you not go forward at this time. I hope you will agree that to do otherwise poses a substantial risk not only to prosecution but to the Government's ultimate ability to discover the full extent of the damage done.

Further, I do not believe any aspect of this case can be isolated for hearing purposes. Many of the same witnesses and documents could at any point become relevant to issues raised by defense counsel, and your discussions with Mr. Lee's attorney may inadvertently create opportunities for the defense that otherwise might not occur.

Please do not interpret this request as concern about having hearings. My concern is only about timing and the potential for increased risks to prosecution. We intend to continue fully cooperating with the Subcommittee and look forward, once the criminal proceedings have concluded to describing for the American people how the FBI was able to achieve this result.

Sincerely yours,

LOUIS J. FREEH,
Director.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, December 10, 1999.

Today, Wen Ho Lee, a nuclear weapons engineer, was indicted in a 59 count indictment alleging that he downloaded and removed from the Los Alamos National Laboratory the following classified nuclear weapons design and testing files. These extensive files relate specifically to the design, construction and testing of nuclear weapons.

Data files that contain information relating to the physical and radioactive properties of materials used to construct nuclear weapons;

Input deck/input file information that includes descriptions of the exact dimensions and geometry of nuclear weapons that are used in connection with the design and simulated testing of nuclear weapons, and the computer instructions to set up a simulated nuclear weapons detonation;

Source codes used for determining by simulation the validity of nuclear weapons designs and for comparing bomb test results with predicted results;

Nuclear bomb testing protocol libraries reflecting the data collected from actual tests of nuclear weapons;

Data concerning nuclear bomb test problems, yield calculations, and other nuclear weapons design and detonation information; and

Computer programs necessary to run the design and testing files.

The charges alleged in the indictment include violations of the Atomic Energy Act that carry a maximum penalty of life imprisonment and federal espionage statutes.

Over 60 FBI Agents and dozens of computer specialists and other specialists such as scientists, engineers, and technicians, both from the FBI and the DOE, have been dedicated to this investigation.

Investigation leading to this indictment has been extensive. The FBI, with the assistance of the Department of Energy and Los Alamos National Laboratory, has conducted over 1,000 interviews and searched over one million computer files. Comprehensive analysis by the FBI's Computer Analysis Response Team and DOE was critical to uncovering many of the facts that lead to this indictment. Over four trillion bits of data were examined. Several searches also have been conducted.

The Department of Energy and Los Alamos National Laboratory deserve great credit for their superb assistance and extraordinary expertise.

A copy of the press release by the United States Attorney and a copy of the indictment are attached.

DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION,
Washington, DC, December 17, 1999.

Hon. ARLEN SPECTER,
Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: This is to thank you for honoring the request of FBI Director Louis J. Freeh that the Subcommittee postpone the hearings that it had scheduled for December 14 and 16 on matters related to the investigation of Wen Ho Lee. As Director Freeh noted, with the indictment of Mr. Lee on December 10, the criminal case against Mr. Lee has entered a new and sensitive stage. United States Attorney John J. Kelly and I, as well as the Attorney General, share Director Freeh's concern that holding hearings at this time could have inadvertently interfered and seriously harmed the criminal prosecution of Mr. Lee for misappropriation of extraordinarily sensitive and important nuclear weapons information. Indeed, it is reasonable to expect that Mr. Lee's attorneys would have welcomed such hearings as a way of generating information that they could have later used to attack the Government's prosecution.

Additionally, as Director Freeh noted, it is essential to the nation's security that we have the greatest opportunity possible to learn as much as we can from Mr. Lee in a carefully controlled setting. We must not miss any possible way of reducing the damage to the national security that Mr. Lee's actions may have caused, regardless of whether that damage is directly related to the pending criminal case against Mr. Lee.

We also agree with Director Freeh that it would be impossible to completely isolate any aspect of the Wen Ho Lee investigation for hearing purposes. Many of the witnesses have information that is pertinent to both criminal and national security issues. Thus, even if the Committee had attempted to restrict testimony at the hearing to matters that it believed were unrelated to the criminal case, it could still have elicited testimony that Mr. Lee's counsel could exploit in the criminal prosecution.

We want to make clear that the Department of Justice has been, and will continue to be, cooperative with the Subcommittee in its investigation. We have provided the Subcommittee with open access to the FBI's files on Mr. Lee and numerous Department officials have testified before the Committee. For the reasons discussed above, however, we strongly believe that holding hearings during the pendency of the criminal prosecution could have serious negative consequences for both the prosecution and the national security. We greatly appreciate your understanding of that concern. Once the criminal prosecution has concluded, we will be glad to provide testimony on the Wen Ho Lee matter.

Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely yours,

JAMES K. ROBINSON,
Assistant Attorney General.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, January 4, 2000.

Mr. EDWARD J. CURRAN,
Director, Office of Counterintelligence, Department of Energy, Washington, DC.

DEAR ED: I have been provided a copy of the undated FBI blind memorandum captioned "KINDRED SPIRIT; LEE, WEN HO; LEE, SYLVIA; FCI–PRC." As we discussed telephonically, this document is in the possession of DOJ and I understand has been provided to one or more Congressional Committees. Also as we discussed, I told you I would cause an in-depth review to be made in the FBI and if appropriate, correct any misperceptions this document creates when viewed out of content. Having stated that, it is the purpose of this letter to (1) put that document into its proper context and (2) correct at least what I understand from you are two apparent misinterpretations of this document.

With respect to the document, I have been advised that it was created by FBI Albuquerque as a result of a telephonic discussion between the Assistant Special Agent in Charge and a Deputy Assistant Director of the National Security Division. It was intended only to be a "rough" update of the status of the investigation prepared by FBI Albuquerque. It was not intended to be further disseminated or to reflect all of the facts about any aspect of the investigation. As a "blind memorandum" it also is not intended to capture official witness statements or other evidence. In common parlance, it is the equivalent of a "note to the file." From what you described, it underscores the difficulty associated with utilizing any one document to characterize a long term investigation or for that matter a critical aspect of the investigation.

With respect to the details of this document, I would like to comment on two aspects in particular:

(1.) In the first paragraph there are reported details of the polygraph of Wen Ho Lee on December 23, 1998. These facts are accurate. However, as we discussed, your impression was that this paragraph suggested that there was not the high level of coordination between the FBI and DOE regarding this polygraph that you understood existed. To the contrary, from everything I know, this polygraph was coordinated appropriately. FBI Albuquerque agreed in advance with its role in a standby capacity as this was at the time a DOE administrative matter. My recent review did not identify any coordination issue or conflict with respect to the conduct of the polygraph.

(2.) The second paragraph reports on the status of an access to the polygraph charts (for subsequent FBIHQ Polygraph Unit quality control review). It also attributes a DOE response to you by name.

With respect to the attribution to you by name, I can find no FBI employee that can confirm such a statement. It may be that someone in DOE used your name, but even that is not certain. Any indication that you personally made a statement preventing the FBI access to the polygraph charts is inaccurate.

With respect to the remaining facts in this paragraph as to access to the charts they are accurate. However, they can in hindsight easily be taken out of context. When we were informed on December 23, 1998, Wen Ho Lee passed the polygraph, immediate access to the charts was requested but not insisted by the FBI. We were informed of the DOE internal handling procedures. At the time, in part because we were under the impression he had passed the polygraph, we waited for the charts to be provided as we understood they would be. FBI Albuquerque did make inquiries as to the availability of these charts and were concerned with the time factor involved. However, I can find no formal of the charts availability, in Albuquerque, they were immediately obtained and transmitted to FBIHQ, and the quality control review conducted. Upon learning that the FBIHQ Polygraph Unit believed the results to be inconclusive, this was immediately relayed to you telephonically.

I hope these comments place in proper context the blind memorandum and eliminates any misunderstanding on the two aspects noted above.

Sincerely yours,

NEIL J. GALLAGHER,
Assistant Director,
National Security Division.

FBI FACSIMILE COVER SHEET

PRECEDENCE	CLASSIFICATION
____ Immediate	__ Top Secret
____ Priority	__ Secret
__X__ Routine	__ Confidential
	__ Sensitive
	__X__ Unclassified

DATE: September 13, 2000

TO: **Dobie McArthur**

FAX NO.: 224-8165

FROM: Eleni P. Kalisch
Special Counsel
Office of Public and Congressional Affairs
TEL (202) 324-5051
FAX (202) 324-6490

NUMBER OF PAGES: 3 (including cover page)

COMMENTS:

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

FBI NATIONAL PRESS OFFICE
(202) 324-3691

IMMEDIATE RELEASE
September 13, 2000

STATEMENT BY FBI DIRECTOR LOUIS J. FREEH

In June of this year Judge Parker raised as a possibility the opportunity to engage in mediation in the Wen Ho Lee case. Ultimately the parties agreed to a protocol and four weeks ago, even prior to the most recent bail hearings, Dr. Lee's lawyers and the government began the plea bargain process in earnest. Our goal was to achieve what is being announced today. In return for a plea of guilty to one felony count, Dr. Lee and his lawyers agreed to a process we believe provides the opportunity to determine what in fact happened to the nuclear design and source codes that Dr. Lee unlawfully and criminally downloaded, copied and removed from Los Alamos. In simple terms, the government accepted this plea in exchange for the full cooperation of Dr. Lee.

FBI investigation, with great assistance from the nuclear weapons experts at Los Alamos, determined that the rough equivalent of 400,000 pages of nuclear design and testing information was transferred out of the secure computers at Los Alamos and downloaded onto ten portable tapes. As the government has previously stated, this 806 megabytes of nuclear weapons data represents the fruits of 100's of billions of dollars of investment by the United States. While three of the tapes have been recovered, the others remained missing and unaccounted for.

Documents seized from Dr. Lee's possession during searches in the course of the investigation provided substantial evidence of his criminal conduct. Complex analysis of millions of computer records established with certainty that during nearly 40 hours of downloading over 70 different days Dr. Lee manipulated these enormous and often highly classified nuclear weapons data files in a way that defeated existing security and allowed them to be placed onto tapes in an unclassified setting. While some of the information was not classified, the government was prepared to prove that much of it was highly classified nuclear weapons information. The government was also prepared to prove that the tapes were unlawfully made and unlawfully removed from the possession of the United States. With today's plea agreement, there is no longer any doubt that it happened. Dr. Lee acknowledges that in his plea.

The government was prepared to prove that the weapons data was taken in this fashion and that numerous efforts were made both to conceal the unlawful download of classified information and to destroy the electronic footprints left by the transfer and downloading process. The government was prepared to prove that after the existence of the investigation became known, efforts were made by Dr. Lee to delete files that had been manipulated into unclassified systems. The government was prepared to prove that there were many attempts–some in the middle of the night-- to regain access to the classified systems even after access had been formally revoked by Los Alamos.

As the government has previously represented to Dr. Lee and the court, determining what happened to the tapes has always been paramount to prosecution. On balance, from the moment it became clear that the nuclear weapons design and testing information was stolen, it is most important to the security of the nation to determine with certainty what Dr. Lee did with the tapes, if they were copied and whether he gave them to another country. Success in the investigation and prosecution, while clearly an objective given the extraordinary sensitivity of what was removed from Los Alamos, does not in the end protect the nation to the degree that determining what happened to the tapes after he made them does. The safety of the nation demands we take this important step.

In this case, as has happened often in the past, national security and criminal justice needs intersect. In some instances, prosecution must be foregone in favor of national security interests. In this case, both are served.

As the government indicated previously, the indictment followed an extensive effort to locate any evidence that the missing tapes were in fact destroyed, and repeated requests to Dr. Lee for specific information and proof establishing what did or did not happen to the nuclear weapons data on the tapes. None was forthcoming. The indictment followed substantial evidence that the tapes were clandestinely made and removed from Los Alamos but no evidence or assistance that resolved the missing tape dilemma.

Some will undoubtedly question whether the penalty imposed by this guilty plea arrangement is commensurate with the theft and crimes that occurred. Dr. Lee was entrusted with some of the nation's most vital and highly classified information. Were the location of the tapes not at issue, the answer in all likelihood would be no. But the location of the stolen data and who, if anybody, has had access to it, are at issue. These have been the central issues since we first asked Dr. Lee, prior to the indictment, what he did with the tapes and information. The obligation that rests on the government is first and foremost to determine where the classified nuclear weapons information went and if it was given to others or destroyed. This simple agreement, in the end, provides the opportunity of getting this information where otherwise none may exist.

Dr. Lee has pleaded to his crime. Now for the first time we have the opportunity for him to explain what happened and to provide the United States with the information necessary to give assurance that the nuclear weapons data has not been and cannot further be compromised. As is customary, the agreement is based on his truthfulness -- and the government will have ample opportunity to verify what we are told, to include, if necessary, use of the polygraph. As the attorney general said, if we believe he is not being truthful and forthcoming, then we can move to void the agreement and prosecute on all counts in the indictment.

The FBI is grateful to the Attorney General and her staff for making this plea bargain possible. We are also grateful to U.S. Attorney Norman Bay, lead prosecutor George Stamboulidis, and all of the other prosecutors and FBI agents who so meticulously constructed this case and who were prepared to go to trial. I want especially to thank the FBI's many computer experts who, along with John Browne and his staff at Los Alamos, were able to unravel this extraordinarily complex computer case.

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DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, September 21, 2000.

Hon. ARLEN SPECTER,
Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: Enclosed for your use is an excerpt from the "Statement of Facts" portion of the Government's answer brief filed in February 2000, with the Tenth Circuit Court of Appeals. This pleading was filed in response to the brief filed by counsel for Wen Ho Lee appealing the District Court's denial of bail.

As you prepare for hearings on the Government's handling of the Wen Ho Lee case, I thought it would be helpful for you to have this factual explanation of the classification levels of the material Lee down-partitioned and downloaded. That remains one of the publicly debated central issues. While much testimony and many documents on this issue undoubtedly will be forthcoming, this excerpt provides a concise, unclassified description of the nature of the material. Also enclosed is transcript from a recent edition of Nightline that reflects public statements by U.S. Attorney Norman Bay on this same and other issues.

As we identify other unclassified documents that appear useful for hearing preparation, we will bring them to your attention. Please feel free to contact me if you have any questions.

Sincerely yours,

JOHN E. COLLINGWOOD,
Assistant Director,
Office of Public and Congressional Affairs.

Enclosures.

STATEMENT OF THE FACTS

1. LEE'S BACKGROUND

Lee was born in Taiwan in 1939. (App. at 220.) He has six siblings, three who live in Taiwan and three who live in the United States. (App. at 221–22.) He is married and has two adult children, both of whom were born in the United States and live here. (App. at 302–03.)

Lee came to the United States in 164 on a student visa and enrolled at Texas A&M in College Station, Texas. (App. at 221.) Lee received his master's degree in 1966 and his doctorate in 1969 in mechanical engineering. (App. at 221.)

In 1970, Lee became a naturalized United State's citizen. (App. at 221.) His wife, Sylvia, became a naturalized citizen in 1997. (App. at 221.) Lee and his wife both speak Mandarin Chinese and, of course, English. (App. at 222.)

LANL hired Lee in 1980, and Lee worked for the laboratory until his termination in March 1999.[3] (App. at 222,225.) Lee was assigned to LANL's X Division, the division responsible for the research and design of approximately 85 percent of the United States nuclear stockpile, as a hydrodynamicist/engineer. (App. at 152,222.) Lee's primary job assignment throughout his eighteen years at LANL was to write and implement physics models in the area of hydrodynamics as applied to nuclear weapons research. (App. at 222–25.)

In 1993, Lee was notified that he was in danger of losing his job because of a potential reduction in force (RIF). (App. at 292.) In response, Lee applied for overseas employment in Singapore, Taiwan, Hong Kong, Malaysia, Germany and Switzerland. (App. at 292–94.) Although Lee did not lose his job, he maintained professional contacts overseas. In March and April, 1998, for example, with LANL approval, Lee was a lecturer and consultant at a science institute in Taiwan for six weeks.[4] (App. at 294.)

2. THE PRELIMINARY INVESTIGATION

In 1996, the FBI began to investigate possible espionage by the People's Republic of China (PRC) with regard to a specific nuclear weapon in the United States arsenal—the W88 (App. at 219–20.) Although Lee was a subject of that investigation,

[3] In December 1998, Lee was transferred to an unsecured area in LANL's T Division. Although Lee lost his security clearance, and thus his ability to enter X Division, on February 23, 1999, Lee's X Division office was sealed until it was searched on March 5, 1999. (App. at 223–25.)

[4] This was before LANL and the FBI knew that Lee had down-partitioned and downloaded America's nuclear secrets on to portable computer tapes. (App. at 220.)

the indictment does not charge him with PRC-related espionage. (App. at 6–50.) Instead, a separate and distinct investigation of Lee began in late March, 1999, after the FBI and LANL unearthed information that Lee had down-partitioned from a secure to an unsecured computer, 806 megabytes of Secret and Confidential Restricted Data relating to thermonuclear weapon research and design.[5] (App. at 220,230.) When the nature and extent of the compromise was discovered, LANL immediately and completely shut down its entire computing system for three weeks to scrub Lee's classified information from the unsecured computing environment. (App. at 359–60.)

As the subsequent investigation revealed that Lee surreptitiously created ten portable cassette tapes[6]—seven of which remain unaccounted for—which contained most of the 806 megabytes of classified information, the FBI and national intelligence agencies began an unsuccessful world-wide search for the missing tapes. (App. at 708–09.) Lee was indicted after the search for the tapes was unsuccessful. (App. at 707–11.) In terms of the overall national interest, finding the tapes was more important than a successful criminal prosecution because Lee's indictment publicly confirmed the existence of the missing tapes and the value of the information on those tapes, and thus "whet[ed] [foreign intelligence services'] appetite to unlawfully gain access to those materials." (App. at 708–11.)

3. THE NATURE AND THE SENSITIVITY OF THE SECRET AND CONFIDENTIAL RESTRICTED DATA DOWN-PARTITIONED AND DOWN LOADED BY LEE

Four scientists testified about the nature and sensitivity of the Secret and Confidential Restricted Data Lee stole: Dr. Stephen Younger, Dr. Richard Krajcik, Mr. John Romero, and Dr. Paul Robinson. Dr. Younger, as the Associate Laboratory Director for Nuclear Weapons at LANL, is entrusted with a $900,000,000 program that employs 3,500 people, and is responsible for the research, design, development, and safe stewardship of approximately 85% of the United States nuclear arsenal. (App. at 151–52.) Dr. Richard Krajcik is a physicist who has spent. twenty-six years at LANL, including seven years as the group leader for primary design and two years as a project leader for advanced weapon design, and has been the Deputy X Division Director since 1997. (App. at 496.) Physicist John Romero is the team leader for Code A, which is LANL's most significant secondary design nuclear weapons source code. (App. at 511–12, 649.) Dr. Paul Robinson, the current President of Sandia National Laboratory, worked at LANL for eighteen years, first as a weapons designer and then as the Principal Associate Director for National Security. (App. at 683–84.) In addition, Dr. Robinson was the Ambassador for the United States to the Nuclear Test Ban Talks in Geneva, Switzerland, which culminated in two treaties ratified by the United States Senate. (App. at 684.) As President of Sandia National Laboratory, Dr. Robinson is the Science Advisor to the Strategic Advisory Committee to the Commander-in-Chief of Stratcom. (App. at 684.)

In providing an unclassified primer on American thermonuclear weapon design and construction, both Dr. Younger and Dr. Krajcik testified that the major tools used to design and develop American thermonuclear weapons are nuclear weapons design source codes. (App. at 153–54,498–99.) American nuclear weapons design source codes are extraordinarily complex and hundreds of thousands of lines long. (App. at 154–60,498–500.) The source codes model and simulate every aspect of the complex physics process involved in creating a thermonuclear explosion. (App. at 154–60,498–500.) The source codes are written to design specific portions of a nuclear weapon—either the primary[7] or the secondary.[8] (App. at 160,503.)

Although nuclear weapons source codes contain all of the physics involved in a thermonuclear weapon, the source codes themselves require "data files"—both classified and unclassified—to run actual simulations. (App. at 161–64,503–05.) Data files contain all of the physical and nuclear properties of materials required for a

[5] 806 megabytes of information roughly translates into 800 reams of paper, i.e., 400,000 pages at 2,000 characters per page. (App. at 230–32.)

[6] In addition, Lee surreptitiously created five tapes which contained unclassified information. FBI agents found six tapes in Lee's T Division office in March 1999. Of the nine that are missing, seven contain classified information and are charged in the indictment. The other two missing tapes contain data files required to run nuclear weapons source codes. (App. at 250–58, 1040–68, 1073–119.)

[7] A "Primary" is the first stage of a nuclear weapon. The primary uses chemical high explosives and nuclear materials to start a nuclear reaction that produces sufficient energy to drive the secondary stage. (App. at 13.)

[8] "Secondary" is the second stage of a nuclear weapon. The secondary uses the energy produced by the primary to trigger a thermonuclear burn (nuclear fusion reaction). It is this thermonuclear burn that produces the ultimate destructive force of the nuclear weapon. (App. at 13.)

nuclear explosion. (App. at 161–64,503–05.) Like nuclear weapons source codes, the data files are the product of more than fifty years of both theoretical and experimental calculations, and they represent knowledge acquired from more than a thousand American nuclear tests. (App. at 161–64,503–05.) Data files become classified as SRD when the properties of the materials are most directly relevant to nuclear weapons, i.e., in environments involving very high pressures and temperatures. (App. at 505.) The American national investment in producing the information contained on LANL SRD data files is of a magnitude of "hundreds of billions of dollars." (App. at 164.) The information contained in these files cannot be duplicated given the current ban on nuclear testing. (App. at 165.)

"Input decks" are mathematical descriptions of the actual geometry and materials within a nuclear device itself. (App. at 165–66,508–09.) In essence, as input deck is an "electronic blueprint" of either a primary or secondary within a nuclear weapon. (App. at 509.)

According to Drs. Younger and Krajcik, Lee down-partitioned and downloaded all of LANL's significant nuclear weapon primary and secondary design codes in their entirety. (App. at 174–76,521–23.)

> They [Codes A, B, D/G, and I][9] represent the complete nuclear weapons design capability of Los Alamos at that time. There may have been small codes that weren't included in there, but they were the big ones. And they would enable the possessor to install the complete nuclear weapons design capability at a remote location without a great deal of effort.

(App. at 174–75.) In addition, Lee down-partitioned and downloaded "all of the data files required to operate those codes," as well as multiple input decks representing actual nuclear bomb designs that ranged in sophistication from relatively simple to complex. (App. at 174–76,523–25.)

Dr. Krajcik described Lee's personal library[10] of America's nuclear secrets as "chilling" because it

> contained the codes important for doing design or design assessment, files important to determine geometries, important successfully tested nuclear weapons. It contained important output setups, nuclear output setups. It contained devices across a range of weapons, from weapons that were relatively easy to manufacture, let's say, to weapons that were very sophisticated and would be very difficult to manufacture. It contained the data bases that those codes would require to run. And for someone who used those codes to incorporate them into any kind of calculations that were made in terms of designing something new or checking something old, it was all there. . . . It really represents a capability that someone could use to design and analyze nuclear weapons.

(App. at 509–10.) Lee's theft of Codes A and G involved the taking of everything an unauthorized possessor would need to design a functional secondary device.[11] (App. at 510–12.) And Code D, which Lee also misappropriated, was the "latest and best tool as of 1997" for primary design. (App. at 514).

Like his fellow LANL scientists, physicist John Romero found Lee's down-partitioning of America's nuclear secrets to be "unimaginable." (App. at 652, 664). Romero was incredulous when he discovered what Lee had done. "I could not believe it. I cannot—I still cannot. I have trouble believing it. It's just—all the codes, all the data, all the input files, all the libraries, the whole thing is there, the whole ball of wax, everything." (App. at 664.)

Mr. Romero, the team leader for Code A, explained that Lee took Code A in two different formats, one of which was contained in File 1,[12] and the other in File 2. (App. at 652–53.) The disturbing difference between Files 1 and 2 was that File 1 contained the Cray supecomputer version of Code A while File 2 contained a version of Code A that was adapted to run on non-Cray computers, albeit at far slower speeds. (App. at 652–53.) Although Code A was designed to run on a Cray supercomputer, if one did not know the computing resources of a potential unauthorized possessor, one contemplating espionage would take both versions. (App. at 654–57.)

The same was true with the SRD data files Lee took in Files 5 and 7. According to Mr. Romero, File 7 contained all of the data, both classified and unclassified, necessary to run any LANL nuclear weapons source code in "IEEE binary format."

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[9] The codes Lee took have been assigned letters as "alias" names rather than using the true code names. (App. at 345.)

[10] According to Dr. Krajcik, the 806 megabytes of classified information in Lee's library existed in only two other places in the United States—the two national weapons laboratories, LANL and Lawrence Livermore. (App. at 526–27,533.)

[11] Lee attempted to take one other secondary design code, but the team leader of that particular code turned down Lee's three attempts to gain access to that code. (App. at 194–96.)

[12] The nineteen TAR files that Lee downloaded and as alleged in the indictment are designated by numbers one through nineteen.

(App. at 657.) File 5, a subset of File 7 in that it contained only classified data files, was in "ASCII format," which is "human readable."[13] Lee's theft of all of LANL's data files in two different formats, a "portable" machine readable binary format and a human readable text, would be useful for unauthorized possessors with uncertain computing platforms. (App. at 600.)

The information that Lee knowingly down-partitioned and downloaded on to the missing portable computer tapes would mean different things to different unauthorized possessors. (App. at 177.) For a group or state that "did not have the indigenous scientific capability to do it alone," the information "would represent an immediate capability to design a credible nuclear explosive." (App. at 177.) A country that had some experience with nuclear explosives could use the information to optimize its nuclear bombs. (App. at 178.) An advanced nuclear state could use the information to "augment their own knowledge of nuclear explosives" and to "uncover vulnerabilities in the American arsenal which would help them to defeat our weapons through anti-ballistic missile systems or other means." (App. at 178.)

After being briefed on the contents of Files 1 through 19 and Tape N,[14] Dr. Robinson, the current president of Sandia National Laboratory, testified that the information on the missing tapes "represent[s] a portfolio of information that would allow one to develop a simple, easily manufactured weapon such as a terrorist weapon all the way up to the very best that the United States is capable of designing." (App. at 690.) Dr. Robinson believed that putting Lee at liberty under any condition of release would be a risk of the magnitude of a "you bet your country decision." (App. at 691.) What Lee did was "a grave undercut to our strategic posture." (App. at 695.)

[13] Lee also down-partitioned and downloaded the unclassified data files in ASCII format, which were the balance of what was contained in File 7. (App. at 658.)

[14] Lee assigned letters to the tapes he created, which are consistent with the designations of the tapes in the indictment. (App. at 1069–71.)

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FBI

ALL INFORMATION CONTAINED HERE IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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TRANSMIT VIA: [X] Teletype [ ] Facsimile [ ] AIRTEL

PRECEDENCE: [ ] Immediate [ ] Priority [X] Routine

CLASSIFICATION: [ ] TOP SECRET [X] SECRET [ ] CONFIDENTIAL [ ] UNCLAS E F T O [ ] UNCLAS

ASSIFIED BY: 60267 NS1 b2
EASON: 1.5 (C)
ECLASSIFY ON: X1

Date 8/23/95

FM FBI ALBUQUERQUE [redacted] [S]

TO DIRECTOR FBI/ROUTINE/

BT

S E C R E T

Date [redacted] [S]

CITE: //3020:3589// [S]

PASS: FBIHQ, NSD, [redacted] SSA CRAIG SCHMIDT.

SUBJECT: [redacted] [S] OO: ALBUQUERQUE.

THIS ~~CWBIRE~~ COMMUNICATION IS CLASSIFIED "SECRET."

RE ALBUQUERQUE TELETYPE DATED AUGUST 22, 1995.

FOR INFORMATION OF FBIHQ, ON AUGUST 25, 1995, [redacted] (PROTECT REQUESTED), FSS DIVISION GROUP LEADER AT LOS ALAMOS NATIONAL LABORATORY (LANL), WHO OVERSEES COUNTERINTELLIGENCE MATTERS, ADVISED LANL'S REPORT REGARDING KINDRED SPIRIT WILL BE PROVIDED TO NOTRA TRULOCK OF DOEHQ IN APPROXIMATELY TWO WEEKS. FURTHER, A "SMOKING GUN" HAS BEEN FOUND (NFI). [redacted] [S]

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Approved: TJK/dc Original filename: PA00IW.240

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PAGE 2 AO [redacted] SECRET

[redacted] LEARNED OF THIS INFORMATION FROM [redacted] (PROTECT REQUESTED) OF IAHL'S NIO DIVISION.

~~CLASSIFIED BY C/I SPECIALIST ON OADR~~

BT

BY MR. GEORGE:

Q Okay. What happens after this memo?

A I think at that time--something happened right after that. Let me see.

[Pause.]

Yeah. The next day Lee Wen Ho was interviewed by [redacted]

and given a polygraph exam by the counterintelligence people in Los Alamos, Department of Energy people. And they administratively suspended his access to classified information for 30 days.

Q And you're still very much involved at that point in the investigation?

A Yes. I'm involved in the investigation. However, I at that point had very little control over what was going on.

Q Okay. How's that?

A Because the Cox Committee had been meeting for some time. They had focused very heavily on this investigation and what they saw as being problems here concerning lack of security at the national laboratories. The Department of Energy was becoming more and more concerned about how they would appear and how they were appearing during the committee meetings. And it was becoming very urgent for them to look like they were doing something. Ergo, they decided that, "On our own, we have to interrogate and interview Lee Wen Ho, and we have to jerk his clearance or his access, and we expect the FBI--we're begging the FBI, please resolve this investigation in the next 30 days or 60 days so we can fire the guy." And at that point I no longer had any control over the investigation, nor did Albuquerque or anybody else.

[redacted]

Q Was there interaction going with FBI leadership in D.C. at that point or how did that work? Who did they basically communicate that to at FBI?

A Well, one of the people at Department of Energy that was driving this or was responding to higher-ups at the Department of Energy was Mr. Ed Curran. Used to be--I think he still is with the FBI, but he was secunded over to the Department of Energy pursuant to PDD-61 to take over the--you know, try and correct the problems there. But of course, there was a new Secretary of Energy there, who all of a sudden had a big need to show that they were correcting all the problems, and if that meant immediately firing Lee Wen Ho, regardless of whatever it was the FBI was doing, they were going to do it as soon as possible. So they were taking their own action on this.

Q Okay. Did that affect or impede in any way your continuing investigation, meaning the FBI's continuing investigation?

A The original plan to discreetly, subtly, in a non-alerting manner, investigate the guy and not let him know he was under investigation, and then use electronic surveillance to try and catch him red-handed or get enough information to do a powerful interrogation based on information obtained from the electronic surveillance, that was in the trash can. That was over and done with when DOE

decided to start confronting the guy and dealing with the problems on their own.

Q Now, after that point or shortly after that point, the FBI interviews Wen Ho Lee; is that correct? Can you take me through that chain of events?

A Yeah. It becomes a little fuzzy at that point. We did an interview. The Albuquerque did their first--let me see here--I think it was in January. I'm not sure. Give me a minute. I'll find it.

January 17th, the Albuquerque office of the FBI interviews Lee, and obtained a signed statement from him recounting his contacts and travels with the PRC.

Q Were you involved at all in the decision to interview him?

A No. That was being basically driven by the Department of Energy saying, on the 23rd, "We've suspended his access for 30 days. Now FBI, come up with something that we can use to fire him and make his suspended access stick."

Q Okay.

A And there were a lot of communications going on at high levels between the SAC of the Albuquerque field office, section-chief level people at FBI Headquarters and above, and Ed Curran, and for all I know, the Secretary of Energy and the Director of the FBI. I was not privy to these

conversations. I would not necessarily be told that the conversations even took place, much less what was being decided.

Q Okay. So did you know--did you know that Lee was going to be interviewed on the 17th? I'm trying to figure out how much you were involved in--

A Yeah, I think I was, yes. But as to whether or not the interview would take place was no longer a decision I could affect or have any influence on.

Q Okay. And how about after that, what's sort of the string of events that occurs after that?

A Shortly after that it was discovered that during the polygraph that Lee Wen Ho was given on the 23rd by the Department of Energy--you know, they had initially concluded that he had passed the polygraph. The results were sent back to FBI Headquarters for a separate evaluation, something that's really typically not done. But it was in January--I'm sorry, the 2nd of February. The FBI Headquarters Polygraph Unit quietly advises us, in an unofficial way, that they've got problems looking at the charts on the polygraph exam that was done by the DOE people in December, and that DOE had sat there saying, "See, he passed his polygraph exam, no problem", and all of a sudden they now have to go to the Secretary and say, "Well, actually there was a problem." And there was a flurry of

[redacted]

activity for a day or so there. You know, all of a sudden every expert in the world had to be shown the charts and have an opinion on the thing.

MR. LAWSKY: And this is February '99?

THE WITNESS: That's correct. February 2nd, '99 is when the FBI says, "Guys, these charts don't look good."

BY MR. GEORGE:

Q And then what's the next decision that's made by the FBI, the next activity that's--

A That Lee Wen Ho is going to be again interviewed by the FBI, and this time polygraphed by the FBI, and it's going to be a Headquarters polygrapher.

So I, myself, and a Headquarters polygrapher went down to Albuquerque, spent three days down there, and the polygrapher gave him a test. But more importantly, the interview surrounding and during and after the test, Lee Wen Ho made some incredible admissions. Not incredible, no. That's what we believed all along, that he had actually been helping the Chinese with their nuclear weapons program. He, however, did deny that he ever passed any classified information. He did admit that he--that the information he was knowingly giving them would in fact help them with their nuclear weapons program.

Q And based on that, there was then a search warrant application that was pursued?

[redacted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEN HO LEE,

Defendant.

CRIMINAL NO. 99-1417 JC

RESPONSE TO DEFENDANT WEN HO LEE'S MOTION TO REVOKE JUDGE SVET'S ORDER OF DETENTION

The United States of America, by John J. Kelly, United States Attorney for the District of New Mexico, and Robert J. Gorence, First Assistant United States Attorney, requests this Court to affirm United States Magistrate Judge Don J. Svet's order that defendant Wen Ho Lee ("Lee") be detained prior to trial pursuant to 18 U.S.C. § 3142(f)(1)(B).[1] Lee stole this country's nuclear secrets. Lee is responsible for creating seven missing computer tapes containing classified information sufficient to build a functional thermonuclear weapon. Absent credible evidence to the contrary, this Court must find that Lee continues to exercise dominion and control over these seven tapes. Because Lee has denied the United States exclusive control over information that could lead to our military defeat, he poses an *unprecedented* risk of danger to the United States.

[1]Although Judge Svet did not reach the issue of whether Lee poses a substantial risk of flight, the United States continues to rely on that factor as a secondary basis for detention.

I. THE DETENTION HEARING AND JUDGE SVET'S FINDINGS

On December 13, 1999, United States Magistrate Judge Don J. Svet heard approximately four and a half hours of testimony from three witnesses. The government called Dr. Stephen Younger, the Associate Director for Nuclear Weapons at Los Alamos National Laboratory ("LANL"), and Special Agent Robert Messemer, the FBI Supervisory case agent. Lee called Jean Marshall, Lee's next door neighbor and X Division colleague. After hearing the evidence and the arguments of counsel, Judge Svet ordered Lee detained. In doing so, Judge Svet stated:

> I am convinced that I'm right because of the testimony of Dr. Younger who essentially gives us this equation. The knowledge of the defendant, plus the missing tapes, the source code, are a clear and present danger to the national security of the United States. So I will order him held.

(12/13/99 Detention Hearing Transcript ("Tr.") at 175-76.) Judge Svet's analysis was correct, and this Court should affirm the order of detention.

II. THE GOVERNMENT PROVED BY CLEAR AND CONVINCING EVIDENCE THAT LEE IS A DANGER TO THE COMMUNITY.

The government does not contest that it must prove by clear and convincing evidence that defendant is a danger to the community if he is detained prior to trial on that basis. 18 U.S.C. § 3142(f). In determining whether the defendant is a danger to the community, the Court must consider (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the history and characteristics of the defendant, including such things as his character, family ties, financial resources, and community ties, and (4) the nature and seriousness of the danger to the community if defendant is released. 18 U.S.C. § 3142(g). The Ninth Circuit has held that although the weight of the evidence against the defendant should be considered, it is the least important factor. *See United States v. Townsend,* 897 F2d 989, 994 (9th

Cir. 1990) (citing *United States v. Motamedi,* 767 F.2d 1403, 1408 (9th Cir. 1985)). The degree of danger posed by the defendant's release, however, is critical. *See United States v. Leon,* 766 F.2d 77, 81 (2nd Cir. 1985). Based on the four factors that the Court must consider, the government presented clear and convincing evidence that Lee's release poses "the gravest possible security risk to the United States." (Tr. at 38.)

A. The Nature and Circumstances of the Indictment Against Lee Weigh Heavily in Favor of Detention.

On December 10, 1999, a federal grand jury in Albuquerque returned a 59-count indictment charging Lee with violations of the Atomic Energy Act of 1954 and the Espionage Act. According to the indictment, LANL is responsible for the safe stewardship of a substantial portion of the U.S. nuclear arsenal. The X Division at LANL has responsibility for the research, design, and development of thermonuclear weapons. Located within X Division is the most sensitive nuclear weapons data and information possessed by the United States, information that, if improperly handled or disclosed, could cause serious damage to the national security.

The indictment does not allege negligence on Lee's part. Instead, the indictment alleges that in 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 this 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. In addition, the indictment alleges that 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. Seven of the tapes Lee made remain unaccounted for as of today. The Atomic Energy Act counts allege that Lee's conduct was knowing and with the intent to injure the United States or aid a foreign power.

If convicted of any count under the Atomic Energy Act, Lee faces a maximum penalty of imprisonment for any term of years or life and a $250,000 fine. If convicted of any of the federal Espionage Act counts, Lee faces a maximum sentence of ten years imprisonment and a $250,000 fine. The extremely serious nature of the charges against Lee, in conjunction with the surreptitious circumstances under which Lee gathered the nation's most sensitive nuclear secrets as described below, weigh heavily in favor of detention.

B. The Nature and Sensitivity of the Secret Restricted Data Down-Partitioned and Downloaded by Lee is Clear and Convincing Evidence that Lee's Release Would Pose a Serious Danger to the National Security

At the December 13, 1999 detention hearing, Dr. Younger provided an unclassified primer on American thermonuclear weapons and generally described how nuclear weapons work. (Tr. at 8-10.) Dr. Younger, as the Associate Laboratory Director for Nuclear Weapons at LANL, is responsible for a $900,000,000 program, 3,500 people, and is responsible for the research, design, development, and safe stewardship of approximately 85% of the U.S. nuclear arsenal. (Tr. at 8.) Dr. Younger testified that the major tool used to design and develop American thermonuclear weapons are nuclear weapon design source codes. (Tr. at 10-13.) American nuclear weapon design source codes are extraordinarily complex, hundreds of thousands of lines long, and represent a "human-readable" graduate course in nuclear weapons design. (Tr. at 11.) The source codes model and simulate every aspect of the very complex physics process involved in creating a thermonuclear explosion. (Tr. at 11.) According to Dr. Younger, American nuclear

weapon source codes are "the best in the world" because they are the product of 50 years of enormous American national investment. (Tr. at 16.)

Although nuclear weapon source codes contain all of the physics involved in a thermonuclear weapon, the source codes themselves require "data files" -- both classified and unclassified -- to run actual simulations. (Tr. at 17.) Dr. Younger testified that data files contain all of the physical and nuclear properties of materials required for a nuclear explosion. (Tr. at 17.) Like nuclear weapon source codes, the data files are the product of 50 some years of both theoretical and experimental calculations, and they represent the knowledge that was acquired from over 1,000 American nuclear tests. (Tr. at 19-20.) According to Dr. Younger, the data files become classified, Secret Restricted Data when the properties of the materials are most directly relevant to nuclear weapons, i.e., in environments involving very high pressures and temperatures. (Tr. at 18.) The American national investment in producing information contained on LANL Secret Restricted Data files is on a magnitude of "hundreds of billions of dollars." (Tr. at 20.) In addition, the type of data contained in classified LANL data files cannot be acquired given the current ban on nuclear testing. (Tr. at 21.) Finally, Dr. Younger described nuclear weapon "input decks" as mathematical descriptions of the actual geometry and materials within a nuclear device itself. (Tr. at 21-22.)

Secret Restricted Data nuclear weapons source codes, the data files that operate them, and the blueprints of a nuclear device as represented by input decks, are stored only on a classified computing system at LANL. (Tr. at 25.) Dr. Younger was unaware of anyone who had ever moved information of that sensitivity, in its entirety, to an unsecure computer. (Tr. at 25.) Lee, however, is alleged to have down-partitioned from the classified computing system to the open

computing system, and then downloaded on to portable computer tapes approximately 806 megabytes of classified American nuclear secrets.[2] (Tr. at 86-88.) According to Dr. Younger, Lee down-partitioned and downloaded all of the significant nuclear weapons design codes used by LANL for both primary and secondary design.

> They [Codes A, B, D, and I] represent the complete nuclear weapons design capability of Los Alamos at that time. There may have been small codes that weren't included in there, but they were the big ones. And they would enable the possessor to install the complete nuclear weapons design capability at a remote location without a great deal of effort.

(Tr. at 30-31.) In addition, Lee down-partitioned from a secure computer to an open computer and then downloaded on to portable computer tapes "all of the data files required to operate those codes" as well as a range of input decks representing actual nuclear bomb designs that ranged in sophistication from relatively simple to complex. (Tr. at 30-32.)

The information that Lee knowingly down-partitioned and downloaded on to the missing portable computer tapes would mean different things to different unauthorized possessors. (Tr. at 33.) For a group or state that "did not have the indigenous scientific capability to do it alone," the information "would represent an immediate capability to design a credible nuclear explosive." (Tr. at 33.) A country that had some experience with nuclear explosives could use the information to optimize its nuclear bombs. (Tr. at 34.) An advanced nuclear state could use the information to "augment their own knowledge of nuclear explosives" and to "uncover vulnerabilities in the American arsenal which would help them to defeat our weapons through anti-ballistic missile systems or other means." (Tr. at 34.)

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[2]According to Special Agent Messemer, 806 megabytes roughly translates into 800 reams of paper. (Tr. at 86-88.)

Lee possesses cognitive knowledge that would assist an unauthorized possessor of the stolen nuclear weapons source codes, data files, and input decks to operate them. (Tr. at 37.) Given Lee's control of and access to the seven missing tapes, Lee poses an *inconceivable* risk to U.S. national security. Specifically,

> 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. They enable the possessor to design the only objects that could result in the military defeat of America's conventional forces. The only threat, for example, to our carrier battle groups. They represent the gravest possible security risk to the United States, what the president and most other presidents have described as the supreme national interest of the United States, the supreme national interest.

(Tr. at 38.)

C. The Secretive and Surreptitious Actions Undertaken by Lee to Accomplish the Down-Partitioning and Downloading of Secret Restricted Data Evidences that Lee Intended to Injure the United States and Weigh in Favor of Detention.

The weight of the evidence against Lee supports an order of detention. Although defense counsel has admitted that Lee created the tapes, they argued at the detention hearing before Judge Svet that the government presented no evidence that Lee acted with the intent to injure the United States or aid a foreign power. Lee's secretive and surreptitious actions to gather the classified TAR files, to down-partition and download the files on to tapes, to lie to colleagues to facilitate his actions, and then his subsequent deletions to cover his tracks all evidence an intent to injure the United States. Lee's intent to injure the United States also can be inferred by the additional testimony that the government will present to this Court that Lee, in taking *complete* thermonuclear weapon design capability, stole information that was not in any way related to his duties as a hydrodynamicist. The United States also will offer additional testimony that there

was *no* work related reason to ever move the classified information that Lee moved and downloaded on to computer tapes from the secure to the unsecure computing environment. These facts evidence an intent to injure the United States by depriving it of exclusive control of its most sensitive nuclear secrets.

According to Special Agent Robert Messemer, an agent with 16 years of experience in foreign counterintelligence investigations, Lee engaged in multiple instances of highly secretive, surreptitious and nefarious conduct in order to accomplish his allegedly illegal down-partitioning and downloading of America's nuclear secrets. (Tr. at 111.) First, before Lee could accomplish the down-partitioning of the 800 megabytes of America's nuclear secrets from the LANL closed computer to the open computer, he had to, by keystroke, tell the computer that the information itself was *unclassified*. (Tr. at 88-89.) Lee made these perniciously false representations to the computer on many occasions and over an extended period of time without any supervisory input or approval. (Tr. at 88-91.)

Lee's next misrepresentation was to lie to a fellow T Division employee in order to use the colleague's completely unsecure T Division computer, physically located outside the security perimeter of LANL, to download America's nuclear secrets on to portable tapes. (Tr. at 90-97.) Specifically, Lee lied to a T Division colleague by representing to the T Division colleague that Lee wanted to "download a resume" from the open computing system to a portable tape. Lee never told the T Division employee that instead of downloading a resume, he would be moving massive amounts of America's nuclear secrets on to an unclassified T Division work station and putting them on portable computer tapes. (Tr. at 97.)

Lee's next misrepresentation occurred after he was interviewed and polygraphed by the FBI on the unrelated W-88 investigation and after Lee had deleted all of his classified files from the unclassified computing system. At that point, Lee approached two different T Division colleagues and again requested access to an unsecure T Division workstation equipted with a tape drive. Lee, when left alone at the unsecure T Division workstation, reconfigured two of the tapes that he previously had downloaded, and deleted classified files from those tapes. (Tr. at 110-12.) Lee lied to this T Division employee to gain access to an unsecure workstation with a tape drive. (Tr. at 109.) Lee's specific lies to this T Division employee were that he

> needed to upload information contained on a 6150 tape . . . and needed to upload it into the unclassified system in order to run some calculations. Moreover, [Lee] said that he would make a copy of those calculations available to the [T Division] user of this computer, ostensibly to [allay] any concerns he might have that Dr. Lee was using it improperly.

(Tr. at 109.) Based on Agent Messemer's experience in foreign counterintelligence investigations, Lee's actions were secretive and appeared to be clandestine. (Tr. at 111.)

D. Lee's Character Demonstrates a Pattern of Deception that, Combined with His Risk to U.S. National Security, Weighs in Favor of Detention.

Section 3142(g)(3)(A) requires the Court to consider available information concerning "the history and characteristics of the person, including the person's character . . . ." Lee's memorandum states that "Dr. Lee is a loyal American. Through his work, he has contributed greatly to this country's national security." (Lee Memorandum at 5.) To rebut these assertions, and offered pursuant to 18 U.S.C. § 3142(g)(3)(A) for a different insight on Lee's character,

Agent Messemer will testify at the *de novo* hearing before this Court that Lee engaged in a practice of deception at LANL beyond lying to colleagues.[3]

Agent Messemer will testify that on at least two occasions, Lee made significant misrepresentations to LANL security personnel with regard to foreign trip reports that Lee made in 1986 and 1988. Specifically, upon his return from foreign trips to the PRC in 1986 and 1988, Lee denied that he had ever been approached by a foreign intelligence officer. Over a decade later, Lee admitted to the FBI that he had lied on his LANL foreign trip reports and had in fact been approached by PRC foreign intelligence officers.

Additionally, Agent Messemer will testify that on December 3, 1982, Lee called a former employee of Lawrence Livermore National Laboratory who had been suspected of passing classified information to the PRC. This call was intercepted pursuant to a Foreign Intelligence Surveillance Act ("FISA") court authorized telephone surveillance, and was taped. After introducing himself, Lee stated that he had heard about the Lawrence Livermore employee's "matter" and that Lee thought he could find out who had "squealed" on the employee. On November 6, 1983, the FBI interviewed 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. After being informed that the call had been intercepted, Lee admitted that he had called the Lawrence Livermore employee and had previously misled the FBI on the matter.

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[3]Agent Messemer already testified about the classified documents found in Lee's T Division office which Lee had physically altered to hide their classified nature. (Tr. at 82-85.)

In sum, Lee has engaged in the pattern and practice of deception by lying to LANL employees to further his scheme to download information on to portable cassette tapes, by physically altering classified documents to mask their classified nature, and by misleading security personnel at LANL and the FBI. As such, Lee is an unsuitable candidate for release pending trial.

III. THE COURT SHOULD NOT RELY ON DEFENSE COUNSEL'S REPRESENTATIONS THAT THE TAPES HAVE BEEN DESTROYED AND THAT LEE NEVER INTENDED TO GIVE THEM TO AN UNAUTHORIZED PERSON

Lee's attorneys repeatedly assert in their memorandum that "the tapes were destroyed." (Lee's Memorandum at 3, 4.) Notwithstanding an enormous effort by the FBI to locate them, seven of the tapes containing a complete nuclear design weapon capability are missing, along with two other tapes which contain unclassified data files essential to run the nuclear weapons codes successfully. (Tr. at 114-115.) The surveillance that was instituted by the FBI in early April was done primarily in an attempt to locate the missing tapes. Unfortunately, the effort was for naught. (Tr. at 120-121.)

Preliminarily, it is incredulous that Lee's lawyers want the United States government, on a question that could effect the "global strategic balance of power," to accept their uncorroborated assertion as fact. This is particularly true given the history of Lee's lawyers missing the mark in their factual assertions to the government. As recently as December 10, 1999, Mark Holscher stated in a letter to U. S. Attorney John J. Kelly and First Assistant U.S. Attorney Robert J. Gorence, that "we are deeply troubled that, despite your concession that you have no proof whatsoever that Dr. Lee ever gave any tapes to anyone *and the lack of any proof*

that these tapes ever left the highly secure X Division, you are planning to indict Dr. Lee." (Emphasis added.) (Mr. Holscher's letter is attached Exhibit 1.) The government obviously made no such concession for the simple reason that there is irrefutable evidence that Lee's downloading of America's nuclear secrets occurred in an unsecure T Division trailer after he had bamboozled the T Division employee into letting Lee use his computer. If Lee told his lawyer, Mr. Holscher, that he never took America's nuclear secrets outside the highly secure X Division, he lied to his attorney.

Second, on June 21, 1999, Mr. Holscher and Mr. Dan Bookin engaged in a full day proffer session with the government. Despite requests by the government, Lee steadfastly refused to be interviewed with regard to why he down-partitioned classified files and downloaded America's nuclear secrets on to portable tapes. During the proffer session, Lee's attorneys stated that Lee downloaded only *unclassified* files on to 6150 tapes and that he used a T Division colleague's computer because "he was a friend who happened to have a tape drive on his computer." After being informed that the government had credible evidence to the contrary, Lee's attorneys said that *if* classified information had been downloaded on to 6150 tapes, Lee had destroyed the tapes. At no time, and most particularly not during the December 13, 1999 detention hearing, were *any* specifics or corroboration provided regarding when or how the downloaded classified tapes were allegedly destroyed. It appears that Lee's attorneys have taken a different tack than the one they chose to take on June 21, 1999 and now concede that Lee in fact downloaded America's nuclear secrets on to portable tapes.

With so much at stake, and Lee's attorneys' ever-shifting "declarations," the government uld be derelict if anything but skeptical. There is no *evidence*, much less any corroboration,

that the tapes have been destroyed. Agent Messemer will testify during the *de novo* hearing about what transpired during the proffer session between the government and Lee's attorneys and why, based on his foreign counterintelligence experience, the United States cannot base its national security on the uncorroborated declaration of Lee's lawyers who have consistently not provided credible explanations.

In his memorandum, Lee repeatedly asserts that the government has no evidence that Lee passed or communicated classified information to an unauthorized person, or attempted to do so. (Lee Memorandum at 1, 4.) Quite simply, this is inaccurate. The government will offer evidence at the *de novo* hearing that in February 1999, Lee failed a polygraph examination directly on the question of whether or not he ever passed or transmitted classified information to an unauthorized person.[4] While recognizing that polygraph evidence is inadmissible to establish criminal liability, it is relevant and probative under 18 U.S.C. § 3142(g)(4) as to the risk associated with releasing Lee pending trial. *See United States v. Bellomo,* 944 F. Supp. 1160, 1163 (S.D.N.Y. 1996) (polygraph evidence properly considered at detention hearing); *United States v. Hernandez,* 939 F. Supp. 108, 110 (D.P.R. 1996) (court properly admitted, evaluated and considered polygraph exam results in detention hearing).

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[4]The February 1999 polygraph is not the only polygraph that Lee took. Lee passed a polygraph in 1984 on the same issue. The FBI determined that another polygraph examination of Lee in December 1998 was inconclusive, although the contract examiner for DOE, Wackenhut, Inc., concluded that Lee passed the exam.

IV. ONLY DETENTION IN CONJUNCTION WITH SPECIAL RESTRICTIONS ON LEE'S COMMUNICATIONS CAN REASONABLY ASSURE THAT LEE WILL NOT DISCLOSE CLASSIFIED INFORMATION AND THEREBY ENDANGER NATIONAL SECURITY

As pointed out in Lee's motion, restrictions have been placed on Lee's communications during his detention. Lee has been segregated from other prisoners; only members of his immediate family and his attorneys are permitted to visit him, all family visitations are monitored by an FBI agent; Lee does not have access to a phone other than to call his attorneys, and his mail is monitored. These restrictions have been imposed because detention by itself cannot reasonably assure that Lee will not disclose classified information that would endanger the nation's security. The Attorney General has broad authority to place restrictions on pretrial detainees to safeguard national security by preventing the unauthorized dissemination of classified information. Pretrial services could not monitor Lee to the extent necessary to protect this extremely sensitive classified information if he is released. Consequently, there are no conditions of release that can reasonably assure the nations's security, and Lee should be detainec pending trial.

V. LEE IS A FLIGHT RISK

The government must prove by a preponderance of the evidence that a defendant is a flight risk if he is detained prior to trial on that basis. *See, e.g., United States v. Zulam,* 84 F.3d 441, 442 (D.C. Cir. 1996); *Townsend,* 897 F.2d at 994. In determining whether a defendant is a flight risk, the Court must consider the same four factors that it considered in determining whether the defendant is a danger to the community. *See id.* at 993; 18 U.S.C. § 3142(g). Based on these factors, Lee should be detained.

As already discussed, the nature of the charges against Lee are serious and carry severe penalties. The severity of the penalties that Lee faces if he is convicted provide an incentive for him to flee before trial. *See Townsend,* 897 F.2d at 995.

The weight of the evidence against Lee also weighs in favor of detention. Lee's attorneys already have admitted that Lee created the tapes, and the main issue is whether he intended to injure the United States or aid a foreign power. The surreptitious nature of Lee's acts, the meticulousness with which he gathered nuclear secrets unrelated to his work, his lies to his colleagues, and his efforts to cover his tracks all evidence his intent to injure the United States or aid a foreign power.

With respect to Lee's ties to a foreign nation, Agent Messemer testified that Lee was born abroad, speaks a foreign language, has siblings who live abroad, applied for foreign employment in 1992 and 1993, and recently taught and lectured abroad. (Tr. at 76-78, 148-53.) Consequently, although Lee also has ties to New Mexico, his background indicates an ability and willingness to live abroad, which makes him more of a flight risk. Moreover, although defense counsel has indicated that Lee is willing to provide an irrevocable waiver of extradition surrendering his right to contest extradition if he is found in another country, the United States has no way of knowing whether such a waiver would be enforceable in any of the many countries around the world to which Lee could flee.

Finally, the risk that Lee could disclose American nuclear secrets to a foreign power weighs heavily in favor of detention. The tremendous value to a foreign country of the information on the seven missing tapes could itself provide the necessary incentive for such a

country to provide a safe haven for Lee, which "possibility must be taken into account in evaluating the risk of fight." *Townsend,* 897 F.2d at 994. Lee should be detained pending trial.

VI. THE LENGTH OF LEE'S DETENTION CURRENTLY DOES NOT VIOLATE HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS.

Lee asserts in his memorandum that "this case will not go to trial for at least a year" and consequently his pretrial detention "for a such a prolonged period would vitiate the presumption of innocence and violate his right to due process." (Lee Memorandum at 9.) While the government is not clairvoyant as to the date of the trial, the government will provide all Rule 16 and Jencks Act discovery once counsel obtain their appropriate security clearances according to the schedule ordered by Judge Conway. This should greatly facilitate a trial within a reasonable period of time.

Even if this Court were to assume that Lee would be detained for one year prior to trial, that period of detention would not violate Lee's Fifth Amendment due process right. A defendant can be detained prior to trial consistent with the Due Process Clause of the Fifth Amendment as long as the confinement does not amount to "punishment of the detainee." *Bell v. Wolfish,* 441 U.S. 520, 535 (1979). In *United States v. Salerno,* 481 U.S. 739, 747 (1987), the Supreme Court held that the pretrial detention of a defendant under the Bail Reform Act of 1984 does not constitute punishment, and thus does not violate the Due Process Clause of the Fifth Amendment. The Court declined, however, to decide "the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 748, n.4. In *United States v. Accetturo,* 783 F.2d 382, 388 (3rd Cir. 1986), the Third Circuit stated:

> Because due process is a flexible concept, arbitrary lines should not be drawn regarding precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial. Instead, we believe that due process judgments should be made on the facts of individual cases, and should reflect the factors relevant in the initial detention decision, such as the seriousness of the charges, the strength of the government's proof that defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits. Moreover, these judgments should reflect such additional factors as the length of the detention that has in fact occurred, the complexity of the case, and whether the strategy of one side or the other has added needlessly to that complexity.

There are no bright lines for determining the constitutional limits on the length of time that the government may detain a person pending trial. *United States v. Ojeda Rios,* 846 F.2d 167, 169 (2nd Cir. 1988). In assessing a claim of a due process violation in the context of pretrial detention, this Court should consider three factors: (1) the length of the detention, (2) the extent to which the prosecution is responsible for the delay, and (3) the strength of the evidence upon which detention is based. *See United States v. Orena,* 986 F.2d 628, 631 (2nd Cir. 1993). At this point, this issue is purely speculative, and all factors currently weigh in favor of the government's position that Lee's due process rights are not violated by continued detention.

VII. PRETRIAL DETENTION WILL NOT AFFECT LEE'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Lee argues in his motion that pretrial detention will violate his Sixth Amendment right to counsel because Lee will not be able to view classified materials if he is detained. This argument has no merit. Even if Lee were not detained prior to trial, he and his attorneys would have to be escorted to a secure environment at LANL to review classified material there. If Lee is detained prior to trial, the United States will make arrangements with the Marshall Service to transport Lee to a secure environment to meet with his lawyers and review classified material as necessary

to prepare for his defense. If Lee and his attorneys require access to LANL, the United States will arrange for such access upon reasonable notice, just as it would if Lee were not detained. Pretrial detention will not affect Lee's Sixth Amendment right to counsel.

VIII. CONCLUSION

Lee stole America's nuclear secrets sufficient to build a functional thermonuclear weapon. Lee absconded with that information on computer tapes, seven of which are still missing. Those missing tapes, in the hands of an unauthorized possessor, pose a mortal danger to every American. The government does not know what Lee did with the tapes after he surreptitiously created them. Despite previous denials, Lee now admits that he created the tapes -- tapes which the government will establish contain an entire thermonuclear weapon design capability. The risk to U.S. national security is so great if Lee were to communicate the existence, whereabouts, or facilitate use of the tapes that there is no condition or combination of conditions that will reasonably assure the safety of this country if Lee is released. The United States respectfully requests that the Court order that Lee be detained pending trial.

Respectfully submitted,

JOHN J. KELLY
United States Attorney

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I hereby certify that a true copy of the foregoing document was faxed and mailed to defense counsel of record as set forth below this 23rd day of December, 1999.

ROBERT J. GORENCE
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December 10, 1999

VIA COURIER AND FACSIMILE [505] 224-2276

United States Attorney John Kelly
First Assistant United States Attorney Robert Gorence
United States Attorney's Office for the
District of New Mexico
201 3rd Street N.W.
Albuquerque, New Mexico 87108

Re: *Investigation of Dr. Lee*

Dear U.S. Attorney Kelly and First Assistant Gorence:

I write to accept Mr. Kelly's request that we provide him with additional credible and verifiable information which will prove that Dr. Lee is innocent. On the afternoon of Wednesday December 8, Mr. Kelly informed me that it was very likely that Dr. Lee would be indicted within the next three to four business days. In our phone conversation, Mr. Kelly told me that the only way that we could prevent this indictment would be to provide a credible and verifiable explanation of what he described as missing tapes.

We will immediately provide this credible and verifiable explanation. Specifically, we are prepared to make Dr. Lee immediately available to a mutually agreeable polygraph examiner to verify our repeated written representations that at no time did he mishandle those tapes in question and to confirm that the he did not provide the tapes to any third party. As a sign of our good faith, we will agree to submit Dr. Lee to the type of polygraph examination procedure that has recently been instituted at the Los Alamos Laboratory to question scientists. It is our understanding that the government has reaffirmed that this new polygraph procedure is the best and most accurate way to verify that scientists are properly handling classified information.

Because the statute of limitations will not run for years on the charges that the government is considering, we know of no reason for you to not accept this offer. In any event, we are also prepared to sign an agreement today to waive the statute of limitations period for the time it takes to agree on the procedures, so that there can be no possible downside to the government to receive this important information.

By separate letter, we will again raise with you our deep concerns with the manner in which this investigation continues to being mishandled. We are deeply troubled that, despite your concession that you have no proof whatsoever that Dr. Lee ever gave any tapes to anyone and the lack of any proof that these tapes ever left the highly secure X division, you are planning to indict Dr. Lee. As our earlier presentations have made clear, such an indictment would be a horrible injustice. We, however, wanted to ensure that you immediately receive our acceptance of your request for information before we readdress these other issues.

Very truly yours,

Mark Holscher
of O'MELVENY & MYERS LLP

cc: James K. Robinson, Chief, Criminal Division, U.S. Department of Justice
Daniel Bookin, Esq.
John Cline, Esq.

LA2:496435 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CR. No. 99-1417 JC

WEN HO LEE,

Defendant.

MEMORANDUM OPINION AND ORDER

On December 17, 1999, Defendant Wen Ho Lee ("Dr. Lee") filed "Motion of Wen Ho Lee to Revoke Magistrate Judge's Detention Order," (Doc. No. 17). After conducting a three-day evidentiary hearing and carefully reviewing the applicable law, I conclude that at this time there is no condition or combination of conditions of pretrial release that will reasonably assure the appearance of Dr. Lee as required and the safety of any other person, the community, and the nation. Dr. Lee's motion will, therefore, be denied.

I. BACKGROUND

The Government alleges that in 1993 and 1994 Dr. Lee assembled a collection of nineteen files, called tape archive (TAR) files, containing secret and confidential restricted data relating to nuclear weapons research, design, construction, and testing. According to the Government, Dr. Lee gathered these files from the secure classified "red" partition computers at the Los Alamos National Laboratory ("LANL") and moved them to unclassified open "green" partition computers. The Government also alleges that Dr. Lee later downloaded seventeen of the nineteen classified TAR files from the green partition computers to nine portable computer tapes and that in 1997 Dr. Lee downloaded from the red partition secured computers directly to a tenth portable computer tape a current nuclear weapons design code and its auxiliary libraries and utility codes. Seven of the ten portable computer tapes are unaccounted for; Dr. Lee's attorneys say they have been destroyed.

Although Dr. Lee began transferring and downloading classified files from the secure red partition during 1993, Government agents did not become aware of Dr. Lee's actions until 1998 when an investigation began. By late May or June 1999, the Government had developed probable cause to believe Dr. Lee committed the offenses for which he eventually was arrested and indicted more than half a year later on December 10, 1999. The Government could have sought a warrant to arrest Dr. Lee in May or June 1999 but chose not to do so even though, according to testimony of Government witnesses, Dr. Lee presented an enormous risk to the national security throughout the six to seven month period the Government chose to delay arresting Dr. Lee. The Government did place Dr. Lee under round-the-clock surveillance during that time in the hope that Dr. Lee would lead the Government to the seven missing portable

computer tapes. Dr. Lee's movement within the United States was not restricted during this period, although he surrendered his passport to his attorney.

On October 14, 1999, CNN reported that law enforcement sources revealed that Dr. Lee had transferred secret "legacy codes" related to the United States nuclear weapons programs, described by a nuclear weapons expert as "the crown jewels of our nuclear weapon design effort," from a secure to a non-secure computer and next copied the codes on tape. CNN further said that investigators disclosed that they had been unable to account for some of the tapes and that Dr. Lee had failed to produce the tapes despite being asked to do so. Nevertheless, although this information involving missing tapes containing highly secret information about the United States nuclear weapons programs was put into the public domain by CNN during October 1999, Dr. Lee was not taken into custody until two months later.

On December 10, 1999, the grand jury returned a fifty-nine count indictment against Dr. Lee charging him with violations of the Atomic Energy Act, 42 U.S.C. § 2275, Pub. L. No. 106-65, § 3148(b), 113 Stat. 938 (1999) (Receipt of Restricted Data) and 42 U.S.C. § 2276 (Tampering with Restricted Data), and the Espionage Act, 18 U.S.C. § 793 (Gathering, transmitting or losing defense information). Although Pretrial Services recommended Dr. Lee's release on a $100,000 fully secured bond and electronic monitoring, at a December 13, 1999 detention hearing United States Magistrate Judge Don J. Svet ordered the pretrial detention of Dr. Lee under 18 U.S.C. § 3142 on the ground that Dr. Lee posed a danger to the community.

On December 17, 1999, Dr. Lee filed a motion under 18 U.S.C. § 3145(b) seeking an order revoking Magistrate Judge Svet's detention order and asking that conditions of release be set. Dr. Lee requested an expedited hearing and proposed the following conditions: 1.) that Dr.

Lee's neighbor, Jean Marshall, serve as third-party custodian; 2.) that Dr. Lee consent to a search of his home before he returns to ensure that he does not have seven tapes that the Government claims are missing and that Dr. Lee claims were destroyed; and 3.) that Dr. Lee execute an irrevocable waiver of extradition surrendering his right to contest his return to the United States if he is found in a foreign country.[1] At a December 20, 1999 scheduling conference the parties agreed that I should hold the hearing because the judge to whom the case has been assigned, Chief Judge John Edwards Conway, was unavailable and would not be able to hold the hearing until January 12, 1999.[2] *See* Order of December 21, 1999, (Doc. No. 21). The hearing began on December 27, 1999[3] and ended on December 29, 1999.

II. LAW

In enacting the federal Bail Reform Act of 1984, Congress responded to criticism that the Bail Reform Act of 1966 did not afford judges appropriate authority to make decisions regarding the pretrial release of defendants who posed serious risks of flight or danger to the community.

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[1] Dr. Lee had not offered these conditions for Magistrate Judge Svet's consideration.

[2] 18 U.S.C. § 3145(b) states that a motion for review and revocation of a magistrate judge's detention order "shall be determined promptly."

[3] Immediately before the beginning of the presentation of testimony on December 27, 1999, the Court and counsel conferred about a letter dated December 10, 1999 from Mr. Holscher, one of Dr. Lee's attorneys, to United States Attorney John Kelly. In his letter, Mr. Holsher offered to have Dr. Lee submit to another polygraph examination, to be performed by an agreed upon examiner, to confirm that the tapes were destroyed and that Dr. Lee did not mishandle them or provide them to unauthorized persons while he possessed them. Mr. Holsher stated that the offer presented in the December 10, 1999 letter still stands. The Government attorneys expressed concerns about the scope of questions that could be asked of Dr. Lee and counsel for both parties discussed a procedure for handling this. The process was to begin by the Government attorneys providing a list of questions they want to ask about the missing tapes.

See S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.A.A.N. 3182. The legislative history of the Bail Reform Act of 1984 states that "there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons," and that it was this "limited group of offenders that the courts must be given the power to deny release pending trial." *Id.* at 6-7, *reprinted in* 1984 U.S.C.A.A.N. at 3189. The legislative history stresses that "the decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial," but notes that this interest must be weighed against society's interest in protecting the community. *Id.*

Consistent with this legislative history and a defendant's presumption of innocence,[4] the statutory scheme of 18 U.S.C. § 3142 generally favors the pretrial release of defendants. *See* 18 U.S.C. § 3142(b); *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985). However, for a narrowly defined group of defendants Congress clearly indicated that it did not encourage pretrial release. *See* 18 U.S.C. § 3142(e). Congress prescribed that "a rebuttable presumption arises that no condition or combination of conditions [of release] will reasonably assure the safety of any other person and the community" if the judicial officer finds that the defendant had previously been convicted of committing one of certain serious crimes while the defendant was on release pending trial for a Federal, State, or local offense, and "a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the

[4] In § 3142(j) Congress emphasized that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j).

offense" of conviction. 18 U.S.C. § 3142(e). Congress also separately provided that "[s]ubject to rebuttal . . . it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds . . . probable cause to believe" that the defendant committed one of certain specified offenses, regardless of whether the defendant had any prior convictions. *Id.*

At the December 13, 1999 detention hearing, the Government conceded that neither of these statutory rebuttable presumptions of detention applies in this case. *See* Tr. of December 13, 1999 hearing at 7. During the December 20, 1999, scheduling conference, an attorney for the Government also stated that the rebuttable presumption of § 3142(e) did not apply to Dr. Lee. *See* Tr. of December 20, 1999 hearing at 7. Therefore, this Court must begin its analysis with the backdrop of Congressional preference for pretrial release under 18 U.S.C. § 3142. *See* 18 U.S.C. § 3142(b); *Orta*, 760 F.2d at 890.

Under § 3142(b), a judge "shall order the pretrial release" of a defendant on personal recognizance or unsecured appearance bond "unless" the judge determines that the defendant's release "will endanger the safety of any other person or the community" or "will not reasonably assure" the defendant's appearance. 18 U.S.C. § 3142(b). If release under § 3142(b) is not appropriate, then a judge "shall order the pretrial release" of a defendant "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B). One of the many conditions specifically contemplated by § 3142(c)(1)(B) is a defendant's supervision by a third-party custodian. 18 U.S.C. § 3142(c)(1)(B)(i). "The wide range of restrictions available ensures, as Congress

intended, that very few defendants will be subject to pretrial detention." *Orta*, 760 F.2d at 891.

Only after a hearing and a finding that "no condition or combination of conditions will reasonably assure the appearance" of the defendant and the safety of the community,[5] can a judge order a defendant's pretrial detention. 18 U.S.C. § 3142(e). A finding against release must be "supported by clear and convincing evidence." 18 U.S.C. § 3142(f).

Congress has instructed judicial officers "in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community" to take into account the available information regarding the following factors:

> (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including–
>
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
>
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

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[5] The legal standard set forth in subdivision (c) and (e) differs from that of subdivision (b), which "reemphasizes congressional intent to preserve the statutory bias favoring pretrial release for most defendants. . . .The change from the negative to the positive in the flight determination standard and from 'will' to 'will reasonably assure' in the dangerousness evaluation criterion renders it more difficult to find the defendant a flight and safety risk." *Orta*, 760 F.2d at 891 n. 14.

> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g).

Finally, it should be noted that "the district court's review of a magistrate's detention order is to be conducted without deference to the magistrate's factual findings." *United States v. Koenig*, 912 F.2d 1190, 1192 (9th Cir. 1990).

III. DISCUSSION

In determining whether there are any conditions of release that will reasonably assure the appearance of Dr. Lee and the safety of the community, the first factor to be considered is the "nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug." 18 U.S.C. § 3142(g)(1). Dr. Lee is alleged to have violated the Atomic Energy Act, 42 U.S.C. § 2275-2276, and the Espionage Act, 18 U.S.C. § 793, neither of which involves crimes of violence or narcotic drugs. Dr. Lee is charged under 42 U.S.C. § 2275, with receiving restricted data. This statute states in relevant part:

> Whoever, with intent to injure the United States or with intent to secure an advantage to any foreign nation, acquires, or attempts or conspires to acquire any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data shall, upon conviction thereof, be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than $100,000 or both.

Dr. Lee is also charged with violating 42 U.S.C. § 2276, which prohibits tampering with restricted data. Section 2276 reads, in relevant part:

> Whoever, with intent to injure the United States or with intent to secure an advantage to any foreign nation, removes, conceals, tampers with, alters, mutilates, or destroys any document, writing,

> sketch, photograph, plan, model, instrument, appliance, or note involving or incorporating Restricted Data and used by any individual or person in connection with the production of special nuclear material, or research or development relating to atomic energy, conducted by the United States, or financed in whole or in part by Federal funds, or conducted with the aid of special nuclear material, shall be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than $20,000 or both.

Finally, Dr. Lee is charged with violating 18 U.S.C. § 793. This statute states in relevant part:

> (a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . .
>
> . . . .
>
> (c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or
>
> . . . .
>
> (e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to

> communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;
>
> . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

Although the charges against Dr. Lee fall short of espionage, the nature of the offenses he is alleged to have committed are quite serious and of grave concern to national security. The circumstances under which Dr. Lee is alleged to have acted in committing the offenses are also deeply troubling.

Government witnesses testified in detail at the hearing about the clandestine circumstances in 1993 and 1994 under which Dr. Lee moved classified files in a very suspicious way from a secure restricted red partition computer system to an unsecure open green partition system and then in a devious manner downloaded that sensitive information to portable tapes. According to the Government's witnesses, the codes and files transferred and downloaded by Dr. Lee contained all the information needed to build a functional thermonuclear weapon and represented the "crown jewels" of the United State's nuclear weapons program. Several witnesses testified that in 1993 and 1994 Dr. Lee downloaded nineteen classified files from the open green computer system to nine portable computer tapes and that in 1997 he downloaded classified information directly from the red partition secured computers to a tenth portable computer tape. Government witnesses also testified that during 1993 or 1994 Dr. Lee asked a favor from a T division employee who did not have a Q clearance and who was working in a trailer outside the perimeter of the secure X division. According to the Government witnesses,

Dr. Lee told the T division employee he wanted to download his resume onto a tape. Dr. Lee asked the T division employee for a lesson in downloading information from the open green computer to portable computer tapes, which was a function Dr. Lee's computer could not perform.[6] Government witnesses testified that the T division employee breached LANL security requirements when he then wrote down on a piece of paper, which was eventually found in an FBI search of Dr. Lee's house, his password and unique log-on name. Witnesses for the Government also testified that Dr. Lee never revealed to the T division employee that he would be downloading an enormous volume of classified information onto the portable computer tapes.

The Government's witnesses, most of whom are scientists at LANL and are acutely aware of the sensitive nature of the transferred information, consistently described Dr. Lee's conduct as "inconceivable," "unimaginable," and "nefarious," and stated that there was absolutely no work-related reason for Dr. Lee to have moved the highly sensitive classified information to the open green partition computer system or to have downloaded this information to portable computer tapes. Without exception, every scientist or worker from LANL who testified at the hearing made it quite clear that Dr. Lee's transfer and downloading of highly sensitive classified information was unprecedented in the history of LANL, that they did not know of anyone else ever purposefully transferring and downloading classified material, and that Dr. Lee's actions could not have been the result of a simple mistake. Significantly, although there are hundreds of workers in the X division of LANL, and although two Q-cleared LANL

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[6] At the time, there was no tape drive attached to Dr. Lee's computer that would allow him to download information onto portable computer tapes from his own computer in the X division.

workers testified on Dr. Lee's behalf regarding their offer to be his third-party custodian, not a single LANL scientist or employee testified that Dr. Lee's actions were routine or tacitly condoned at LANL.

The purposefulness with which Dr. Lee acted was further underscored by testimony that in order to transfer files to the open green partition computer system, Dr. Lee had to override the default on the secure red partition computer system. A Government witness testified that in the red partition computer system, files are automatically saved as classified, but that Dr. Lee overrode this automatic default by typing in "cl=u," which falsely indicated to the computer that the files he was saving to the open green partition computer system were unclassified. According to the evidence, it took Dr. Lee approximately forty hours to collect and transfer the nineteen highly sensitive classified computer files from the secured red partition computer system to the open green partition computer system, which effectively eliminates any possibility that Dr. Lee's actions were accidental. Thus, the circumstances under which the alleged offenses occurred are highly suspicious and weigh in favor of Dr. Lee's pretrial detention.

Under § 3142(g), the second factor to be considered by the judicial officer, which overlaps with the previous discussion of the first factor, is the weight of the evidence against Dr. Lee. The Government presented direct evidence that Dr. Lee acquired or tampered with restricted data as charged under 42 U.S.C. § 2275 and § 2276 and that he acquired material connected with national defense or had unauthorized possession of information relating to national defense as charged under 18 U.S.C. § 793. Although the Government did not present any direct evidence regarding Dr. Lee's intent to harm the United States or to advantage a foreign nation, which is an element of the offenses he is charged with committing, the Government did

present circumstantial evidence of Dr. Lee's intent to violate these provisions of the Atomic Energy Act and the Espionage Act. This evidence, which is discussed in detail above, included the following testimony: that the classified information Dr. Lee transferred and downloaded is of a highly sensitive nature; that Dr. Lee's conduct was secretive and deceptive; and that there would have been no work-related reason for Dr. Lee to transfer the sensitive classified information from the red partition computer system to the green partition computer system and download it to portable computer tapes. The Government also produced information about various suspicious contacts or meetings between Dr. Lee and nuclear weapons scientists and officials from the Peoples Republic of China that occurred both within the United States and in China. A Government witness also testified that Dr. Lee once said he may have "inadvertently" given classified information to a foreign scientist, although Dr Lee's attorneys brought out that this may have been a reference to material in an article that had been cleared for publication.

The third factor under the statute requires evaluation of Dr. Lee's "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings." 18 U.S.C. § 3142(g)(3)(A). Regarding Dr. Lee's character, the Government's witnesses testified that Dr. Lee has lied to LANL employees and to law enforcement agents and has consciously deceived them about the classified material that he had put on the tapes and about contacts with foreign scientists and officials. No evidence was presented to suggest that Dr. Lee presently suffers from any mental illness or serious medical condition, and he seems to be in good mental and physical condition. From all appearances, Dr. Lee has a close-knit immediate family, which consists of his wife and

two adult children who have been present each day of the hearing. It also appears that other family members have attended the hearing and have provided support to Dr. Lee. Concerning employment, Dr. Lee began working as a scientist during 1967. After working for several different organizations, Dr. Lee was employed at LANL from December 1978 to March 8, 1999, when his employment was terminated. Dr. Lee, who has resided in Los Alamos for two decades, has significant ties to the community. He also has substantial financial resources; his assets include a home in Los Alamos, two houses in Albuquerque, and several motor vehicles, and he has a pension income. Aside from Dr. Lee's deceptive behavior regarding the issues raised in this case, his past conduct appears to have been lawful and without reproach. It is undisputed that Dr. Lee has no criminal history or history of drug or alcohol abuse. Although Dr. Lee's appearance at court proceedings has been guaranteed by the fact he is in custody, it should be noted that Dr. Lee voluntarily met on several occasions with Government agents and the FBI during the lengthy pre-indictment investigation of this case. Finally, the Government has stipulated that Dr. Lee was not on probation, parole or other release at the time of the current offense or at the time of his arrest. *See* 18 U.S.C. § 3142(g)(3)(B); Tr. of December 20, 1999 hearing at 7.

The last factor to be considered under § 3142(g) is "the nature and seriousness of the danger to any person or the community that would be posed by [Dr. Lee's] release." 18 U.S.C. § 3142(g)(4). The Government has presented credible evidence showing that the possession of information by other nations or by organizations or individuals could result in devastating consequences to the United States' nuclear weapon program and anti-ballistic nuclear defense system. Some of the Government's witnesses apparently suspect that the information Dr. Lee

transferred and downloaded in 1993 and 1994 may already be in the hands of unauthorized users or nations adverse to the United States. The Government, of course, has a great deal of concern about the number of years that, unknown to the Government, highly sensitive classified information remained on the open green partition computer system. The Government also presented evidence that it remains extremely concerned about the seven missing portable computer tapes containing valuable classified files. The Government offered considerable information that Dr. Lee's release from custody at this time poses a danger to the United States because of the risk that Dr. Lee will find a way to, and will be inclined to, reveal to unauthorized persons the location of the seven missing tapes or to assist an unauthorized possessor in understanding and utilizing the information contained in the tapes. Based on the Government's evidence that Dr. Lee lied about meetings with nuclear weapons scientists and officials from the Peoples Republic of China, it is conceivable that Dr. Lee may be inclined to reveal to unauthorized possessors either the whereabouts of the tapes or his knowledge of how to use the information on the tapes.

Moreover, despite repeated requests by the Government investigators for information about the location of the missing tapes or about details regarding their destruction made during a lengthy pre-arrest investigation, Dr. Lee never provided that information. The only representation that the tapes have been destroyed came from Dr. Lee's attorneys. This representation is based on broad, non-specific language about destruction of classified documents and material in a one-page "Security Termination Statement," Ex. F, signed by Dr. Lee at the time LANL fired him. The Court was not given any sworn testimony that the seven missing tapes were destroyed nor was it provided any information about the time and manner of their

destruction or whether they had been copied. It would have been fairly simple for Dr. Lee to have disclosed at some point during the exhaustive and lengthy investigation, whether he had copied or destroyed the tapes and, if so, where, how, why, and when that occurred.

IV. CONCLUSION

With a great deal of concern about the conditions under which Dr. Lee is presently being held in custody, which is in solitary confinement all but one hour a week when he is permitted to visit his family, the Court finds, based on the record before it, that the Government has shown by clear and convincing evidence that there is no combination of conditions of release that would reasonably assure the safety of any other person and the community or the nation. The danger is presented primarily by the seven missing tapes, the lack of an explanation by Dr. Lee or his counsel regarding how, when, where, and under what circumstances they were destroyed, and the potentially catastrophic harm that could result from Dr. Lee being able, while on pretrial release, to communicate with unauthorized persons about the location of the tapes or their contents if they are already possessed by others. Although Dr. Lee's motion to revoke Magistrate Judge Svet's detention order is denied at this time, changed circumstances might justify Dr. Lee renewing his request for release. If, for instance, Dr. Lee submits to a polygraph examination, as discussed *supra* at n. 3, and the results of the exam allay concerns about the seven missing tapes, Dr. Lee's request for pretrial release can be reconsidered in a significantly different light.

The Court realizes that a defendant in Dr. Lee's position is at a distinct disadvantage during a hearing regarding pretrial release or detention. The rules governing admissibility of evidence at trial do not apply at a detention hearing, *see* 18 U.S.C. § 3142(f)(2)(B), and much of the information provided by the Government over the last three days both in open court and in

confidential classified sessions may not be admissible at a trial. Testifying at a detention hearing raises significant risks for a defendant, but in the absence of a defendant's testimony it is often difficult to explain what appears to be very damaging information about a defendant's conduct that might at a trial be either inadmissible as evidence or fully explainable by a defendant or his witnesses.

The case law supports the Government's position that after considering information about the factors discussed in 18 U.S.C. § 3142(g), a judicial officer should not fashion extreme conditions of release that go well beyond the types of conditions enumerated in § 3142(c)(1)(B)(i)-(xiv). *See e.g., United States v. Tortora*, 922 F.2d 880, 887 (1st Cir. 1990) ("[T]he Bail Reform Act . . . does not require release of a dangerous defendant if the only combination of conditions that would reasonably assure societal safety consists of heroic measures beyond those which can fairly be said to have been within Congress's contemplation."); *United States v. Bellomo*, 944 F. Supp. 1160, 1167 (S.D.N.Y. 1996) ("The government is not obligated to replicate a jail in [defendant's] home so that he can be released.") (citations omitted). The conditions that were discussed during the hearing far exceeded those described in § 3142(c)(1)(B)(i)-(xiv) and would be extraordinarily burdensome to the Government.

Dr. Lee relies primarily on two cases to support his position. One of the cases, *United State v. Traitz*, 807 F.2d 322, 325 (3d Cir. 1986), stands for the proposition that "house arrest is a statutorily permissible condition." The Court does not dispute that it could impose house arrest as a condition of Dr. Lee's release. However, simple house arrest would not allay the concerns expressed by the Government, and shared by this Court, concerning Dr. Lee's ability to

communicate while under house arrest with unauthorized persons about the location of the tapes or their contents.

The other case on which Dr. Lee primarily relies, *United States v. Patriarca*, 948 F.2d 789 (1st Cir. 1991), distinguishes *Tortora*. In *Patriarca*, "[t]he district court devised an innovative and extensive group of conditions" for the defendant's pretrial release, which included electronic monitoring, limitations on phone lines, being subject to unannounced searches, meeting only with court-approved individuals, execution of an agreement to forfeit $ 4 million upon determination that he violated any conditions of release, and installation and maintenance, at the defendant's expense, of a twenty-four hour video camera aimed at each entrance to his house. *Id.* at 793. The First Circuit reasoned that because the defendant was financing the video monitoring system, and because "the other conditions are not extraordinarily burdensome to the government," the government was not forced to go to the "heroic measures" discussed in *Tortora*. *Id.* at 794. *Patriarca* is distinguishable from this case, however, because the danger posed by Dr. Lee's pretrial release is his ability to *communicate* with unauthorized persons while under house arrest. Extreme conditions of release, such as those discussed during the hearing of Dr. Lee's motion would be necessary to reasonably assure this does not occur. The conditions discussed during the hearing ranged from having Dr. Lee's third party custodian accompany his wife on any excursion from the Lee's residence to having the FBI search visitors prior to their meeting with Dr. Lee in his home and listening to any conversations he had with them. These measures, which the Court is convinced would be necessary to ensure the safety of any person or the community, can fairly be characterized as "heroic" and "extraordinarily burdensome to the government." Moreover, the concept advanced by the First Circuit's opinion in *Patriarca*--that a

defendant can buy his pretrial release if he has sufficient funds to finance the creation of a private jail at his home--seems repugnant to a sense of justice.

Although the Court concludes that Dr. Lee must remain in custody, the Court urges the Government attorneys to explore ways to loosen the severe restrictions currently imposed upon Dr. Lee while preserving the security of sensitive information.

IT IS THEREFORE ORDERED that "Motion of Wen Ho Lee to Revoke Magistrate Judge's Detention Order," (Doc. No. 17), is DENIED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 99-1417 JP
	)	
WEN HO LEE,	)	
	)	
Defendant.	)	

RESPONSE TO DEFENDANT WEN HO LEE'S MOTION TO COMPEL DISCOVERY ON ISSUES OTHER THAN SELECTIVE PROSECUTION

The United States of America, by Norman C. Bay, United States Attorney for the District of New Mexico, and George A. Stamboulidis, Assistant United States Attorney, hereby responds to defendant Wen Ho Lee's Motion to Compel Discovery on Issues Other Than Selective Prosecution. By his motion, Lee requests this Court to order the government to produce discovery in a number of categories. For the convenience of the Court and the parties, the government will respond to each request in the same order as the requests are raised in Lee's motion. The government requests a hearing on Lee's motion for the purpose of presenting oral argument and to answer any questions the Court may have regarding the issues raised by the motion.

I. GENERAL PRINCIPLES

Lee has brought his motion to compel discovery on two grounds. Lee asserts that the requested documents are discoverable either because they are material to the preparation of his defense under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, or because they contain exculpatory *Brady* material. Generally, the government does not dispute Lee's recitation of the law in his motion, but a couple of points merit clarification.

First, with regard to what is "material" to the preparation of Lee's defense within the meaning of Rule 16(a)(1)(C), only documents that are material to defending against the government's case-in-chief are discoverable under Rule 16(a)(1)(C). *United States v. Armstrong*, 517 U.S. 456, 462-63 (1996). Rule 16(a)(1)(C) does not encompass documents which may be relevant to a defense based on a challenge to the government's conduct in the case, or other "sword-like" defenses. *Id.* Moreover, documents are "material," and therefore discoverable, only if there is a reasonable probability that their disclosure would enable the defendant to alter the result of the trial. *See United States v. Hernandez-Muniz*, 170 F.3d 1007, 1011 (10th Cir. 1999); *Banks v. Reynolds*, 54 F.3d 1508, 1518 (10th Cir. 1995).

Second, Lee suggests in his brief that whether documents or other evidence is exculpatory should not be left to the government to decide. It is the responsibility of the prosecutor, however, to determine what is exculpatory given the prosecutor's knowledge of the government's case against the defendant. *See Banks*, 54 F.3d at 1517. Generally the prosecutor is in a better position than the court to determine what is exculpatory. *See United States v. McVeigh*, 923 F. Supp. 1310, 1313 (D. Colo. 1996). Although the prosecution must carefully exercise its discretion in determining what is exculpatory, and should resolve doubtful questions in favor of the defendant, *see Banks*, 54 F.3d at 1517, the court may rely on the prosecution's determinations unless there is reason to believe that the prosecution has not properly exercised its discretion. *See United States v. Poindexter*, 727 F. Supp. 1470, 1485 (D.D.C. 1989).

There is no indication in this case that the government has failed to properly exercise its duty to provide exculpatory materials to Lee, and the government will continue to meet its obligation in this regard. The government is not required, however, to open its files to Lee or to disclose any and all potential defenses to Lee. *See Banks*, 54 F.3d at 1517; *Poindexter*, 727 F. Supp. at 1485. And although the government is required to produce all *exculpatory* evidence, it is not required to produce all evidence that simply is *not inculpatory*. *See Poindexter*, 727 F. Supp. at 1485. The government only is required to disclose evidence that has a reasonable probability -- not a mere possibility -- of producing a favorable outcome to the defendant. *See*

Banks, 54 F.3d at 1517.

II. GOVERNMENT'S RESPONSE TO DISCOVERY REQUESTS AT ISSUE

A. Requests Relating to the Computer Codes

Lee has requested the Court to compel the government to produce (1) "[a]ll documents that relate to problems with or flaws in the computer codes at issue in the indictment," (2)"[a]ll documents that relate to the alleged 'benchmarking' of the codes to test data from the Nevada test site," and (3) "[a]ll documents that relate to efforts by Charles Neil, John Romero, or others at LANL to run the computer codes contained in Files 1 through 19 and Tape N on or after March 8, 1999." LANL employees are compiling documents responsive to the first two requests but have informed government counsel that the documents may be voluminous. The government will make these documents, or the relevant portions of these documents, available to defense counsel for their inspection at LANL within a reasonable period. Once defense counsel has reviewed these documents, the government will attempt to accommodate any reasonable requests for copies of specified items. With respect to the third request in this category, government counsel has determined that all responsive documents have already been produced.

B. Weapons Blueprint.

Lee contends that he is entitled to obtain a blueprint of a nuclear weapon so that he can show that an actual weapons blueprint is more detailed than the input decks that Lee put on Files 1 through 19 and Tape N. Lee further contends that because the actual blueprints are more detailed than the input decks, they are more useful in building a thermonuclear weapon, and the fact that he did not take a weapons blueprint supports his defense that he did not have any criminal intent when he took the input decks and other materials on Files 1 through 19 and Tape N.

At the detention hearing, the government established that an input deck contains the "contours" of either a primary or a secondary (i.e., the exact dimensions and contents of a particular nuclear weapon before detonation), and as such constitutes an electronic blueprint.

(Tr. 12/13/99 at 21-22.) The evidence also established that manufacturing blueprints could be drawn from the information contained in an input deck. (Tr. 12/27/99 at 188-89.) Rule 16, however, does not require the government to provide Lee with a blueprint of a nuclear weapon to enable him to cross-examine government witnesses at trial concerning the utility of an American input deck in the hands of an unauthorized possessor compared to a manufacturing blueprint. The fact that Lee theoretically could have stolen other valuable Restricted Data in addition to what he did take is not material nor relevant on the issue of his criminal intent. Lee will have ample opportunity to test the sensitivity and value of an input deck without the specificity of the information contained in the manufacturing blueprints of an American thermonuclear weapon. Thieves are not entitled to discovery of items they did not steal to show that what they did not steal was more valuable that what they did take. This is especially true where the discovery Lee seeks is classified and presents grave national security concerns.

C. Computer Security Audits

In Request Number 18 (Exhibit D), Lee seeks "[a]ll documents that relate to the DOE computer security audit conducted at LANL during the period June 12 through June 20, 1995." The government will produce the report from this audit.

In Request Number 19 (Exhibit D), Lee attempts to obtain similar documents for an audit which purportedly took place in October and November, 1996. After a thorough search, LANL counsel has informed the government that they are not aware of a computer security audit that took place during this time period. Consequently, there are no responsive documents to this request.

In Request Number 29 (Exhibit D), Lee seeks "[a]ll reports of the DOE Office of Oversight (or any predecessor office) that relate to inspections of safeguards and security programs at LANL during the period January 1, 1980 through March 8, 1999, and any responses to the reports by LANL or the DOE Albuquerque Operations Office." This request is patently overbroad, both in subject matter and time. The indictment alleges criminal conduct involving the theft of America's nuclear secrets from a classified computing system, a crime which began

in 1993. Any type of audit, other than a computer security audit, is irrelevant. In addition, computer security audits more than a decade before Lee's crimes are irrelevant. The government has and will produce computer security audit reports from 1993 to 1999.

D. Sylvia Lee's Cooperation with the FBI and CIA

The government has produced all documents that relate to Lee's cooperation with the FBI. The government concedes that a jury may be entitled to evaluate Lee's purported assistance when determining his criminal intent pursuant to the Atomic Energy Act counts. Any assistance by Sylvia Lee, however, is completely unrelated to this case. Sylvia Lee has not been charged with any crime, and her affiliation with the FBI and/or the CIA has no bearing on Lee's criminal intent. Government counsel has reviewed the files relating to this request and has determined that they do not contain any exculpatory information. If required, the government can make these files available for the Court's *in camera* review to confirm that the requested documents are not material to the preparation of Lee's defense, nor do they contain exculpatory information.

E. Attorney General Reno's June 8, 1999 Testimony

Lee has requested the classified version of Attorney General Reno's June 8, 1999 testimony before the Senate Judiciary Committee on the ground that the information may be relevant to rebut evidence introduced by the government pursuant to Rule 404(b) of the Federal Rules of Evidence. Government counsel has examined this testimony and has determined that it does not contain exculpatory information. The government's 404(b) notices are due 60 days before trial. If this testimony becomes subject to discovery pursuant to a 404(b) notice, the testimony will be produced.

F. Classified Legislative and Executive Branch Materials

Lee has requested various classified legislative and executive branch materials which Lee claims discuss a purportedly relaxed attitude toward computer security at LANL. Lee claims that these classified materials may be relevant to his intent and therefore discoverable under Rule 16(a)(1)(C), or that they may be discoverable based on what Lee speculates the government may offer into evidence under Rule 404(b). The classified versions of the Cox Committee Report and the Rudman Report do not contain additional information that is material to the preparation of Lee's defense, nor do they contain exculpatory information.

Government counsel is in the process of reviewing transcripts of testimony before

congressional committees (within the possession of executive branch agencies) or executive branch committees, but so far none of this material is discoverable under Rule 16, nor is it exculpatory. If upon further review government counsel finds transcripts or portions of transcripts that are discoverable, the government will produce them. Government counsel has not yet obtained the classified addendum to LANL Director John Browne's May 5, 1999 testimony but is in the process of doing so. If this addendum, or a portion of this addendum, is discoverable under Rule 16 or is exculpatory, it will be produced. If required, the government will produce these materials to the Court for its *in camera* review to confirm that they are not subject to discovery. If these materials (or some portion of them) become discoverable based on a 404(b) notice, the government will provide the relevant materials to the defense.

G. FBI Memoranda

Lee has requested that the government provide six FBI memoranda to the Court for its *in camera* review so that the Court may determine whether these documents are discoverable under Rule 16(a)(1)(C) or are exculpatory. Government counsel has reviewed these documents and has determined that they are not discoverable under Rule 16, nor are they exculpatory. If required, the government will provide these documents to the Court for its *in camera* review.

II. PRC Weapons Codes

The defense has requested "[a]ll documents that relate to the computer codes that the PRC has used since January 1, 1980 in the modeling and design of nuclear weapons." Without any factual basis whatsoever, Lee asserts that PRC weapons codes are superior to those developed by the United States, and consequently the PRC would have little interest in acquiring American nuclear secrets. This unsupported assertion is directly contrary to Dr. Stephen Younger's testimony that a country with some experience with nuclear weapons could use American design codes to optimize its weapons as well as to "uncover vulnerabilities in the American arsenal that would help them to defeat our weapons through anti-ballistic missile systems or other means." (Tr. 12/13/99 at 34.) PRC Weapons Codes are not material to Lee's defense of the government's case-in-chief. Consequently, whether the PRC had any weapons codes superior to those of the United States would not be relevant at trial.

III. CIPA § 10

Lee has requested that the government provide its CIPA § 10 notice no later than 90 days before trial. The government will agree to provide its notice within a reasonable time before trial, and government counsel is working with defense counsel to prepare a proposed Second Scheduling Order for the Court's review which will address all CIPA scheduling issues.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Lee's Motion to Compel Discovery except to the extent that the government has agreed to comply with his requests.

Respectfully submitted,

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United States Attorney

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I hereby certify that a true copy of the foregoing document was mailed and faxed to defense counsel of record as set forth below this ____ day of June, 2000.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JUN 23 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION

Dr. Wen Ho Lee, through undersigned counsel, respectfully moves the Court, pursuant to the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America, for discovery of materials relevant to establishing that the government has engaged in unconstitutional selective prosecution.

The grounds for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

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Attorneys for Defendant Dr. Wen Ho Lee

I HEREBY CERTIFY that a true copy of the foregoing was mailed to opposing counsel this 25th day of June, 2000.

Nancy Hollander

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JUN 23 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION

INTRODUCTION

Defendant Wen Ho Lee is the only person the U.S. Department of Justice (DOJ) has selected for indictment under the draconian Atomic Energy Act since it was passed in 1948. During this fifty-year period, the DOJ has repeatedly declined to fully investigate, much less charge, individuals who may have compromised classified nuclear weapons related information.

The DOJ also indicted Dr. Lee under 18 U.S.C. § 793(c) and (e) for the alleged mishandling of computer codes and data files, even though these files had not been classified at the time of Dr. Lee's alleged activities. Instead, the computer codes and data files had been designated as "protect as restricted data" (PARD), which ranks between unclassified and confidential on the Los Alamos National Laboratory (LANL) security hierarchy. Moreover, the government obtained the indictment under § 793 even though it concededly has no evidence that the codes and data files were ever transferred to any unauthorized person. Not one person other than Dr. Lee has ever been charged under § 793 for mishandling materials that had not been formally classified and that were not transferred.

Dr. Lee has obtained concrete proof that the government improperly targeted him for criminal prosecution because he is "ethnic Chinese." This direct evidence includes the following:

- A sworn declaration from a LANL counterintelligence official who participated in the investigation of Dr. Lee that Dr. Lee was improperly targeted for prosecution because he was "ethnic Chinese."
- Videotaped statements of the FBI Deputy Director who supervised counterintelligence investigations until last year admitting that the FBI engaged in racial profiling of Dr. Lee and other ethnic Chinese for criminal counterintelligence investigations.
- The sworn affidavit the U.S. Attorney's Office used to obtain the warrant to search Dr. Lee's home, in which the FBI affiant incorrectly claimed that Dr. Lee was more likely to have committed espionage for the People's Republic of China (PRC) because he was "overseas ethnic Chinese."

- A posting to the Los Alamos Employees Forum by a LANL employee who assisted counterintelligence investigations and personally observed that the DOE engaged in racial profiling of Asian-Americans at Los Alamos during these investigations.

Dr. Lee has requested that the government provide specific reports and files to him that squarely relate to the issue of whether he has been selectively prosecuted as a result of improper racial profiling. The government has refused to provide any of these documents to Dr. Lee.

Because Dr. Lee is the only person who has ever been selected for prosecution under the Atomic Energy Act,[1] and the only person ever prosecuted in remotely similar circumstances under § 793, and because he has uncovered specific direct admissions from the government that he was targeted for criminal investigation because he is "ethnic Chinese," he has made the necessary showing to obtain this discovery. Even if Dr. Lee did not have this direct evidence, he has also satisfied the stringent requirements of United States v. Armstrong, 517 U.S. 456 (1996), which held that in the absence of direct evidence of impermissible racial targeting, a defendant is nevertheless entitled to discovery if he provides some evidence that similarly situated people have not been prosecuted and that his investigation and prosecution were caused by improper racial motivations.

[1] At Dr. Lee's detention hearing on December 13, 1999, FBI Special Agent Robert Messemer conceded that Dr. Lee is the only person who has ever been charged under the Atomic Energy Act. See Transcript of Proceedings, December 13, 1999, at 139.

This memorandum summarizes compelling evidence that the DOJ had an informal policy of refusing to bring criminal charges in situations similar to and (even more egregious than) Dr. Lee's case. In addition, we provide several specific examples of similarly situated individuals whom the government has chosen not to indict under either the Atomic Energy Act or § 793. Unlike the meritless selective prosecution discovery motions discussed in Armstrong, where several thousand men and women of all races had been charged under the same statutes as the defendants, Dr. Lee can conclusively establish that he is the only person whom the government has ever chosen to indict under the Atomic Energy Act and the only person indicted in similar circumstances under § 793.

FACTUAL BACKGROUND

A. The Indictment

On December 10, 1999, the government brought a fifty-nine-count indictment against Dr. Lee. Thirty-nine counts allege that Dr. Lee violated the Atomic Energy Act because he purportedly mishandled material containing restricted data, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation. Dr. Lee was also charged with ten counts of unlawfully obtaining national defense information in violation of 18 U.S.C. § 793(c), and with ten counts of willfully retaining national defense information in violation of 18 U.S.C. § 793(e).

B. Dr. Lee's Discovery Requests

Dr. Lee's counsel have made a written request to the prosecution for specific materials his counsel believe contain direct evidence that Dr. Lee was improperly selected for prosecution because he is "ethnic Chinese." [2] Among the several categories of materials requested were: (1) the reports and memoranda supporting the findings of the DOE's Task Force on Racial Profiling's January 2000 report, (2) the Defensive Information to Counter Espionage videotapes, that were created by DOE counterintelligence and shown to DOE employees until last year, and are now prohibited at LANL because they allegedly contain racial stereotypes; (3) DOE or DOJ memoranda and reports confirming that the FBI targets

Americans of Chinese ethnicity for potential criminal espionage involving the PRC; (4) the DOJ's and DOE's responses to the numerous Congressional inquiries related to the justification for and details of the investigation of Dr. Lee; (5) the classified September 1999 State Department report by Jacqueline Williams-Bridger, detailing hundreds of cases of mishandling classified information, including cases of actual passing of classified information; and (6) information concerning specific cases in which the government declined to prosecute under circumstances similar to, or more egregious than, this case. The government has refused to produce any of the materials requested by Dr. Lee's counsel.

[2] See May 1, 2000, letter from Mark Holscher to AUSA Robert Gorence, attached as Exhibit A.

I. THE LEGAL STANDARD FOR DISCOVERY REGARDING SELECTIVE PROSECUTION

The Supreme Court established the threshold for discovery on selective prosecution claims in United States v. Armstrong, 517 U.S. 456 (1996). The Court held that to obtain discovery in a case in which the court is asked to infer discriminatory purpose, a defendant must produce (1) some evidence that similarly situated individuals have not been prosecuted, and (2) some evidence of improper motivation in deciding to prosecute. The Court did not decide whether a defendant should be required to produce some evidence that similarly situated persons have not been prosecuted if the prosecution has admitted having a "discriminatory purpose." Id. at 469 n.3.

II. DR. LEE MORE THAN MEETS THE LEGAL STANDARD FOR DISCOVERY REGARDING SELECTIVE PROSECUTION

As we demonstrate below, Dr. Lee clearly meets the legal standard that Armstrong establishes for discovery related to a selective prosecution claim. In Part A, he presents direct evidence that government officials have admitted a racial basis for investigating Dr. Lee, and in Part B, he establishes that the government has declined to prosecute similarly situated persons.

A. Dr. Lee has Direct Evidence that He was Targeted for Criminal Investigation Because He is "Ethnic Chinese."

The troubling chain of events that led to Dr. Lee's indictment began when the DOE's Chief Intelligence Officer, Notra Trulock, incorrectly concluded in 1995 that the PRC had obtained the design information for the W-88 warhead from someone at the Los Alamos National Laboratory.[3] Mr. Trulock began an Administrative Inquiry to identify the suspect or suspects who should be the focus of this counterintelligence investigation. On May 29, 1996, Mr. Trulock issued the Administrative Inquiry which listed Dr. Lee as the main suspect. This Administrative Inquiry led to meetings between DOE counterintelligence officials and FBI Special Agents in New Mexico regarding Dr. Lee. The FBI then opened a criminal investigation of Dr. Lee.

[3] Just last year the DOJ conceded in a press conference that this conclusion was incorrect, and it opened a criminal investigation into the over 450 individuals outside LANL who had received this design information. See, e.g., Vernon Loeb and Walter Pincus, New Leads Found in Spy Probe, Washington Post, Nov. 19, 1999 at A1, attached as Exhibit B.

1. Vrooman's Declaration Establishes that the Government Engaged in Improper Racial Profiling

Robert Vrooman, who was the Chief Counterintelligence Officer at LANL from 1987 until

1998, participated in the Administrative Inquiry and assisted in the resulting criminal investigation of Dr. Lee. Mr. Vrooman is adamant that Mr. Trulock's targeting of Dr. Lee for investigation was the result of improper racial profiling. In a declaration, attached as Exhibit C, Mr. Vrooman states:

> Mr. Trulock's office chose to focus specifically on Dr. Lee because he is "ethnic Chinese." Caucasians with the same background and foreign contacts as Dr. Lee were ignored.

Vrooman Decl., Ex. C at 3, ? 9. Vrooman is also unequivocal in stating that this impermissible racial profiling was the main reason Dr. Lee was targeted for criminal prosecution. "I state without reservation that racial profiling was a crucial component in the FBI's identifying Dr. Lee as a suspect." Id. at 3,? 12.[4]

> [4] Vrooman consistently raised this concern with federal officials, long before he provided his declaration here. As he indicated in a May 1999 letter to U.S. Senator Domenici: "[e]thnicity was a crucial component in identifying Lee as a suspect. Caucasians with the same background as Lee were ignored." See Ex. I to Ex. C. Vrooman also wrote to Senator Conrad Burns in June 1999 that "Mr. Lee was selected as the prime suspect mainly because he is ethnic Chinese." See June 25, 1999, letter from Robert Vrooman to U.S. Senator Conrad Bums, attached as Exhibit D.

Vrooman has also made clear that Trulock, who was the highest ranking DOE employee overseeing all counterintelligence investigations, intentionally targeted "ethnic Chinese" because Trulock held the belief that these American citizens could not be trusted like other American citizens. As Vrooman states in his declaration, Trulock told him that "ethnic Chinese should not be allowed to work on classified projects, including nuclear weapons." Id. at 3,? 13.[5] Trulock made these statements while he was chief of the DOE's counterintelligence office, and when he was personally assisting the criminal investigation of Dr. Lee. Trulock's statements that American citizens who are "ethnic Chinese" should be barred from sensitive jobs at LANL are a violation of federal civil rights statutes that prohibit racial discrimination for employment.[6] Trulock's statements are further corroboration that Trulock intentionally targeted Dr. Lee because he was "ethnic Chinese."

> [5] Vrooman confirmed this troubling fact in the letter he wrote to Senator Domenici on May 11, 1999, See Ex. I to Ex. C.

> [6] See 42 USCA § 2000e-2 ("It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

2. Former FBI Deputy Director Paul Moore has Confirmed that Dr. Lee was Targeted by the FBI Due to Racial Profiling

The FBI used the same impermissible racial profiling in its criminal investigation of Dr. Lee. The Deputy Director of the FBI responsible for all criminal counterintelligence prosecutions until 1999 confirmed that the FBI's criminal investigation of Dr. Lee was premised on the same impermissible racial bias, namely, that "Chinese-Americans" were

more likely to commit espionage. The Deputy Director, Paul Moore, oversaw portions of the criminal investigation of Dr. Lee. In a televised interview with Jim Lehrer, on December 14, 1999, regarding the arrest and indictment of Dr. Lee, Deputy Director Moore admitted that racial profiling was used, but attempted to justify this racial classification as reasonable:

> There is racial profiling based on ethnic background. It's done by the People's Republic of China. ... Now the FBI comes along and it applies a profile, so do other agencies who do counter intelligence investigations -- they apply a profile, and the profile is based on People's Republic of China, PRC intelligence activities. So, the FBI is committed to following the PRC's intelligence program wherever it leads. If the PRC is greatly interested in the activities of Chinese-Americans, the FBI is greatly interested in the activities of the PRC as [regards] Chinese-Americans.

The News Hour With Jim Lehrer, December 14, 1999, Tuesday, Transcript #6619, attached as Exhibit E at 12.

Moore's statements ignored the fact that senior FBI officials, in memoranda the government is withholding from Dr. Lee, had concluded long before December 1999 that it did not have credible evidence that the Taiwanese-born Dr. Lee had engaged in any improper activities with the PRC. In his videotaped interview, Moore then attempted to explain why the DOJ had indicted Dr. Lee:

> So, now, the U.S. in my opinion, this signals that the U.S. is fighting back. This is the situation quite similar to the Al Capone case where they couldn't [lock] him up for his racketeering activities, so they cast about and they found something else that they could get him for.

Id. at 14.

Moore, however, later conceded that the FBI's targeting of American citizens who are "ethnic Chinese" for increased scrutiny for espionage did not make sense. In response to a statement by Nancy Choy of the National Asian Pacific-American Bar Association that targeting people for criminal investigation based on their race was improper, Moore backtracked from his earlier statement that the racial targeting of "ethnic Chinese" by the FBI was reasonable. After Ms. Choy challenged the profiling, Moore admitted that:

> Ethnic profiling doesn't work for the PRC, it doesn't work for the FBI. You cannot predict someone's intelligence, somebody's espionage behavior based on his ethnic background. (Emphasis added.)

Id. at 13.

Moore did not even attempt to address the issue of how such racial targeting could even be considered for a citizen of the United States who was born in Taiwan. The Attorney General of the United States, in testimony before a Senate subcommittee, also stated that it was illogical to claim that a Taiwanese-born scientist like Dr. Lee would be predisposed to assist the PRC. "Now, if you are using that information to suggest that you are an agent of a foreign power, to whit, [sic] the PRC, the immediate question is raised, how are you that if you are clearly working with the Taiwanese Government on matters that apparently involve non-classified information?" Top Secret Hearing Before the Senate Committee on the Judiciary, 106th Cong. (1999), (visited June 22, 2000) (http://www.fas.org/irp/congress/1999_hr/renofisa.html) (statement of Attorney General Janet Reno).

3. Acting Counterintelligence Director Washington Also Confirmed Trulock's Profiling of Chinese Americans

Eugene Washington, who was DOE's acting Director of Counterintelligence in 1996, also believes that Trulock engaged in improper racial profiling. Washington confirmed in an interview with the Washington Post in August 1999, that "he told Trulock that he was unfairly singling out Lee and another Chinese American scientist." Vernon Loeb and Walter Pincus, Espionage Whistleblower Resigns: Energy's Trulock Cites Lack of Support as Debate About His Tactics Grows, Washington Post, August 24, 1999, attached as Exhibit F. Washington apparently sent Trulock a memorandum recommending that the investigation be closed and apparently questioning the DOE's focusing on Chinese Americans. This government has not produced this memorandum to Dr. Lee.

4. The Search Warrant Affidavit the DOJ Submitted to Search Dr. Lee's House Contains Additional Proof that Dr. Lee was Targeted Because He is "Ethnic Chinese."

The once-sealed affidavit in support of a search warrant to search Dr. Lee's home confirms that the government considered Dr. Lee's race to be evidence of possible espionage.[7]

> [7] This affidavit was written after internal FBI memoranda apparently concluded that Dr. Lee did not pass W-88 information to the PRC. The government has refused to turn over to the defense the FBI 302's dated November 29, 1998, January 22, 1999, February 26, 1999, and September 3, 1999, memoranda which, according to multiple press reports, directly contradicted the sworn declaration provided to the United States Magistrate Judge in New Mexico.

To support the now fully discredited allegations that Dr. Lee may have committed espionage, the affidavit asserts that FBI counterintelligence experts were relying in part on the fact that Dr. Lee was "ethnic Chinese." As the affidavit states, the "supervisory Special Agent of the FBI who specializes in counterintelligence investigations regarding the People's Republic of China" who"has supervised from FBI headquarters PRC counterintelligence investigations for the past five years" explained to the investigative agent "that PRC intelligence operations virtually always target overseas ethnic Chinese." The affidavit leaves no doubt that improper racial profiling, which started with Mr. Trulock, continued to be a substantial basis for the targeting of Dr. Lee in 1999.

5. Another LANL Employee Has Also Confirmed that the DOE Engaged in Racial Profiling.

Dr. Lee has uncovered additional corroboration that DOE's counterintelligence staff used racial profiling. In an e-mail to his fellow employees, Michael Soukup wrote that the DOE pressured him to investigate Asian-Americans because of their ethnicity when he assisted the DOE in counterintelligence investigations. See Letter of Michael Soukup, dated April 12, 2000, and published in the Los Alamos National Laboratory Online Forum, http://www.lanl.gov/orgs/pa/News/forum/letter2OOO-O8O.html.

Specifically, Soukup states:

> While I was assigned to NIS-9 (until mid-1998), I supported, on a part-time basis, the counterintelligence investigation into alleged Chinese espionage at Los Alamos. Based upon my experience and observations, I conclude that racial profiling of Asian-Americans as a result of the investigation indeed took place, but principally at the DOE. Further, DOE personnel directed some Los Alamos National Laboratory staff to undertake research that profiled Asians and Asian-Americans at the Laboratory. I do not believe any of us were happy with this.

Soukup's statement buttresses Vrooman's declaration and provides an additional basis to believe that discovery regarding selective prosecution could lead to additional proof of

improper racial profiling.

B. Evidence that Similarly Situated Individuals Have Never Been Prosecuted Under the Atomic Energy Act or ? 793(c) and (e)

It is clear that race played an impermissible role for selecting Dr. Lee for prosecution under the Atomic Energy Act and the Espionage Act, 18 U. S.C. § 793. During the past fifty-two years, no American has ever been prosecuted under the Atomic Energy Act. FBI Special Agent Messemer conceded this fact at the December 13 bail hearing. See fn.1, supra. Evidence that similarly situated individuals have not been prosecuted can be found in both statements of DOJ officials concerning the practices of the DOJ in declining to prosecute similar or more egregious cases as well as specific examples of similarly situated individuals that the DOJ declined to charge.

Not only have there been no other prosecutions under the Atomic Energy Act, the DOJ had a policy of not bringing cases such as this under § 793 as well. As a former DOJ official told the Washington Post a few months ago, for twenty years the Department had followed a practice of not prosecuting civilians where no evidence existed that the classified materials in question had been transferred to a third party. According to this official, "[n]o matter how gross the violation, there would be no prosecution if the agency took strong administrative action." See Walter Pincus and Vernon Loeb, U.S. Inconsistent When Secrets Are Loose, Washington Post, March 18, 2000, at A1, attached as Exhibit G. Here, not only had Dr. Lee's files not been classified at the time he allegedly mishandled them, but also the indictment does not allege that the files in question were provided to any third party and the government conceded at the detention hearing that it has no such evidence. Dr. Lee was terminated -- obviously "strong administrative action" -- and under DOJ practice there should have been "no prosecution."

Further evidence that DOJ has never prosecuted similarly situated individuals can be found in the Department's apparent blanket refusal to bring criminal charges where State Department officials have mishandled classified materials. In 1999 alone, the State Department investigated thirty-eight incidents of mishandling classified information. See id. A classified analysis by the State Department likewise detailed numerous similar breaches, in a September 1999 report written by Jacqueline Williams-Bridger. According to press reports, this classified document, which the government has not provided to the defense, details hundreds of breaches of appropriate procedures for handling classified information, including the intentional transferring of secret information, which did not result in criminal prosecution. See, e.g., S. Rep. No. 106-279, at 10-15 (2000); Vernon Loeb & Steven Mufson, State Dept. Security Has Been Lax, Audit Finds: Many Offices Not Swept For Listening Devices, Washington Post, Jan. 17, 2000, at A1, attached as Exhibit H. It is critical to note that these individuals who were not prosecuted included State Department employees who intentionally transferred secret or top secret information to unauthorized persons. By contrast, Dr. Lee did not provide information to any unauthorized person, and the material at issue had not been classified at the time of his alleged actions.

Employees of the DOE and the national weapons laboratories have a long history of unprosecuted mishandling of classified information. According to the 1999 Report by the President's Foreign Intelligence Advisory Board entitled Science at Its Best, Security at Its Worst, attached as Exhibit I, designs of classified weapons had been left unsecured on library shelves at Los Alamos, and personnel were "found to be sending classified information to outsiders via an unclassified email system," yet no prosecutions resulted. This report also outlined dozens of examples of systemic mishandling of classified information by laboratory employees. See id. at 3-6, 15, 22. During the entire time of LANL's woeful security record, nota single employee faced charges under the Atomic Energy Act or § 793. Based on discovery Dr. Lee has received to date, the DOE investigated dozens of cases of mishandling of classified information at LANL, without a single prosecution. See Pincus, U.S. Inconsistent When Secrets are Loose, Ex. G at 4.

In addition to the evidence of the government's practice of not prosecuting violations of the Atomic Energy Act and § 793(c) and (e), Dr. Lee has uncovered several individuals who have not been investigated criminally, much less indicted.

- **John Deutch:** During his tenure as director of the CIA, former Director John Deutch used his unsecured personal computer at home to create and access top secret files even though he had a secure computer in his home. See S. Rep. No. 106-279, at 9 (2000); Bob Drogin, CIA Reprimands 6 for Actions in Deutch Investigation, L.A. Times, May 26, 2000, at A14, attached as Exhibit J.

- **Kathleen Strang:** According to published reports Arms Control and Disarmament Agency employee, Kathleen Strang "improperly removed [classified] documents from a storage vault at the State Department, repeatedly left them overnight in an open safe accessible to dozens of people without security clearances and then ignored several warnings to protect these documents." These classified documents reportedly included highly sensitive details of how the U.S. intelligence community monitors nuclear tests and weapons development. These reports state that Ms. Strang gave other sensitive information to the Japanese. Apparently, one could draw a complete picture of how U.S. intelligence monitors nuclear tests and weapons development from these documents. See Bob Woodward, ACDA Aide Faulted on Security, Washington Post, Nov. 4, 1986, at A1, attached as Exhibit K.

- **Anonymous sources of Bill Gertz:** A government employee or government employees unknown to Dr. Lee provided Bill Gertz with classified material from the National Security Agency published in the May 1999 book Betrayal, which includes fifty-nine pages of secret documents (including those covered by the Atomic Energy Act) relating to Chinese missile technology. See Bill Gertz, Betrayal: How the Clinton Administration Undermined American Security (1999).

- **Fritz Ermarth:** CIA employee Fritz Ermarth reportedly transferred secret and top secret files between his home computer and his work computer, resulting in a virus entering the CIA's classified network. See Pincus, U.S. Inconsistent When Secrets Are Loose, at A1, Ex. G.

- **LANL Scientist:** A LANL nuclear scientist allegedly downloaded the "Green Book" containing secret restricted data regarding U.S. nuclear strategy and the vulnerabilities of U.S. nuclear weapon systems onto an unclassified LANL computer with Internet access. See id.[8]

  [8] Dr. Stephen Younger, whose testimony that the nuclear balance of power would be adversely affected if Dr. Lee were released is partly responsible for Dr. Lee being held without bond, was involved in evaluating the seriousness of this security violation and deferring the appropriate punishment of the LANL scientist referred to above.

- **M.K:** A CIA agent identified only as M.K. sold twenty-five CIA computers to the public without erasing top-secret information on their hard drives. The CIA learned of the breach when an individual who purchased a computer called to say that the hard drive of his computer contained files that he didn't think should be there. See Vernon Loeb, CIA Employees Sue Agency for Unfettered Right to Legal Help, Washington Post, May 14, 1999, at A31, attached as Exhibit L.

- **James R. Conrad:** In 1987 the government declined to prosecute defense contractor James R. Conrad, who Department of Defense investigators accused of removing classified documents from the Pentagon. Conrad earlier had transmitted classified information including missile launch commands and wartime bomber routes over

unsecured computer lines from his computer in San Diego to Fairfax County, Virginia. See Secrets Breach Reported, The Dallas Morning News, June 12, 1987, at A8, attached as Exhibit M.

- **Unnamed defense contractor:** The DOJ investigated an employee of a defense contractor in Southern California for transferring hundreds of secret documents and storing them in his garage. DOJ lawyers apparently overruled the investigative agencies and declined to prosecute this employee.

The defense has been unable to locate a single reported decision dating back to the 1950s in which a civilian was prosecuted under S.793(c) or (e) without any allegation that he provided classified material to an unauthorized person. Unlike the defendants in the cases that have been brought, [9] the government has not even alleged that Dr. Lee transferred national-defense information to any unauthorized recipient.

[9]See e.g., Coplon v. United States, 191 F. 2d 749, 750-53 (D.C. Cir. 1951) (defendant was arrested while attempting to deliver data slips of F.B.I. reports to a Russian agent); Scarbeck v. United States, 317 F.2d 546, 548 (D.C. Cir. 1962) (defendant communicated classified information to representatives of the Polish Government); United States v. Dedeyan, 584 F.2d 36, 38 (4th Cir. 1978) (defendant showed a cousin who was working with a Soviet agent a classified study); United States v. Kampiles, 609 F.2d 1233, 1235 (7th Cir. 1979) (defendant was charged with willfully delivering a national-defense document to unauthorized persons); United States v. Truong Dinh Hun, 629 F.2d 908, 911 (4th Cir. 1980) (defendant arranged to have someone deliver classified papers to Vietnamese agents); United States v. Harper, 729 F.2d 1216, 1217 (9th Cir. 1984) (defendant was charged with obtaining and selling national-defense information to Polish agents; United States v. Smith, 780 F.2d 1102, 1103 (4th Cir. 1985) (defendant sold classified information to a Soviet agent); United States v. Walker, 796 F.2d 43, 45 (4th Cir. 1986) (defendant was arrested while attempting to deliver classified defense information to a Soviet agent); United States v. Zettl, 835 F.2d 1059, 1060 (4th Cir. 1987) (defendant delivered Navy program element descriptions to an unauthorized person); United States v. Morison, 844 F.2d 1057, 1060 (4th Cir.1988) (defendant sent secret Naval satellite photographs to a British publisher for publication); United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988) (defendant was charged with obtaining and delivering national-defense information to a foreign government); United States v. Miller, 874 F.2d 1255, 1258 (9th Cir. 1989) (defendant copied and delivered national-defense information to the Soviet government).

Even the defendants in reported military court cases, tried under the more stringent provisions of the Uniform Code of Military Justice, were tried when the evidence showed that they actually transferred materials or allowed an unauthorized third-party to physically obtain classified information.[10]

[10] See, e.g., United States v. Roller, 42 M.J. 264, 265 (C.M.A. 1995) (defendant left classified documents in his garage, which allowed a moving company employee to obtain access to the documents); United States v. Baba, 21 M.J. 76, 77 (C.M.A. 1985) (defendant was charged with willfully delivering or cause to deliver three documents to unauthorized persons); United States v. Gonzalez, 16 M.J. 428, (C.M.A. 1983) (defendant left two classified messages in an unauthorized recipient's desk drawer); United States v. Grunden, 25 C.M.A. 327, 2 M.J. 116,119 (C.M.A. 1977) (defendant attempted to communicate national-defense information); United States v. Anzalone, 40 M.J. 658, 813 (N-M.C.M.R. 1994) (defendant disclosed and mailed information about military forces to unauthorized persons); United States v. Schoof, 34 M.J. 811, 813 (N-M.C.M.R. 1992) (defendant attempted to deliver microfiches to a foreign power); United States v. Lonetree, 31 M.J. 849, 852 (N-M.C.M.R. 1990) (defendant

identified the names of United States intelligence agents to Soviet agents and provided the floor plans and office assignments of personnel in United States Embassies in Moscow and Vienna). But see United States v. Chattin, 33M.J. 802, 803 (N-M.C.M.R. 1991) (Defendant pleaded guilty to removing classified documents and willfully retaining it. Chattin was sentenced to confinement for four years, reduction to pay grade E-1,forfeiture of all pay and allowances, and a bad conduct discharge. The convening authority suspended all confinement in excess of three years for twelve months).

Similarly situated individuals who have not transferred any national-defense information have not been prosecuted under the Espionage Act. [11] The government has never alleged that Dr. Lee transferred the materials to anyone, nor that he left them unprotected where they could be stumbled upon by anyone. In fact, the evidence presented by the government itself at the bail hearings in this case confirms that Dr. Lee password-protected any materials on which he worked.

[11] Dr. Lee anticipates that the government will attempt to rely on United States v. Poulsen, 41 F.3d 1330,1333-35, (9th Cir. 1994) (defendant was charged with violating 18 U.S.C. § 793(e), in a second superseding indictment, for storing computer tapes of United States Air Force tasking orders in a rental storage unit). But Poulsen was not similarly situated to Dr. Lee because Poulsen allowed a third party to gain actual access to the tapes. Unauthorized third-party access constitutes transfer of the information. Poulsen stole the computer tapes from a previous employer and stored the tapes under a false name and address. Defendant then defaulted on the rental payments. The tapes were discovered by a third party, the rental-unit owner, while the rental-unit owner was evicting all contents from the unit due to defendant's seventy-one-day default.

C. Dr. Lee Meets Both Prongs of the Test Stated In Armstrong.

Dr. Lee indisputably meets both prongs of the Armstrong test, and must be granted discovery because he has submitted credible evidence that similarly-situated individuals have not been prosecuted as well as statements from government and law enforcement officials demonstrating improper motivations to prosecute Dr. Lee. Dr. Lee was selected from among more than a dozen identically situated individuals at LANL for criminal investigation in 1996 because he was "ethnic Chinese." This improper classification was employed for the next three years, and was explicitly reaffirmed in the April 9, 1999, search warrant application. The evidence of selective prosecution Dr. Lee has already uncovered far exceeds the Armstrong threshold.

Armstrong denied discovery to defendants who were charged with distributing crack cocaine in violation of 21 U.S.C. §§ 841 and 846. In Armstrong, the defense offered only one hearsay affidavit that in the year Armstrong was prosecuted, the twenty-three other § 841 cases handled by the Federal Public Defender in Los Angeles involved black defendants. See id. at 459. The defendants in Armstrong presented no evidence that the prosecution undertook any targeting based on race, see id., nor did the defendants make any showing that non-blacks had not been charged in other years or by one of the ninety-two other U.S. Attorney's Offices in 1991. In Armstrong, the government submitted proof that 3,500 defendants had been charged with violating § 841 in the previous three years and eleven non-blacks had been charged for distributing crack cocaine. id. at 482 n.6.

Dr. Lee's compelling showing here stands in stark contrast to the anemic showing in Armstrong. First, this Court has direct evidence in the form of a sworn declaration and a videotaped statement from government agents who assisted in the criminal investigation of Dr.Lee, which establish that a racial profiling was used to target Dr. Lee. Second, in contrast to Armstrong, where the government proved that 3,500 men and women of all races had been charged under §§ 841 and 846 during a three-year period, Dr. Lee is the only person

who has been charged under the Atomic Energy Act in the past fifty-two years. Third, Dr. Lee has provided this Court with examples of similarly situated non-Asians who have not been prosecuted under either the Atomic Energy Act or § 793. The defendants in Armstrong made no showing whatsoever that similarly situated non-blacks had not been prosecuted. Equally as compelling, Dr. Lee has provided this Court with evidence that the DOJ had a policy of not prosecuting individuals similarly situated to Dr. Lee. Additionally, no case has been brought under § 793 involving prosecution for information that had not been formally classified at the time of the defendant's conduct.

The evidence Dr. Lee has presented by far exceeds the threshold found sufficient to permit discovery in other cases decided under the Armstrong standard. For example, In United States v. Jones, 159 F.3d 969 (6th Cir. 1998), the Sixth Circuit overturned a District Court's decision and granted discovery under circumstances directly analogous to this case. In Jones police officers sent taunting letters to two black defendants, but not to a white defendant involved in the same conspiracy, and made a T-shirt with the black defendants' pictures, but not the white defendants. In Jones, the court found that the taunting letters and T-shirt had established a prima facie case of racial motivation on the part of the investigating officers, and had set forth "some evidence" of discriminatory effect, warranting discovery. The court found that although the defendant was unable to produce "prima facie evidence" of discriminatory effect, "some evidence" was enough when coupled with the evidence of discriminatory motivation. Id. at 977. The Jones analysis holds even greater force here, where key investigators have unequivocally stated that the DOE practiced racial profiling which led to Dr. Lee's indictment, and the lead counterintelligence official at DOE made racially-charged statements regarding the fitness of American citizens who are "ethnic Chinese" to work on nuclear weapons programs. Dr. Lee has presented more than "some evidence" of discriminatory effect. Unlike the defendant in Jones who could not show that others were not prosecuted, Dr. Lee has shown that no one else has ever been prosecuted under the Atomic Energy Act provisions at issue in this case, nor has anyone else been prosecuted under § 793 for mishandling information that had not been formally classified and that had not been furnished to any unauthorized person.

Similarly, in United States v. Tuitt, 1999 WL 791927 (D.Mass. 1999), the trial court ordered that the defendant be provided discovery under far less compelling circumstances. In Tuitt, the defendant's attorney compared four counties within the judicial district over a four-month period and found a statistically significant difference between the crack cocaine prosecutions brought in federal court and the crack cocaine prosecutions brought in state court. See id. at *4. Tuitt held that this showing was enough to meet the Armstrong standard where "Defendant is simply attempting to gain discovery so that he can more adequately determine whether a selective prosecution claim might indeed be viable." Id. at * 11. Again Dr. Lee far surpasses the threshold met by the Tuitt defendant. Rather than four months, Dr. Lee's attorneys examined reported cases covering fifty years, and rather than four counties, the search covered fifty states, without finding a single other reported case of prosecution under the Atomic Energy Act.

Similarly, in United States v. Glover, 43 F. Supp. 2d 1217 (D. Kan. 1999), the court granted discovery on a selective prosecution claim regarding imposition of the death penalty where the defense provided far less evidence on either prong of the Armstrong test. In Glover, the defendant presented some statistical evidence that over a three-and-one-half-year period, "the Attorney General authorized a greater number of black defendants for death-penalty prosecution than white defendants." Id. at 1234. The court found that this evidence, coupled with evidence that two other similarly-situated defendants were not prosecuted in federal court, was enough to permit discovery. See id. Rather than the mere statistical inference found sufficient in Glover, Dr. Lee has presented credible evidence in the form of specific statements made by investigators in this case that race was a factor in selecting Dr. Lee for prosecution. Moreover, he has presented some evidence of not two, but several individuals mishandling classified information without facing criminal charges of any kind, much less a potential life sentence.

CONCLUSION

Dr. Lee has presented compelling evidence the government singled him out for prosecution because of his race and refused to prosecute similarly situated individuals. Dr. Lee is entitled to the information the government is withholding from him -- information that will prove this is an egregious example of selective prosecution in violation of Dr. Lee's rights under the United States Constitution.

This Court should grant this motion and order the government to provide Dr. Lee the requested discovery materials, as set forth in Exhibit A.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,

Defendant.

RENEWED MOTION OF DR. WEN HO LEE FOR PRETRIAL RELEASE

Dr. Wen Ho Lee, through undersigned counsel, renews his motion for pretrial release under 18 U.S.C. § 3142 and the Due Process Clause of the Fifth Amendment. The grounds for this motion are set forth in the accompanying memorandum. Dr. Lee requests an evidentiary hearing on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2000, a copy of the foregoing was sent by hand delivery to:

George A. Stamboulidis
Assistant United States Attorney
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John D. Cline

REDACTED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 99-1417 JP

WEN HO LEE,

Defendant.

MEMORANDUM OPINION

On July 21, 2000 Defendant, Dr. Wen Ho Lee, filed his "Renewed Motion of Dr. Wen Ho Lee for Pretrial Release," (Doc. No. 114). After conducting a three-day evidentiary hearing and carefully reviewing the total available information and the applicable law, I concluded in an Order filed August 24, 2000 that Dr. Lee's motion should be granted.

I. Background

On December 10, 1999 the United States government filed a 59 count indictment charging Defendant Dr. Wen Ho Lee with violating part of the Espionage Act, 18 U.S.C. § 793, and two provisions of the Atomic Energy Act, 42 U.S.C. §§ 2275 and 2276. The government immediately arrested Dr. Lee and held him in custody. Three days later on December 13, 1999, during Dr. Lee's first appearance in court, United States Magistrate Judge Don J. Svet ordered pretrial detention. On December 17, 1999 Dr. Lee moved under 18 U.S.C. § 3145(b) for the revocation of Magistrate Judge Svet's detention order. On December 30, 1999, following a three-day evidentiary hearing, I filed a Memorandum Opinion and Order denying Dr. Lee's motion to revoke Judge Svet's Order of detention. I denied Dr. Lee's motion on the ground that the government had presented clear and convincing evidence that there was no combination of

conditions of release that would reasonably assure the safety of any other person and the community or the nation. See United States v. Lee, 79 F. Supp. 2d 1280, 1289 (D.N.M. 1999). Dr. Lee appealed. On February 29, 2000 the Tenth Circuit Court of Appeals affirmed the denial of Dr. Lee's motion. See United States v. Lee, No. 00-2002, 2000 WL 228263, **1 (10th Cir. Feb. 29, 2000).

Because the detention hearing before Judge Svet and the hearing on Dr. Lee's motion to revoke Judge Svet's order occurred at a very early stage of this prosecution, Dr. Lee and his attorneys did not have information, now available to them, that would have helped them counter the government attorneys' presentations at the December 1999 hearings. The United States Attorney, who argued passionately and persuasively for Dr. Lee's detention and who since has resigned, and his assistants, painted an extremely dark picture of Dr. Lee and his actions that Dr. Lee and his attorneys were unable to challenge effectively. During the passage of the seven months before Dr. Lee filed his renewed motion for release there had been disclosure of

differently.

II. Discussion

A. Reopening a detention hearing

A detention hearing may be reopened "if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142 (f). Some courts have read into the statute a requirement that the movant could not have known, at the time of the prior hearing, of the new information. See, e.g., United States v. Dillon, 938 F.2d 1412, 1415 (1st Cir. 1991); United States v. Ward, 63 F. Supp. 2d 1203, 1206-07 (C.D. Cal. 1999); United States v. Flores, 856 F. Supp. 1400, 1405-07 (E.D. Cal. 1994). But See Hon. John L. Weinberg, Federal Bail and Detention Handbook § 7.09 (1997).

Dr. Lee presented the following evidence which, he claims, warrants reopening his pre-trial detention hearing: (1) declaration testimony from Dr. Harold Agnew,[1] a former director of Los Alamos National Laboratory ("LANL") and from Dr. Walter Goad, a Fellow Emeritus of LANL, plus testimony in person by Dr. John Richter, who has worked at LANL for 40 years as a weapons designer, all of which tends to show that the information Dr. Lee took is less valuable than the government had led the Court to believe it was and is less sensitive than previously described to the Court; (2) declaration testimony from Robert Vrooman, former head of

[1] Dr. Agnew's first "declaration" is an unsworn statement. (See Def's Memo. Ex. A.) Dr. Agnew in his second declaration swears under penalty of perjury that his first statement is true and correct to the best of his knowledge. (See Def's. Reply Ex. A.)

counterintelligence at LANL who has known Dr. Lee a long time, that Dr. Lee did not intend to harm the United States, is not a danger to United States' security, and will not turn over tapes to a foreign power; and (3) evidence that F.B.I. Agent Robert Messemer testified falsely or inaccurately in December 1999 when he said that Dr. Lee (a) told Dr. Kuok-Mee Ling that Dr. Lee wanted to use Dr. Ling's computer to download a "resume" and (b) sent overseas various letters concerning Dr. Lee's work at LANL.

In addition, Dr. Lee makes new arguments that (1) the government's theory, stated in the Bill of Particulars, that Dr. Lee may have taken the information to enhance his employment prospects abroad is different from and less serious than the government's theory presented at the December 1999 hearing, (2) the material which Dr. Lee placed onto tapes was not classified at the time it was taken and is not now classified at the highest level, "Top Secret Restricted Data," and (3) the length and conditions of Dr. Lee's present and anticipated pretrial confinement amount to a constitutional violation.

Since Dr. Lee's argument concerning the classification level of the information he took could have been made at the December hearing, it is not a basis for reopening the detention hearing. This argument will be considered in connection with Dr. Lee's Motion to Strike from the Indictment References to the Alleged Classification Level of the Computer Files at Issue (Doc. No. 128), filed August 7, 2000, which is not yet fully briefed.

As to Dr. Lee's constitutional argument, I decline to reach it since "narrower grounds for a decision exist." See United States v. Gonzales, 150 F.3d 1246, 1254 (10th Cir. 1998)

(declining to resolve constitutional question).[2]

However, Dr. Lee has come forward with information that was not known to him at the time of the December hearing and that is material to the release issues. He also submits a new

[2] Although I have not addressed the question of whether there has been a constitutional due process violation based on the length or conditions of Dr. Lee's pretrial detention, I feel compelled to observe that the government, for reasons I believe not yet adequately explained, seems to have procrastinated in removing unduly onerous conditions of confinement. In my Memorandum Opinion and Order of December 30, 1999 I noted that it was filed "[w]ith a great deal of concern about the conditions under which Dr. Lee is presently being held in custody, which is in solitary confinement all but one hour a week when he is permitted to visit his family." Lee, 79 F. Supp. 2d at 1289. In addition, I stated in the Memorandum Opinion and Order, "Although the Court concludes that Dr. Lee must remain in custody, the Court urges the Government attorneys to explore ways to loosen the severe restrictions currently imposed upon Dr. Lee while preserving the security of sensitive information." Id. at 1289-90. According to a government attorney, who did not become involved with the case until this year, the severe restrictions began to soften, somewhat, around April, 2000, four months after my pointed request. At that time, the government began transporting Dr. Lee from his jail cell to the United States Courthouse in Albuquerque and/or LANL, usually four days per week, to review information and to confer with his attorneys about his defense. While in the highly secured rooms at the courthouse, Dr. Lee has been required to wear ankle chains, although he has not been encumbered with other body restraints. He has been present in the courtroom without any restraints at all hearings that have been open to the public. Dr. Lee has been provided magazines, newspapers, and a radio in his jail cell. Family visits in person remain restricted to one hour per week, however, Dr. Lee may speak to family members and his attorneys by telephone more frequently. In July 2000, only one month ago, Dr. Lee finally was permitted to exercise, unshackled, one hour each weekday. Much more recently, Dr. Lee has been, for the first time, allowed to exercise one hour on each weekend day, as well. Despite the amelioration of the severe restrictions that existed as of December 30, 1999, I have been and remain concerned about the slow response of the government to my December 30, 1999 urging, which, in hindsight, probably should have been phrased in more goading language, and about some of the continued demeaning limitations, one of which is having to wear leg chains in the special, secured courthouse rooms while Dr. Lee is in the company of his attorneys. For the peace of mind of the parties, their attorneys, and the judges on the Court of Appeals, I will assure them that my exasperation over this has not influenced my decision to order the release of Dr. Lee, on tight conditions; that decision was based solely on the information provided during the December 1999 hearing, the hearing on August 16, 17, and 18, 2000, and some of the information I have reviewed *in camera* and otherwise since the case was reassigned from Chief Judge Conway to me on June 5, 2000.

contention that could not have been made in December. First, Dr. Lee has presented testimony from Drs. Agnew, Goad, and Richter that bears on the nature and circumstances of this case, the weight of the evidence, and the nature and seriousness of danger to the community. It appears that Dr. Lee could not have marshaled this evidence in the brief time between his indictment on December 10, 1999 and the hearing before me which began on December 27, 1999. Second, Robert Vrooman's declaration, executed the final day of the latest hearing, has a material bearing on Dr. Lee's character and dangerousness. Third, Dr. Lee could not have known in December 1999 of Agent Messemer's incorrect testimony, which was relevant to all the statutory factors, about Dr. Lee downloading a resume and sending letters to foreign nations. Fourth, Dr. Lee was also unaware in December 1999 of the government's alternative theory that Dr. Lee may have merely been seeking to enhance his employment opportunities; this too materially affects the factors to be considered.

B. Pretrial release

As noted in the December 30, 1999, Memorandum Opinion and Order, the statutory scheme of 18 U.S.C. § 3142 generally favors pretrial release. See Lee, 79 F. Supp. 2d at 1283. A judge can only order a defendant detained if there is "no condition or combination of conditions [that] will reasonably assure the appearance of the person and the safety of any other person and the community." 18 U.S.C. § 3142(e). A finding against pretrial release must be supported by "clear and convincing evidence." 18 U.S.C. § 3142(f).

Congress has instructed judicial officers that

> in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, [a judge must] take into account the available information concerning–

> (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person, including—
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g). I now address each of these § 3142(g) factors in the light of all currently available information, including Dr. Lee's new evidence and arguments.[3]

1. Nature and circumstances of the charged offense

This first factor which a court must take into account is the "nature and circumstances" of the offenses charged. In my December 1999 opinion, I described the nature of the offenses as "quite serious" and "of grave concern to national security." See Lee, 79 F. Supp. 2d at 1285. I also felt the circumstances under which Dr. Lee acted were "deeply troubling." Id. While the nature of the offenses is still serious and of grave concern, new light has been cast on the circumstances under which Dr. Lee took the information, making them seem somewhat less

[3] As noted in the December 30, 1999 Memorandum Opinion and Order, the § 3142(g) statutory factors overlap one another. See Lee, 79 F. Supp. 2d at 1286. In the interest of brevity, I will discuss each new piece of evidence only in connection with one § 3142(g) factor. However, many of the facts influencing my decision support more than the single § 3142(g) factor under which they are individually discussed. Furthermore, I incorporate into this Memorandum Opinion my findings and analyses set forth in the December 30, 1999 Memorandum Opinion and Order to the extent they are not specifically mentioned herein and are not inconsistent with the findings and analyses expressed in this Memorandum Opinion.

troubling than they appeared to be in December. It remains undisputed that Dr. Lee's actions were certainly deliberate and not "the result of a simple mistake." Lee, 79 F. Supp. 2d at 1286. However, a distinguished nuclear weapons scientist, Dr. Richter, has offered an opinion, under oath, that calls into question the finding that Dr. Lee's conduct can only be described as "devious." Lee, 79 F. Supp. 2d at 1285. In expressing his personal version of an adage, Dr. Richter cautioned, "Never attribute to malice what can be adequately explained by stupidity." (Tr. Aug. 16, 2000 at 76.) Dr. Richter followed that with this testimony: "I really think it was something pretty dumb to do, and that is my feeling. I have no other explanation for that. There has been a great effort to find an espionage connection and that hasn't been found. And so what is left? Stupidity is the best I can come up with." (Id.)[4] In addition to the opinion of Dr. Richter on this point, Dr. Lee's attorneys note certain things about the method Dr. Lee used to downpartition and download the files in question. After placing the files on the green, unsecured

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[4] On the other side of the fence, Dr. Paul Robinson, also a highly regarded physicist, recast Dr. Richter's aphorism as "Never assume malevolence when mere incompetency will suffice." (Tr. Aug. 17, 2000 at 30.) Adhering to his position at the December 1999 hearing, Dr. Robinson on August 17, 2000 explained his starkly conflicting view of Dr. Lee's conduct thusly:

> I have tried to see if I could figure out that this was a stupid act, as it was characterized by Dr. Richter. It is a very carefully planned and calculated act. When you look at the listings that are on the tapes and the enormous care that had to be taken to assemble each of the tapes, it was clear that the aim was to establish a complete portfolio of how to design nuclear weapons and how the U.S. has in fact designed its current weapons. Now, for the life of me, I have not been able to figure out why one would take that time, use all that energy, use these methods to do something that they would take out of the protected storage, the careful custody that all the other workers at Los Alamos and at the laboratories take with such information. I just haven't been able to come up with a single excuse . . . . I conclude it was a malevolent act, yes, sir.

(Tr. Aug. 17, 2000 at 30-31.)

partition, Dr. Lee apparently gave them rather obvious filenames. (Id. at 176.) For example, Dr. Lee named the file containing the (Id. 181-83.) He left this and other indiscreetly named files on the open system until 1999. (Id. at 178.) Then, when Dr. Lee decided to erase the files from the open partition, he did so with the assistance of the LANL computing help desk. (Id. at 178; Reply Ex. F.) At all times, Dr. Lee apparently knew that LANL's automated computer anomaly detection system, "NADER," was in operation. (Tr. Aug. 17, 2000 at 177.) This suggests that Dr. Lee's actions may not have been as surreptitious, clandestine, and secretive as the government originally indicated.

Although Dr. Lee may not have been fully forthcoming as to his intentions when he told Dr. Ling that he intended to download "some files," (Tr. Aug. 17, 2000 at 39), it has become quite clear that Dr. Lee never told Dr. Ling that he intended to download only a "resume" (id. at 41.)

2. Weight of the evidence

As I stated in the December opinion, the government has never presented direct evidence that Dr. Lee intended to harm the United States or to secure an advantage for a foreign nation, which are elements of the charged offenses. See Lee, 79 F. Supp. 2d at 1286-87. Now, the strong circumstantial evidence of wrongful intent announced by the government in December has been tempered.

Through the declarations of Drs. Agnew and Goad, the attorneys for Dr. Lee have presented evidence that what may be on the seven missing tapes is in large part available in the "open" literature in the public domain and that many of the individual files Dr. Lee took are unclassified. (See Def's Memo. Exs. A and F; Ex. B at Aug. 16-18, 2000 hearing.) This tends to

raise some doubt as to the culpable nature of Dr. Lee's intent in gathering the information and the danger its disclosure might pose.

There now also is a question as to whether the missing tapes contain "all the information needed to build a functional thermonuclear weapon." Lee, 79 F. Supp. 2d at 1285. Dr. Robinson emphatically reiterated that they do. (Tr. Aug. 16, 2000 at 124.) Recent testimony from others on this point was generally less clear. However, Dr. Robinson now agrees that building a nuclear bomb is not an easy task, even for one in possession of a bomb blueprint. (Tr. Aug. 17, 2000 at 7.)

Since the hearings in December 1999, the government has imputed to Dr. Lee an alternative motive for his conduct. This is that Dr. Lee took the information to improve his prospects for employment abroad. See Bill of Particulars, filed July 5, 2000. Enhancing one's resume is less sinister than the treacherous motive the government, at least by implication, ascribed to Dr. Lee at the end of last year. Furthermore, contrary to Agent Messemer's December testimony, he now admits there is no evidence that Dr. Lee actually mailed or otherwise sent any letters expressing interest in foreign employment.

Also in the December opinion, I observed that the government had produced "information about various suspicious contacts or meetings between Dr. Lee and nuclear weapons scientists and officials from the People's Republic of China that occurred both within the United States and in China." Lee, 79 F. Supp. 2d at 1287. At the hearing on the present motion there was much discussion about certain contacts that occurred during 1982, 1986, and 1988. The more significant information that is new and most favorable to Dr. Lee on this subject is that Dr. Lee did in fact disclose, in his written post-1988 trip report, contact in the People's Republic of China

with Dr. Zheng Shao-Tong.[5] (Tr. Aug. 18, 2000 at 180; Ex. L at Aug. 16-18 hearing.) I should also note, however, that Dr. Lee did not specifically report the clandestine circumstances of his meeting in a Beijing hotel room with Dr. Zheng Shao-Tong or the fact that another high-ranking Chinese nuclear scientist was present.

3. History and characteristics of the person

In addition to the evidence detailed above that tends to show circumstantially that Dr. Lee may not have been quite as deceptive as the government originally portrayed him to be, new direct evidence suggests that Dr. Lee is simply "naive." (Declaration of Robert Vrooman, Ex. I at the Aug. 16-18, 2000 hearing.) Mr. Vrooman was at all relevant times the head of counterintelligence at LANL, and, in Mr. Vrooman's opinion, Dr. Lee "did not understand the ruthlessness of intelligence agencies." Id. Because of this perceived naiveté, and not because he believed Dr. Lee was disloyal, Mr. Vrooman recommended in 1999 that Dr. Lee not travel again to the People's Republic of China. See id.

Also, as was true in December 1999, it appears that many family members and friends have attended the hearings to show their support for Dr. Lee. Now, however, is a dramatic demonstration of their trust in Dr. Lee by pledging over two million dollars in assets which they are willing to forfeit upon Dr. Lee's non-appearance or violation of any other condition of release. (See Ex. J at Aug. 16-18, 2000 hearing.)

I remain seriously concerned about evidence of several deceptions as to which innocuous explanations have not yet been provided. In the December 30, 1999 Memorandum Opinion and

[5] This name has been Romanized in more than one way. (Tr. Aug. 18, 2000 at 170-71.)

Order, I acknowledged that a defendant in a criminal case faces significant risks in testifying pretrial. Dr. Lee has not testified at any of the three hearings regarding release. It may be that he will take the stand at trial and explain the government's evidence of his deceptive conduct.

The more troublesome incidents began in 1982 when Dr. Lee made an unsolicited telephone call to a scientist in California who, unbeknownst to Dr. Lee, was under investigation by the F.B.I. and whose phone was tapped. When an F.B.I. agent inquired of Dr. Lee about the California scientist, Dr. Lee at first denied knowing the person or talking to him. After being confronted with the recording of his conversation, Dr. Lee recanted. Dr. Lee then agreed to assist the F.B.I. in relation to its investigation of the California scientist. Later, in connection with that, the F.B.I. administered a polygraph exam on Dr. Lee. The F.B.I. interpreted as deceptive Dr. Lee's initial response to a question about improperly passing certain information. Dr. Lee then disclosed that, in violation of rules, he had mailed some unclassified information to a representative of Taiwan at an address in the United States. After making this disclosure, Dr. Lee was questioned again and then passed the polygraph examination.

During a LANL authorized trip to the People's Republic of China in mid-1988 with other LANL representatives, Dr. Lee met alone in a Beijing hotel room with two of the highest ranking PRC nuclear weapons scientists. They asked about classified material. Dr. Lee apparently did not give them classified information. After his return to the United States, Dr. Lee did not disclose on his required LANL trip report the extremely unusual secret meeting with the PRC scientists or that one of them was Hu Side, who at the time was Associate Director of the Chinese Academy of Engineering Physics. It was not until over ten years later, during or after a polygraph examination, that Dr. Lee first described the 1988 Beijing hotel room encounter.

Also, after being informed that he had answered deceptively during a February 1999 F.B.I. polygraph examination, Dr. Lee met with and said to Dr. Richard Krajcik, Deputy Director of LANL's X Division, that he may have "inadvertently" disclosed classified information. Dr. Krajcik testified that he instructed Dr. Lee to report this right away to Ken Schiffer, Director of Internal Security at LANL. Dr. Krajcik further testified that he later learned that although Dr. Lee met with Mr. Schiffer, as Dr. Krajcik had told him to do, Dr. Lee never mentioned the inadvertent disclosure of classified information to Mr. Schiffer. Dr. Lee's attorneys did raise questions about the reliability of this testimony by Dr. Krajcik, but since Dr. Lee has not testified, Dr. Krajcik's testimony has not been directly refuted.

On the other hand, the most startling incident of deception described by the government (the one specifically referenced in the December 30, 1999 Memorandum Opinion and Order, see Lee, 79 F. Supp. 2d at 1286), has now been shown to be groundless. During his recent testimony, Agent Messemer admitted that he incorrectly testified earlier that Dr. Lee had hoodwinked a colleague by saying he wanted to use the colleague's computer to download a "resume."

4. Nature and seriousness of danger to the community

The primary concern about "the danger to any person or the community that would be posed by the person's release," 18 U.S.C. § 3142(g)(4), stems from the missing tapes. Dr. Agnew testified that what he understands to be on the missing tapes "would be of very limited use to the People's Republic of China or any other foreign country with a nuclear arsenal." (See Def's Memo. Ex. A.) Dr. Agnew takes this view because of his belief that nations with nuclear weapons already have, and would prefer, their own test and design codes. Dr. Richter, an

experienced bomb designer who later worked in the Office of Energy Intelligence, testified that the material on the tapes would not change the global strategic balance of power, (Tr. Aug. 16, 2000 at 6, 8, 84, 92) (see also Def's Reply Ex. D.), but in the wrong hands could shift a regional balance of power. (Tr. Aug. 16, 2000 at 93.) However, Dr. Richter believed that no nation would actually use the information on the tapes to build a bomb, because, at least in part, of the economic and technological hurdles posed in actually building a nuclear weapon. (Id. at 49.) Dr. Goad testified that "[o]nly a group already deeply engaged in the design of nuclear weapons could profit from" the tapes, and then only marginally. (Def's Memo. Ex. D at 4.)

With respect to another aspect of possible danger, Agent Messemer testified in December 1999 that he anticipated "a marked increase in hostile intelligence service activities . . . in an effort to locate the tapes." (Tr. Dec. 29, 1999 at 68.) Agent Messemer in his recent testimony conceded that concern has not materialized over the last eight months as he had expected it would. (See Tr. Aug. 18, 2000 at 130-31.)

Under the totality of the information that is now before the court, what the government described in December 1999 as the "crown jewels," Lee, 79 F. Supp. 2d at 1281, of the United States nuclear weapons program, no longer is so clearly deserving of that label. (See Def's Memo. Ex. A.) Dr. Goad characterized the "crown jewels" description as a paranoiac "unbridled exaggeration." (Def's Memo. Ex. F.)

In sum, I am at this time confronted with radically divergent opinions expressed by several very distinguished United States nuclear weapons scientists who are on opposite sides of

the issue of the importance of the information Dr. Lee took.[4] The net effect is to cast the nature of the danger posed by the information on these tapes in a light different from that in which this case was viewed in December. Because of their basic differing philosophical beliefs, deeply and sincerely held, the respected nuclear weapons scientists have presented what is now a confused picture of the significance of the information Dr. Lee downloaded onto the tapes. It is no longer indisputable, as the government made it appear in December 1999, that the missing tapes contain crown jewel information about the nation's nuclear weapons program.

I turn then to the two possible factual scenarios, involving the missing tapes, that concern the government if Dr. Lee is released. The first assumes Dr. Lee still constructively possesses the missing tapes, has not made copies, and has not transferred the originals or copies. Under this hypothetical, Dr. Lee's pretrial release might enable him to convey the missing tapes, or cause them to be passed. It now appears that Dr. Lee's continued pretrial detention will not significantly affect this concern. First, while his conditions of confinement have been quite restrictive, they have not been so air-tight as to prevent Dr. Lee from surreptitiously sending a signal which could have resulted in the missing tapes being located and obtained by another. More importantly, given the government's new proposition that Dr. Lee may have been using the tapes to help get a job, it simply does not appear that Dr. Lee will attempt to transfer the tapes on his own or through someone else for that purpose while awaiting trial. Moreover, as earlier noted, Robert Vrooman, who over a long period served as the head of counterintelligence at LANL and knew Dr. Lee well, unequivocally opined, based on his experience with Dr. Lee, that

[4] All of the scientists seemed credible. They simply have honest and powerful conflicting beliefs.

Dr. Lee is not a danger to the United States and will not turn over the tapes, if he has them, to a foreign power. Dr. Lee's attorneys have also recently pointed out that an effort by Dr. Lee to pass classified information could expose him, and possibly his family members if he were to involve them, to the death penalty, which cannot be imposed on the indicted charges. Common sense dictates that Dr. Lee would not assume that risk of an ultimate penalty for himself or his family.

Under the government's second scenario, Dr. Lee's pretrial release will permit him to assist a current, unauthorized possessor of the missing tapes in utilizing the information on them. However, there was new testimony at the hearing on the present motion that at least some of the taped information is of a nature that the tapes in which it is contained would "stand by themselves." (Tr. Aug. 16, 2000 at 141.) If these tapes are already in the possession of another, releasing Dr. Lee until his trial would make little difference as to that secret information, which the possessor can use without Dr. Lee's help. Additionally, I have complete confidence that the various agencies that have thoroughly investigated Dr. Lee's conduct, and that kept him under constant surveillance for months before his indictment and arrest, will satisfactorily monitor Dr. Lee as they will be permitted to do under the conditions of release. Further, the Draconian conditions of release I have ordered[7] will virtually eliminate any risk that Dr. Lee might on his own accord, or even against his will, communicate with supposed possessors of the tapes.

[7] These conditions of release are modeled on proposals discussed during the December 1999 hearing to which Dr. Lee and his attorneys agreed, but which the United States Attorney and his assistants adamantly opposed. In fashioning these final conditions of release Dr. Lee and his attorneys have been extraordinarily accommodating of the government's demands.

III. Conclusion

The evidence which Dr. Lee has presented and the new arguments his attorneys have made lead me to conclude that the government has failed, at this time, to meet its burden of proving by clear and convincing evidence that no combination of conditions of release will reasonably assure the safety of the community and the nation. Hence, as required by the Bail Reform Act of 1984, Dr. Lee must be released from custody under the extreme restrictions imposed in the Order Setting Conditions of Release.

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 99-1417 JP
	)	
WEN HO LEE,	)	
	)	
Defendant.	)	

PLEA AND DISPOSITION AGREEMENT

Pursuant to Rule 11(e)(2), Fed. R. Crim. P., the parties hereby notify the Court of the following agreement between the United States Attorney's Office for the District of New Mexico, the defendant, Dr. Wen Ho Lee, and the defendant's attorneys, Mark Holscher and John D. Cline:

REPRESENTATION BY COUNSEL

1. The defendant understands his right to be represented by an attorney and is so represented. The defendant has thoroughly reviewed all aspects of this case with his attorneys and is fully satisfied with those attorneys' legal representation.

RIGHTS OF THE DEFENDANT

2. The defendant further understands his rights:

   a. to plead not guilty;

   b. to have a trial by jury;

   c. to confront and cross-examine witnesses and to call witnesses in his defense;

d. to testify, if he so chooses; and

e. against compelled self-incrimination.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The defendant hereby agrees to waive these rights and to plead guilty to Count 57 of the above-captioned 59-count Indictment charging violation of 18 U.S.C. § 793(e), that being Unlawful Retention of National Defense Information.

SENTENCING

4. The defendant understands that the maximum penalty the Court can impose is:

a. imprisonment for a period of not more than ten (10) years;

b. a fine not to exceed $250,000.00;

c. a mandatory term of supervised release of not more than three (3) years that must follow any term of imprisonment. (If the defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the defendant's supervised release could be revoked--even on the last day of the term--and the defendant could then be returned to another period of incarceration and a new term of supervised release.);

d. a mandatory special assessment of $100.00; and

e. restitution as may be ordered by the Court.

5. The parties agree, in accordance with Rule 11(e)(1)(C), Fed. R. Crim. P., that the sentence shall be 278 days incarceration, with credit for time served since December 10, 1999, and no fine, forfeiture, restitution, or period of probation or supervised release shall be imposed, other than the mandatory $100.00 special

assessment pursuant to 18 U.S.C. § 3013(a)(2). Given the Court's extensive familiarity with the defendant's personal history and conduct, the parties agree that the defendant shall be sentenced the same day as the plea, without a presentence report.

6. If the Court rejects this agreement in whole or in part, or if it declines to dismiss Counts 1 through 56, 58, and 69 of the Indictment with prejudice, then, in accordance Rule 11(e)(4), Fed. R. Crim. P., the defendant shall be afforded an opportunity to withdraw his plea of guilty.

DEFENDANT'S ADDITIONAL OBLIGATIONS

7. The defendant hereby agrees that:

a. The following definitions shall apply throughout this Plea and Disposition Agreement: (1) "tapes" is defined as the tapes at issue in the Indictment, including any information on the tapes, as well as any copies, printouts, versions, variants or variations in any medium whatsoever; (2) "files" is defined as the files at issue in the Indictment, including any information in the files, as well as any copies, printouts, versions, variants or variations in any medium whatsoever.

b. Before entry of the plea, the defendant will make a truthful written declaration, under penalty of perjury, that (1) he never intended to pass, disclose, or cause or allow to be disclosed to any unauthorized person or third party the tapes and never allowed any unauthorized person or third party access to those tapes, (2) he did not in the past and cannot in the future pass, disclose, or cause or allow to be disclosed the tapes to any unauthorized person or third party, (3) he never intended to pass, disclose, or cause or allow to be disclosed to any unauthorized person or party

the files and never allowed any unauthorized person or third party access to those files, and (4) he did not in the past and cannot in the future pass, disclose, or cause or allow to be disclosed the files to any unauthorized person or party.

c. At the time of and as part of his guilty plea, the defendant agrees that he will allocute under oath that at all times relevant to the Indictment, the following was true:

> On a date certain in 1994, I used an unsecure computer in T-Division to download a document or writing relating to the national defense (File 14) onto Tape L. I knew at the time that my possession of Tape L outside the X-Division perimeter was unauthorized and that, under Los Alamos National Laboratory directives, I was not permitted to have Tape L outside the X-Division perimeter. I retained Tape L and did not deliver it to an officer and employee of the United States entitled to receive Tape L.

The parties agree that the above provides a sufficient factual basis for the defendant's guilty plea.

d. At the time of the plea, the defendant shall acknowledge that the United States had and has a legitimate national security interest in determining what occurred with respect to the files and tapes.

e. Following acceptance of the plea, and before imposition of sentence, the defendant shall provide to the United States a truthful written declaration, under penalty of perjury, stating the manner in which he disposed of the seven tapes referred to in Counts 42, 44 through 49, 52, and 54 through 59 of the Indictment, as well as how, where, and when copies of the tapes were made and the manner in which they were disposed. Other than as necessary to answer any inquiries from the Court, neither party shall make any reference to the substance or content of this declaration to

the Court at any time before the Court imposes sentence and dismisses Counts 1 through 56, 58, and 59 of the Indictment with prejudice in accordance with paragraph 10 below.

f. Beginning on September 26, 2000, or as soon thereafter as the government requests, the defendant shall answer under oath questions from representatives of the United States for a period of ten (10) days within a three-week period, for a reasonable number of hours, which the parties understand to be six (6) hours of questions and answers per day, each of those ten (10) days. To the extent the United States believes that it requires additional time to complete the questioning, it may apply to the Court for a reasonable extension of this debriefing period. To the extent that counsel for the defendant conclude at any time during the three-week period that the questioning has become unreasonable, they may apply to the Court for appropriate relief. During the three-week period identified above in this paragraph, the defendant shall identify any storage spaces (other than his home), including but not limited to safety deposit boxes, computers, and computer accounts, under his control, and he will agree to allow the United States to search them.

g. The parties recognize that, under the particular circumstances of this case, the reliability of any future polygraph examination may be subject to conflicting interpretations. The United States, however, reserves the right to have the defendant undergo a polygraph examination administered by a mutually agreeable polygrapher if, in the United States' view, it becomes necessary for national security reasons or to verify the defendant's declaration or sworn debriefing regarding only the

creation, disposition, and whereabouts of the tapes and files. If the parties fail to agree on a polygrapher, then, after hearing from the parties, the Honorable Edward Leavy of the United States Court of Appeals for the Ninth Circuit (hereinafter "Mediator Judge") shall select the polygrapher. If any such polygraph examination occurs, it shall be conducted after the Court accepts the defendant's plea and imposes sentence and after the debriefing contemplated by paragraph 7(f). The parties agree that the results of any polygraph examination shall not be submitted to this or any other Court in any manner, including without limitation in connection with any proceeding under paragraph 7(h) below.

h. This agreement, and any plea, sentence, or other action taken in accordance with this agreement, shall become null and void if the Court determines, by a preponderance of the evidence admissible under the Federal Rules of Evidence as they would apply at trial, that the defendant knowingly provided false or misleading testimony concerning the creation or disposition of the files and tapes in the declarations contemplated in paragraphs 7(b) and 7(e) above or in the debriefing contemplated in paragraph 7(f) above.

i. For a period of twelve (12) months following imposition of sentence, the defendant shall make himself available to respond to reasonable inquiries from the United States.

j. Notwithstanding paragraph 7(h) above, the defendant's declaration and testimony given under paragraph 7(c) above shall be protected under Rule 11(e)(6), Fed. R. Crim. P.

k. No statements made or other information provided by the defendant in connection with paragraphs 7(b), 7(e), 7(f), 7(g), and 7(i) will be used directly against him in any criminal case brought by the United States, except in the event of prosecution for false statement, obstruction of justice, or perjury arising out of those statements or other information provided by the defendant, or except for a proceeding under paragraph 7(h) or as set forth in paragraph 13. The United States may make derivative use of, and may pursue any investigative leads suggested by, any statements made or other information provided by the defendant. Moreover, if the defendant later testifies at any trial or other judicial proceeding and offers testimony different from any statements made or any information provided during the debriefing, the United States may cross-examine the defendant about any statements made or other information provided by the defendant during the debriefing. Evidence about such statements may also be produced in the United States' rebuttal case in any such trial or judicial proceeding. Notwithstanding the provisions of Rule 410 of the Federal Rules of Evidence and Rule 11 of the Federal Rules of Criminal Procedure, the defendant waives any objection to such cross-examination and rebuttal, as is permissible pursuant to *United States v. Mezzanatto*, 513 U.S. 196 (1995).

l. For a period of twelve (12) months following imposition of sentence, the defendant will provide reasonable written advance notice to the United States of any plans to travel outside the United States. If the United States has any objection to the defendant's travel plans, the United States will bring its objection to the Mediator Judge, who will determine whether the defendant should be allowed to travel outside

the United States. This paragraph is implemented by a letter dated September 13, 2000, signed and agreed to by the United States, the defendant and counsel for the defendant, addressed and delivered to the Mediator Judge, which letter shall be a part of this Agreement.

WAIVERS

8. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging that, the defendant knowingly waives the right to appeal any sentence imposed pursuant to the parties' agreement reflected in paragraph 5, above, on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255.

9. The defendant waives any right to additional disclosure from the government in connection with the guilty plea. The defendant agrees that with respect to all charges in the Indictment, he is not a "prevailing party" within the meaning of the Hyde Amendment, Section 617, P.L. 105-119 (Nov. 26, 1997).

GOVERNMENT'S AGREEMENT

10. Provided that the defendant fulfills his obligations as set out above in paragraphs 3, and 7(b) through 7(e), the United States agrees to move at the time of

sentencing to dismiss with prejudice the remaining counts of this Indictment as to the defendant.

11. This agreement is limited to the United States Attorney's Office for the District of New Mexico and the United States Department of Justice, and does not bind any other federal, state, or local agencies or prosecuting authorities. Moreover, this agreement, which addresses the unique circumstances of this case, may in no way be relied upon or cited as precedent by anyone not a party to this agreement.

VOLUNTARY PLEA

12. The defendant agrees and represents that this plea of guilty is freely and voluntarily made and not the result of force or threats or of promises apart from those set forth in this plea agreement.

VIOLATION OF PLEA AGREEMENT

13. The defendant understands and agrees that if he violates any provision of this plea agreement, the United States may move the Court to declare this plea agreement null and void as to any benefits inuring to the defendant, it being understood that the defendant shall not be entitled to withdraw his guilty plea in such event. If the Court finds a material breach of the plea agreement, the defendant will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crime(s) or offense(s) contained in or related to the Indictment filed in this case, as well as perjury, false statement, and obstruction of justice. Should the Court find a material breach of this agreement, the defendant waives any double jeopardy or statute of limitations defense with respect to any count in the Indictment.

DISPUTE RESOLUTION

14. With the exception of any disputes covered by paragraphs 7(f), 7(h) and 13, the parties agree to submit any disputes as to the implementation of terms of this agreement to the Mediator Judge, who shall have the power to resolve them in a binding manner.

SPECIAL ASSESSMENT

15. At the time of execution of this plea agreement, the defendant will tender to the United States District Court Clerk a money order or certified check payable to the order of the United States District Court, District of New Mexico, 333 Lomas Boulevard NW, Suite 270, Albuquerque, New Mexico 87102, in the amount of $100.00 in payment of the special assessment described in paragraphs 4(d) and 5 above.

ENTIRETY OF AGREEMENT

16. This document, along with the implementing letter on travel outside the United States, is a complete statement of the agreement in this case, supersedes all prior agreements whether oral or written, and may not be altered unless done so in writing and signed by all parties.

AGREED TO AND SIGNED this 13th day of September, 2000.

NORMAN C. BAY
United States Attorney
District of New Mexico

By: _____
GEORGE A. STAMBOULIDIS
Assistant United States Attorney
201 Third Street NW, 9th Floor
Post Office Box 607
Albuquerque, New Mexico 87103
(505) 346-7274

I have read this agreement and carefully reviewed every part of it with my attorneys. I understand the agreement and voluntarily sign it.

_____
WEN HO LEE
Defendant

_____
MARK HOLSCHER
Attorney for Defendant

_____
JOHN D. CLINE
Attorney for Defendant

WHL

10 AUG 2000

DECLARATION OF ROBERT VROOMAN

I, Robert Vrooman, do hereby declare and state:

1. I have reviewed the government's response to Wen Ho Lee's Motion for Discovery of Materials Related to Selective Prosecution, including the attached Declaration of Special Agent Robert Messemer. As set out below, Agent Messemer's declaration contains numerous false statements. Based on my experiences with Agent Messemer and the information I have received from other FBI agents, I believe that he regularly distorts information.

2. I did not tell Agent Messemer that Lee probably assisted the Chinese by helping fix Chinese hydrocodes during his travel in 1986 and 1988. His allegation that I did so is false. Our April 28, 1999 meeting focused on [approx. one line deleted] and Agent Messemer's theory that there was something inappropriate going on [words deleted]. I attended that interview solely as a favor to John Browne, the director of Los Alamos National Laboratory. When it was over, I told Browne that I considered the interview strange, because it had nothing to do with the Lee case. I later learned from officials at the CIA that Agent Messemer was falsely informing CIA officials that I had been critical [word(s) deleted]. At the time, Agent Messemer was attempting to shift blame to the CIA for possible fallout [words deleted]. I sought to obtain a copy of Agent Messemer's memoranda of my interview and to have it corrected. See Attachment one. The FBI refused to provide me a copy of this memorandum, which I expect contains false information.

3. Agent Messemer's statement that the individuals selected for investigation were chosen because they fit a "matrix" based on access to W-88 information and travel to the PRC is false. Dozens of individuals who share those characteristics were not chosen for investigation. As I explained in my prior declaration, it is my firm belief that the actual reason Dr. Lee was selected for investigation was because he made a call to another person who was under investigation in spite of the fact that he assisted the FBI in this case. It is my opinion that the failure to look at the rest of the population is because Lee is ethnic Chinese.

4. Mr. Moore's contention that the Chinese target ethnically Chinese individuals to the exclusion of others, therefore making it rational to focus investigations on such individuals was not borne out by our experience at Los Alamos, which was the critical context for this investigation. It was our experience that Chinese intelligence officials contacted everyone from the laboratories with a nuclear weapons background who visited China for information, regardless of their ethnicity. I am unaware of any empirical data that would support any inference that an American citizen born in Taiwan would be more likely than any other American citizen [deletion].

5. Of the twelve people ultimately chosen for the short list on which the investigation focused, some had no access at all to W-88 information, and one did not have a security clearance, but this individual is ethnically Chinese. I do not believe this was a coincidence. Further, this ethnically Chinese individual did not fall within the "matrix" which Agent Messemer claims was used by the DOE and FBI. In addition, although there were other names on the AI list, Mr. Trulock made clear that Dr. Lee was his primary suspect.

6. Agent Messemer deliberately mischaracterizes the nature of my comments to him regarding my concerns about Dr. Lee's travel to the PRC. I did consider it unusual that Dr. Lee had not reported any contact by Chinese agents when I debriefed him following his return from the PRC. I did not believe then and I do not believe now that Dr. Lee engaged in

espionage, and I made no such intimation to Agent Messemer. Dr. Lee and his wife Sylvia were both cooperating with FBI investigations, and I considered them loyal Americans. Nonetheless, I considered Dr. Lee naive, and therefore a potential security risk. It was to keep Dr. Lee out of harm's way, not because I had any fear that he might knowingly engage in improper conduct, that I recommended against further unescorted trips out of the country for Dr. Lee.

7. My concerns about the real motivation behind the investigation were exacerbated when I received a classified intelligence briefing from Dr. Thomas Cook, an intelligence analyst at LANL, in September 1999. This briefing put to rest any concerns that I may have had that Dr. Lee helped the Chinese in any substantial manner.

8. In my capacity as a counterintelligence investigator at LANL, I was briefed on the existence of an investigation code-named "Buffalo Slaughter" some time in the late 1980s involving a non-Chinese individual working at a DOE laboratory who transferred classified information to a foreign country. That individual was granted full immunity in return for agreeing to a full debriefing on the information that he passed. [Approx. six lines deleted].

9. The statements contained in my Declaration dated June 22, 2000 are true and correct and I so attest.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on August 10, 2000, at Gallatin Gateway, Montana.

[signed]
Robert Vrooman

[Attachment one]

September 17, 1999
Robert S. Vrooman
P.O. Box 348
Gallatin Gateway, MT 59730

David V. Kitchen
Special Agent in Charge
FBI 415 Silver SW
Albuquerque, NM 87102

Dear Mr. Kitchen:

I would like to have a copy of the 302 prepared by SA Robert Messemer as a result of his interview with me on April 28, 1999. Several members of the CIA's IG office have read me portions [of] Messemer's report, and it is clear to me that SA Messemer attributed his opinions to me. During the interview, I told SA Messemer that I did not know [deletion] well enough to have an opinion [deletion]. He then provided me with the details and asked me to speculate on the implications. I find this interview technique objectionable.

On the other hand, SA Messemer did provide me with a lot of details regarding Dr. Lee that I did not know. This helped to solidify my opinions on the case and to have the confidence to go public. I learned during the meeting with SA Messemer that Dr. Lee [Approx. one line deleted]. SA Messemer was particularly helpful to us when he provided us a copy of Mr. Bruno's April 15, 1997 memorandum to Notra Trulock thus allowing us to defend our decision to keep Dr. Lee in his job. For this I am grateful to SA Messemer, but I still object to his using me to promote his opinions.

I am planning to write a book on my experiences and would like to have the 302 as soon as possible.

Sincerely yours,

[signed]
Robert S. Vrooman

MEMORANDUM

DATE: December 10, 1999

TO: Wilfred Romero, Deputy Warden
Major Anthony Romero, Chief of Security
All Shift Commanders

FROM: Lawrence Barreras, Senior Warden

SUBJECT: **HIGH SECURITY SUPERVISION**

The following assignment and security procedures will be implemented for the supervision of high profile USM inmate Wen Ho Lee who is being confined at the Corrections Operated Santa Fe County Detention Facility.

ASSIGNED STAFF (Eight Hour Shifts):

Lt. Paul Maez – Evening shift – 4:00 p.m. – 12:00 a.m.

Officer Frank Sanchez – Morning shift – 12:00 a.m. – 8:00 am.

Officer Vincent Franco – Day shift – 8:00 a.m. – 4:00 p.m.

Sgt. Jose Rodriguez will be a relief.

The following procedures will be in place:

The USM inmate will be assigned to the isolation area adjacent to booking, in a cell that has been enhanced for high security. Enhancements include extra security locks on selected entrances to the isolation area. The cell door has also been enhanced with bolt locks and pad locks, one on the door and one on the tray pass.

The keys will remain in master control for quick access only to the shift commander in the event of an emergency. The cell door may not be opened without the Warden's approval. Emergency access is permitted in accordance with emergency procedures.

HIGH SECURITY SUPERVISION *(cont.)*
Page 2 of 3

- A continuous log will be maintained detailing the entire activity of the individual that is assigned to this security cell. Entries will be made every 15 minutes and for any unusual activity. Additionally, an entry will be made for anyone entering the area. The authorized staff and or visitor must sign the entry on the log.
- The logging of activities should be very detailed identifying the status of the individual continuously.
- The officer assigned to the area is not to leave his/her assigned post under any circumstances. If the officer needs to be relieved for the restroom he/she must notify the shift commander. The shift commander will respond immediately.
- Under no circumstances will other staff, visitors and or inmates be allowed into that immediate area. Only the following staff will have access to the area:
    - Lawrence Barreras, Senior Warden
    - Wilfred Romero, Deputy Warden
    - Major Anthony Romero, Chief of Security
    - Marvin Martinez, Program Administrator
    - Captain James Bustamante, Duty Officer
    - Shift Supervisor
    - Assigned Security Staff
    - Medical Staff – ***with my approval***
      Mental Health Staff – ***with my approval***

If any unusual activity should occur in this immediate area, the shift commander will immediately notify the Warden, Deputy Warden and the Major.

Showers will only be conducted during the regular workweek, during the day with my approval. The Deputy Warden and Major must be on-site to supervise movement.

The following items will be permitted to be in the inmate's possession:

- Hygiene packet, mattress, blanket, sheet, pillow, pillowcase, 1 uniform, 1 pair of issued shoes, reading material (upon inspection by the Major or above), a pen and paper will be made available upon request.

Attorney visits will take place in an adjacent room in the isolation area. Attorneys of record are Mark Holscher and John Cline. The Warden must approve attorney visits. Attorney visits will be coordinated by Marvin Martinez, Program Administrator who will report to the site for the visit.

HIGH SECURITY SUPERVISION *(cont.)*
Page 3 of 3

- Phone calls will be permitted on day shift for 15 minutes. The inmate phone in the multi-purpose room must be used for this purpose. The shift supervisor must be present and monitor phone calls.

- The shift supervisor will coordinate meals for the inmate. The shift supervisor will go to the kitchen at mealtime and have one prepared from the meal line. Styrofoam trays and plastic utensils will be utilized. The shift supervisor will take the meal to the cell and give it to the inmate utilizing the tray pass. Twenty minutes later the shift supervisor will retrieve the meal container, utensils and any remaining food through the tray pass.

- The Warden must approve non-contact family visits. The Warden will relay visit procedures on a case by case basis.

- Any requests or comments made from the news media will be referred directly to the USM. No information whatsoever is to be relayed to anyone calling in reference to the status of the inmate assigned to the security cell.

- Complete isolation of this activity is imperative. Security and professionalism will be maintained to the highest standard.

- All staff assigned to this detail will maintain high vigilance and remain fully alert at all times.

- The inmate will remain secured in the cell 24-hours a day.

- It is imperative that everyone follows and adheres to this directive without fail. All questions will be referred to the Shift Supervisor who will contact the Warden and the Deputy Warden immediately at any hour of the day or night.

This directive will only be changed by the Warden. It will be in effect immediately upon the inmate's arrival on December 10th and maintained until further notice.

xc: Gary Henman, Vice President, Secure Detention
Rick Ploof, USMS
Wilfred Romero, Deputy Warden
Major Anthony Romero, Chief of Security
Marvin Martinez, Program Administrator
Captain James Bustamante, Duty Officer
All Shift Commanders
Staff identified as being assigned to this project.

DOJ-WHL--00166

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HONG KONG
LONDON
SHANGHAI
TOKYO

December 21, 1999

PRIVILEGED & CONFIDENTIAL
VIA FACSIMILE AND MAIL

United States Attorney John Kelly
First Assistant United States Attorney Robert Gorence
United States Attorney's Office for the
District of New Mexico
201 3rd Street N.W.
Albuquerque, New Mexico 87108

Re: *Dr. Wen Ho Lee*

Dear U.S. Attorney Kelly and First Assistant Gorence:

I write to follow up on my conversation with Mr. Gorence yesterday regarding the conditions of Dr. Lee's imprisonment. Apparently at the request of the Department of Justice and the FBI, Dr. Lee's jailers have barred his family from visiting him for more than one hour a week. In addition, the agents have demanded that my client and his wife speak only English and do so in the presence of a federal agent.

Please provide me immediately with a written description of the conditions that you have placed on Dr. Lee's imprisonment, and a statement of the legal authority for these draconian conditions. We formally demand that Dr. Lee be permitted to visit with his family on a daily basis. We also strongly object to the unprecedented intrusion of FBI agents on Dr. Lee's meetings with his family and the insidious demand that he only speak to his wife in English. We hereby again demand that the agents not be present during his meetings with his family. By way of this letter, I also request that you provide me with written assurances that the FBI agents who are eavesdropping on Dr. Lee's conversations have not and will not provide any representative of the Department of Justice or anyone connected with this investigation information regarding those conversations.

Apparently, federal agents, without any court order or authorization, are also refusing to permit Dr. Lee to call me at my home telephone number and are restricting his ability to call me at my office. Please immediately provide the agents with my home telephone number and work telephone number and direct them to permit Dr. Lee to call me on a daily basis at those numbers. You, of course, have already confirmed my telephone numbers, as you have called me at my

home and you have obtained the subscriber information for my home telephone number through a grand jury subpoena.

Very truly yours.

Mark Holscher

Mark Holscher
of O'MELVENY & MYERS LLP

LA2-497592.1

facsimile
TRANSMITTAL

to: Michael Brave
fax #: 202-514-3120
re: Holscher letter attached
date: December 22, 1999
pages: 3 , including this cover sheet.

Please see attached letter. Call Bob Gorence at 505-346-7274 for questions or Paula Burnett at the same number.

Thanks

From the desk of...
Doreen Dowling
505-224-1436 - direct

The Secretary of Energy
Washington, DC 20585

December 27, 1999

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
Washington D.C. 20530

Dear Attorney General Reno:

Re: United States v. Wen Ho Lee, Crim. No. 99-1417
(D. N.M. Dec. 10, 1999)

I write to you pursuant to title 28 of the Code of Federal Regulations, section 501.2, which provides that, upon direction of the Attorney General, special administrative measures may be implemented that are reasonably necessary to prevent disclosure of classified information, upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of classified information would pose a threat to the national security and that there is a danger that the inmate will disclose such information.

I hereby certify that the unauthorized disclosure of classified information described in the above indictment would pose a threat to the national security and that there is a danger that Mr. Lee will disclose such information. In my judgment, such a certification is warranted to enable the Department of Justice to take whatever steps are reasonably available to it to preclude Mr. Lee, during the period of his pretrial confinement, any opportunity to communicate, directly or through other means, the extremely sensitive nuclear weapons data that the indictment alleges Mr. Lee surreptitiously diverted to his own possession from Los Alamos National Laboratory (LANL). I make this certification at the request of U.S. Attorney for the District of New Mexico, John Kelly, and upon the recommendations and evaluations of the Director of the Federal Bureau of Investigation and DOE's Director of Security and Emergency Operations, Eugene Habiger.

Yours sincerely,

Bill Richardson

Bill Richardson

Department of Energy
Washington, DC 20585

MEMORANDUM FOR THE SECRETARY

FROM: Eugene E. Habiger
Director, Office of Security
and Emergency Operations

SUBJECT: Recommendation that You Sign Certification in United States v. Wen Ho Lee, Crim. No. 99-1417 (D. N.M. Dec. 10, 1999)

BACKGROUND: As you know, on December 10, 1999, Wen Ho Lee was indicted in federal court on 59 counts of mishandling classified information. He is being held without bail while awaiting trial on these charges.

Under 28 C.F.R. 501.2, upon direction of the Attorney General, special administrative measures may be implemented that are reasonably necessary to prevent disclosure of classified information, upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of classified information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. U.S. Attorney for the District of New Mexico, John Kelly, has requested that you make this certification.

In my judgment such a certification is warranted to enable the Department of Justice to take whatever steps are reasonably available to it to preclude Mr. Lee, during the period of his pretrial confinement, any opportunity to communicate, directly or through other means, the extremely sensitive nuclear weapons data that the indictment alleges Mr. Lee surreptitiously diverted to his own possession from Los Alamos National Laboratory (LANL).

The indictment returned against Lee charges him with illegally transferring nineteen TAR files (a TAR file is an archive file and constitutes a "container file" in which groups of other files are collected at the direction of the file creator) from the secure partition of the LANL Common File System ("CFS") to the open partition. The TAR files that Lee is alleged to have transferred contained Secret and Confidential Restricted Data relating to the research and design of nuclear weapons.

The indictment also charges Lee with downloading the classified files he had gathered on the open partition onto portable computer tapes. On one occasion in 1997, he allegedly downloaded classified files directly from the secure partition onto a portable computer tape. Lee is charged with creating ten such tapes. Three of these tapes were recovered during the consensual search of Lee's office in March, 1999. The seven remaining tapes, each containing highly sensitive classified information, have never been recovered.

The Restricted Data contained on the nineteen computer files and the seven missing downloaded computer tapes represent the most sensitive information collectively possessed within LANL. As Dr. Steve Younger, Assistant Director of LANL, has testified, what Lee is alleged to have taken includes four of the most important primary and secondary source codes. The data files represent the cumulative knowledge of approximately 1,070 American nuclear tests and contain never to be replicated, absent testing, information concerning material equations of state, neutron cross sections, and opacity information, all of which is relevant only in the design and construction of thermonuclear weapons. The files and tapes Lee is alleged to have created also contained input deck designs and contours, which are the complete "blueprints" of highly optimized weapons. Dr. Younger has expressed the view that the unauthorized disclosure of the source codes and data files in the missing tapes would give a foreign power "all the tools" needed to design a range of thermonuclear weapons and could alter "the global strategic balance of power." As was stated above, seven of the tapes containing this surreptitiously acquired information ahve yet to be recovered by the Govenrment.

SENSITIVITIES. The recently issued indictment does not deprive Mr. Lee of the legal presumption of innocence. Nevertheless, I believe that the national security risks associated with dissemination of what Mr. Lee is alleged to have purloined are both stark and real. Dr. Younger's affidavit vividly describes the nature of the information and the obvious risks it presents if further disclosed.

The United States Attorney, John Kelly, has informed DOE that protective measures have been taken during pretrial confinement in other cases involving alleged compromises of sensitive government information and that, in the absence of such measures, the administrative conditions of pretrial confinement designed generally for other sorts of alleged offenses could permit further compromises to occur.

Although the Department of Justice has already imposed some restrictions on Mr. Lee, he has challenged these restrictions, and the Department of Justice has informed the Office of General Counsel that a certification by you would strengthen the Government's ability to maintain the restrictions in place.

RECOMMENDATION: That you sign the attached certification.

CONCURRENCES: EJFygi/Acting General Counsel 12/27/99

Attachment

CORRECTIONS

MEMORANDUM

DATE: January 4, 2000

TO: Rick Ploof, Supervisor Deputy USM for Prisoner Operations

FROM: Lawrence Barreras, Senior Warden

SUBJECT: SEGREGATION INMATES

As per our conversation attached is the segregation policy you requested.

The following is a summary of our segregation operation. Inmates in segregation have access to the following.

- Phone calls are made collect to attorneys and/or family or friends, 15-minutes per day.
- Barbering services are available on a weekly basis.
- Non-contact visitation. The visits are 1-hour per week on Fridays.
- Legal Access – Legal materials are provided to the inmates on an as needed basis.
- Library Access – Reading materials are provided on a weekly basis.
- Showers are available 5-days per week, Monday through Friday.
- 1-hour per day recreation. Recreation takes place outdoors weather permitting.
- The segregation unit consists of twelve two men cells. Inmates are housed either single or double celled in accordance with their security requirements.
- Inmates receive meal service (3) times per day. Inmates are provided the same meal service provided to the general population. However, segregation inmates receive their meals in styrofoam trays.
- Inmates have access to a modified commissary list weekly.
- The medical department conducts rounds (3) times daily.

CORNELL CORRECTIONS, INC.
SANTA FE COUNTY CORRECTIONAL FACILITY
4312 NM 14
SANTA FE, NEW MEXICO 87505
505-471-4941
FAX: 505-473-0039

SEGREGATION INMATES (*CONT.*)
Page 2

- The mental health department conducts rounds once a week on Monday, and sees inmates as needed by appointment.
- Inmates have access to correspondence with individuals.
- Inmates have access to laundry exchanges in the same manner as general population.
- Inmates have access to hygiene items in the same manner as general population.
- Each cell is equipped with a sink, hot and cold running water, a toilet, a mirror for grooming purposes, a desk and stool, natural and electric lighting and (2) bunks with mattresses, bedding and linen.
- Inmates are in full restraints anytime they are out of the cell being moved from one location to another.
- Inmates are not allowed access to other inmates except in cases where they are being double celled with another segregation inmate.

Any of the above can be modified in accordance with your requirements. Modifications must meet applicable legal requirements.

SFCDC 232-2
Revised:11/99
Page 1 of 4
Cornell Corrections Inc.

POLICY	POLICY NUMBER: 232-2	PAGES 1 of 4
SECTION: Special Management	SUBJECT: General Conditions of Confinement	
FACILITY: Santa Fe County Detention Center	RELATED A.C.A. STANDARDS: 3-ALDF-3D-12, 3-ALDF- 3D-13, 3-ALDF-3D-14, 3-ALDF-3D-15 and 3-ALDF-3D-15-1	

I. AUTHORITY:

A. Cornell Corrections, Inc. Secure Facilities Policy Number

B. Section 33-3-1 through 33-3-26, NMSA (1978)

II. PURPOSE:

The purpose of this policy is to give general conditions of confinement for the Special Management Unit.

III. REFERENCES:

Manual for Standards for Adult Detention Facilities 3-ALDF-3D-12, 3-ALDF-3D-13, 3-ALDF-14, 3-ALDF-3D-15 and 3-ALDF-3D-15-1.

IV. REVIEW AND APPROVAL:

This policy and procedure will be reviewed at least annually by the Senior Warden, Deputy Warden, and the Vice President of Secure Institutions, or their designee, and will be revised as often as required. All changes will be documented in Memorandum form and maintained in the Central Policy History File. A copy of the revised policy will be forwarded to the Vice President of Secure Institutions.

V. POLICY:

A. Inmates in Administrative Segregation will be provided with prescribed medication, clothing that is not degrading, and access to basic personal items to use in their cells.

B. Inmates in Administrative Segregation will have opportunity to shave and shower,(3-ALDF-3D-13) receive laundry, barbering, and hair care services. They issue and exchange clothing the same basics as inmates in general population. Exceptions are permitted only when found necessary by the Shift Commander or Senior Officer on duty. This must be documented in unit Log.

c. When an inmate in Administrative Segregation is deprived of any unusually authorized items or activity a report is made of the situation.(3-ALDF-3D-15) When an inmate uses food or food service equipment in a manner that is hazardous to self, staff, or other inmates, alternative meal service may be provided. 3-ALDF-3D-15-1

VI. PROCEDURE:

A. Inmates in Administrative Segregation will have access to their prescribed medication. The appropriate medical staff will give the inmate his/her prescribed medication through the food port of the cell door. 3-ALDF-3D-12

B. Inmates in Administrative Segregation will wear the same clothing as the inmates in general population. 3-ALDF-3D-12

C. Inmates in Administrative Segregation will have access to basic personal items, to include their prescribed eye glasses. Any or all item may be removed from the inmate's cell where there is imminent danger that the inmate or any other inmate(s) will destroy an item or induce self-injury. 3-ALDF-3D-12

D. Inmates in Administrative Segregation will have the opportunity to shave in appropriate intervals. They will shower at least three times per week. The above activities will be documented. 3-ALDF-3D-13

E. Inmates in Administrative Segregation will have the following items on the same basis as general population:

1. receive a blanket
2. barbering
3. exchange of clothing
4. bedding and linen

Exceptions will be made when found necessary by the Captain on duty. These exceptions will be recorded in the Administrative Segregation log and a written justification is made and sent to the Major. 3-ALDF-3D-14

SFCDC 232-2
Revised:11/99
Page 3 of 3

F. If and inmate in Administrative Segregation uses food in a manner that is hazardous to self and others and alternative meal may be provided with the following conditions only;

1. Alternative meal service is on an individual basis.
2. It is based on health or safety considerations only.
3. The alternative meal meets basic written approval by the Senior Warden and the health authority.
4. The alternative meal shall not exceed (7) days.

SFCDC 232-Z
Revised:11/99
Page 4 of 4

VII. POLICY AND PROCEDURE REVIEWS AND/OR APPROVED POLICY AND PROCEDURE REVISIONS:

☐ Reviewed / No Changes
☐ Approved / Policy Revision
☐ Approved /Procedure Revision

Deputy Warden — Date: 12/1/99

Senior Warden — Date: 12/1/99

Vice President of Secure Institutions — Date: 12-3-99

☐ Reviewed / No Changes
☐ Approved / Policy Revision
☐ Approved /Procedure Revision

Deputy Warden — Date

Senior Warden — Date

Vice President of Secure Institutions — Date

☐ Reviewed / No Changes
☐ Approved / Policy Revision
☐ Approved /Procedure Revision

Deputy Warden — Date

Senior Warden — Date

Vice President of Secure Institutions — Date

U.S. DEPARTMENT OF JUSTICE, UNITED STATES MARSHALS SERVICE, DISTRICT OF NEW MEXICO,

Albuquerque, NM, January 6, 2000.

Re: Federal Inmate Wen Ho Lee.

Mr. LAWRENCE BARRERAS,
Warden,
Cornell Corrections, Inc., Santa Fe County Correctional Facility, Santa Fe, NM.

DEAR MR. BARRERAS: We have reviewed the Cornell Correction/Santa Fe County Correctional Facility Segregation Policy with the United States Attorney's Office and we agree with some additional restrictions, the standard segregation policy currently in place at your facility would adequately confine Mr. Wen Ho Lee.

I understand implementing additional restrictions would not inflate the jail rate all ready established with the United States Marshals Service. Therefore, effective immediately it is requested that Mr. Lee be held in segregation with the following additional restrictions imposed:

1. Mr. Lee is to be kept in segregation until further notice (single cell).
2. Mr. Lee is not to have contact with other inmates at anytime.
3. All outgoing mail except legal mail will be screened by the F.B.I.
4. Mr. Lee will not be permitted personal telephone calls.
5. Mr. Lee will be allowed to place collect telephone calls to attorneys of record Mr. John Cline at (505) 244–7514 and/or Mr. Mark Holscher at (213) 430–6613. A member of the jail staff will dial the telephone number and wait to verify that the attorney is on the line.
6. Mr. Lee will be allowed contact visits with his attorneys only.
7. Mr. Lee will be allowed non-contact visits with immediate family members. To include his wife Sylvia Lee, his daughter Alberta Lee and his son Chung Lee. The family will schedule visits through attorneys John Cline or Mark Holscher. The attorneys will contact the FBI to arrange visits and they in turn will contact the Senior Warden or Deputy Warden. The FBI must be on site to monitor each visit. Visits will not be allowed unless an FBI agent is present.
8. Visitors are to be restricted to Attorneys of Record and immediate family.
9. Any changes to Mr. Lee's conditions of confinement will be authorized by USMS personnel only.
10. Mr. Lee is not to be removed from the facility by anyone unless authorized by the USMS.

Thank you for your assistance in this matter and if you have any further questions or concerns, please do not hesitate to contact me or Chief Deputy Tommy Bustamante.

Sincerely,

JOHN S. SANCHEZ,
U.S. Marshal.

LAW OFFICES OF FREEDMAN, BOYD, DANIELS, HOLLANDER, GOLDBERG & CLINE, P.A.,

Albuquerque, NM, January 6, 2000.

Re: *United States* v. *Wen Ho Lee,* Crim. No. 99–1417 JC/DS (D.N.M.)

ROBERT J. GORENCE, Esq.,
Acting U.S. Attorney,
Albuquerque, NM.

DEAR BOB: We consider Dr. Lee's present conditions of confinement to be unlawful. I expect to address this point with you in detail shortly. In the meantime, I request the following changes:

1. At present, Dr. Lee must remain indoors 24 hours per day. He spends virtually all of that time in his cell. I ask that Dr. Lee receive at least two hours outdoors every day. I understand from officials at the detention center that this could be done without exposing Dr. Lee to any of the inmates.
2. Dr. Lee should be permitted to have a television, radio, and CD player in his cell and to receive access to newspapers.
3. Dr. Lee should be permitted to shower daily, rather than only five days per week, as at present.

These changes could not possibly cause the government any security concern, and they would somewhat mitigate the harsh circumstances of Dr. Lee's detention.

I would appreciate a prompt response to this request.

Very truly yours,

JOHN D. CLINE.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

January 12, 2000

RECEIVED
DEPT OF JUSTICE
2000 JAN 13 P 3:15
EXECUTIVE SECRETARIAT

MEMORANDUM FOR THE ATTORNEY GENERAL
THE DEPUTY ATTORNEY GENERAL

FROM: Gary G. Grindler
Principal Associate Deputy Attorney General

Nicholas M. Gess
Associate Deputy Attorney General

SUBJECT: SAM - Wen Ho Lee

We have reviewed the proposed Special Administrative Measures (SAM) document for Wen Ho Lee and report as follows:

1. This document reflects changes which address the concerns which you have raised since the last time the matter was presented to you;

2. The document has been reviewed by both OLC and the Civil Division. With changes which are incorporated in the attached package, both have indicated their concurrence.

3. The memorandum recommending signature reports that the SAM will require Dr. Lee "to communicate in the English language." (Memorandum at page 6). However, the SAM itself specifies, "[a]ll (other than attorney/client-privileged) communications will be in the English language unless a fluent FBI/DF-approved translator is readily available to contemporaneously monitor the communication." (SAM at page 11).

4. You have also advised that some individuals have expressed concern about Dr. Lee's access to exercise. The SAM does not limit Dr. Lee's access to exercise. According to the Santa Fe County Jail rules, Dr. Lee will be limited to one-hour per day of exercise, as are all administrative segregation prisoners (TAB D; Page 2). This is a factual question about the rules of the facility at which Dr. Lee is detained and you can certainly answer it if asked.

U. S. Department of Justice
Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

SUBJECT: Origination of Special Administrative Measures (SAM) of Confinement Conditions on Federal Government Pre-Trial Detainee Wen Ho Lee (Lee)

PURPOSE: To obtain your signature on the attached memorandum directing the Director, United States Marshals Service (USMS), to originate SAM on Lee

TIMETABLE: As soon as possible. Lee was taken into federal custody on December 10, 1999.

SYNOPSIS: The United States Attorney for the District of New Mexico (USA/DNM) has requested that SAM be authorized on Lee. The U.S. Department of Energy (DOE) has certified the threat to U.S. national security posed by Lee.

DISCUSSION: The USA/DNM has provided information, and the DOE has provided certification, that imposing SAM on Lee is reasonably necessary to prevent disclosure of classified information and that the unauthorized disclosure of such information would pose a threat to the national security of the U.S. and that there is a danger that Lee will disclose such information.

RECOMMENDATION: The Criminal Division (CRM) concurs in the USA/DNM's request. A memorandum to the Director of USMS directing the origination of SAM on Lee is attached for your signature. CRM recommends that you authorize the SAM on Lee and sign the memorandum to the USMS.

LAW ENFORCEMENT SENSITIVE

U. S. Department of Justice
Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: James K. Robinson
Assistant Attorney General

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PURPOSE: To obtain your signature on the attached memorandum directing the Director, United States Marshals Service (USMS), to originate SAM on Lee

TIMETABLE: As soon as possible. Lee was taken into federal custody on December 10, 1999.

SYNOPSIS: The United States Attorney for the District of New Mexico (USA/DNM) has requested that SAM be authorized on Lee. The U.S. Department of Energy (DOE) has certified the threat to U.S. national security posed by Lee.

BRIEF CHRONOLOGICAL HISTORY - LEE:

December 10, 1999	Grand Jury returned a fifty-nine (59) count indictment against Lee
December 10, 1999	Lee taken into federal custody
December 13, 1999	U.S. Magistrate Judge Don Svet conducted a detention hearing and ordered that Lee be detained pending trial because of the risk of danger to the national security if Lee was released

LAW ENFORCEMENT SENSITIVE

December 29, 1999 After a three-day evidentiary hearing reviewing Judge Svet's detention order, U.S. District Judge James A. Parker found that Lee posed such a risk of danger to the nation that there was no condition or combination of conditions under which Lee could be released pending trial.

EXECUTIVE SUMMARY:

The United States Attorney for the District of New Mexico (USA/DNM) has requested (Attachment A) that Special Administrative Measures (SAM) of confinement be originated on federal pre-trial detainee Wen Ho Lee (Lee). The threat posed by Lee to the U.S. national security has been certified by U.S. Secretary of Energy Bill Richardson, U.S. Department of Energy (DOE), the Federal Bureau of Investigation (FBI), and Director Eugene Habinger, Security and Emergency Operations, DOE (Attachment B).

On December 29, 1999, after a three-day evidentiary hearing, U.S. District Judge James A. Parker, ordered that Lee be detained pending his trial. Pursuant to 18 U.S.C. § 3142(i)(2), Lee was committed to the custody of the Attorney General for confinement in a correctional facility. As a person in the custody of the Attorney General, the Attorney General has the inherent authority to implement conditions of confinement based upon evidence of the threat posed by the individual confined.

Lee has been indicted on fifty-nine (59) counts related to compromising classified information. Based upon the substantiation of the risk of compromising classified information, as certified in the attached DOE letter, it is recommended that the Attorney General direct the Director of USMS to impose the SAM of confinement on Lee as set out in the attached memorandum to the Director, USMS.

BRIEF SYNOPSIS OF THE THREAT POSED BY LEE:

The USA/DNM has reported that Lee was a hydrodynamicist/engineer at Los Alamos National Laboratory (LANL)

from December 1978, until he was terminated from his employment in March 1999. In 1980, Lee was assigned to the "X" division at LANL. The "X" division is responsible for the research and design of approximately eighty-five percent (85%) of the U.S. nuclear stockpile. Lee's primary job assignment for the eighteen (18) years he was in X division was to write and implement physics models in the area of hydrodynamics as the discipline applied to nuclear weapons research. While assigned to the X division, Lee had a "Q" clearance and had access to the most sensitive information possessed at LANL.

The fifty-nine (59) count indictment returned against Lee on December 10, 1999, charges him with illegally transferring nineteen TAR files (a TAR file is an archive file and constitutes a "container file" in which groups of other files are collected at the direction of the file creator) from the secure partition of the LANL Common File System (CFS) to the open partition. The TAR files that Lee transferred contained Secret and Confidential Restricted Data relating to the research and design of nuclear weapons in the U.S. arsenal.

The indictment also charges Lee with downloading the classified files he had gathered on the open partition onto portable computer tapes. On one occasion in 1997, Lee downloaded classified files directly from the secure partition onto a portable computer tape. Lee is charged with creating ten (10) such tapes. Three (3) of these tapes were recovered during the consensual search of Lee's office in March 1999. The seven (7) remaining tapes, each containing highly sensitive classified information, have never been recovered.

The Secret Restricted Data contained on the nineteen (19) computer files and the seven (7) missing downloaded computer tapes represent the most sensitive information collectively possessed within LANL. According to Dr. Steve Younger, the Associate Director of LANL, Lee took four (4) of the most important primary and secondary source codes. Lee also took the complete "data files" required to operate the four (4) weapons' design source codes. The data files represent the cumulative knowledge of approximately 1,070 American nuclear tests and contain never-to-be-replicated, absent testing, information

concerning material equations of state, neutron cross sections, and opacity information, all of which is only relevant in the design and construction of thermonuclear bombs. The files and tapes Lee created also contained input deck designs and contours, which are the complete "blue prints" of highly optimized weapons. Dr. Younger believes that the unauthorized disclosure of the source codes and data files in the missing tapes would give a foreign power "all the tools" needed to design a range of thermonuclear bombs and could alter "the global strategic balance of power."

Lee was taken into custody on Friday December 10, 1999, the day the indictment was returned. On Monday, December 13, 1999, U.S. Magistrate Judge Don Svet conducted a detention hearing and ordered that Lee be detained pending trial because of the risk of danger to the U.S. national security if Lee was released. On December 29, 1999, after conducting a three-day evidentiary hearing reviewing Judge Svet's order, U.S. District Judge James A. Parker found that Lee posed such a risk of danger to the nation that there was no condition or combination of conditions under which lee could be released pending trial. Judge Parker stated in his order that:

> The Government has presented credible evidence showing that the possession of information by other nations or by organizations or individuals could result in devastating consequences to the United States' nuclear weapon program and anti-ballistic nuclear defense system ... The Government also presented evidence that it remains extremely concerned about the seven missing portable computer tapes containing valuable classified files. The Government offered considerable information that Dr. Lee's release from custody at this time poses a danger to the United States because of the risk that Dr. Lee will find a way to, and will be inclined to, reveal to unauthorized persons the location of the seven missing tapes or to assist an unauthorized possessor in understanding and utilizing the information contained in the tapes. Based on the Government's evidence that Dr. Lee lied about meetings with nuclear weapons scientists and

officials from the Peoples Republic of China, it is conceivable that Dr. Lee may be inclined to reveal to unauthorized possessors either the whereabouts of the tapes or his knowledge of how to use the information on the tapes.

Moreover, despite repeated requests by the Government investigators for information about the location of the missing tapes or about details regarding their destruction made during a lengthy pre-arrest investigation, Dr. Lee never provided that information. The only representation that the tapes have been destroyed came from Dr. Lee's attorneys. This representation is based on broad, non-specific language about destruction of classified documents and material in a one-page "Security Termination Statement," Ex. F, signed by Dr. Lee at the time LANL fired him. The Court was not given any sworn testimony that the seven missing tapes were destroyed nor was it provided any information about the time and manner of their destruction or whether they had been copied. It would have been fairly simple for Dr. Lee to have disclosed at some point during the exhaustive and lengthy investigation, whether he had copied or destroyed the tapes and if so, where, how, why, and when that occurred.

United States of America v. Wen Ho Lee, in the United States District Court for the District of New Mexico, Memorandum Opinion and Order, dated December 30, 1999, pages 14-16. (Full Memorandum Opinion and Order Attached as "Attachment C").

The USA/DNM has not alleged in court that Lee already has passed Secret Restricted Data to a foreign nation. However, the USA/DNM opines that, since the government still does not know the location of the missing tapes, there is a severe risk that Lee could communicate the tapes' location to someone or instruct someone who already knows their location to disseminate them.

LEE'S CURRENT STATUS:

Lee is currently in the custody of the USMS and is housed in the segregation unit at the Cornell Corrections/Santa Fe County Correctional facility, New Mexico, a USMS contract facility.

NEED FOR SAM:

As detailed herein, the USA/DNM has reported, and DOE has certified, that SAM on Lee is reasonably necessary to prevent disclosure of classified information and that the unauthorized disclosure of such information would pose a threat to the national security of the U.S. and that there is a danger that Lee will disclose such information.

The requested SAM to be imposed on Lee are:

Contacts: Lee will not be allowed to be in contact with other inmates unless this contact is closely monitored.

Language: Lee is required to communicate in the English language. The USA/DNM has reported that Lee's immediate family members, with the possible exception of his siblings who reside in Taiwan, all speak fluent English.

Telephone: Lee will be allowed to use telephones only to communicate with his attorney(s)[1] and Lee's

1. Lee's "attorney(s)" or "attorney(s) of record" refers specifically to Lee's attorney(s) of record who has/have signed the SAM acknowledgement compliance document. This document specifically forbids the attorney(s) or staff to make third-party patch-through calls on Lee's behalf. If an attorney, or attorney's staff member, refuses to agree to and sign the SAM acknowledgement compliance document, the person refusing will be prohibited to contact or communicate with Lee.

immediate family members[2]. Attorney/client privileged telephone calls will be placed by detention facility personnel, but will not be monitored. Immediate family telephone calls will be placed by facility personnel and will be contemporaneously monitored--as well as recorded for FBI analysis.

Visits: Lee will only be allowed to have non-monitored outside visits with his attorney(s) and precleared legal staff. Lee will be allowed to have limited monitored visits with legally identifiable immediate family members in accordance with facility regulations and with only one visitor at a time, and no physical contact will be allowed during these visits.

Mail: Lee will not be allowed to pass written communications to or receive written communications from other facility inmates or visitors, except his attorney(s). Lee will be able to receive incoming mail from any person.

Lee will only be allowed to send outgoing mail to his immediate-family members and his attorney(s).

---

2. "Immediate family members" include Lee's wife, Sylvia, his adult son, Tse-Chung Lee, his adult daughter, Alberta Lee (Lee's spouse, son, and daughter all reside in the U.S.). Lee's parents are both deceased. Lee has seven living siblings, four living in the U.S. and three who reside in Taiwan.

3. The FBI has indicated that they will screen Lee's incoming mail. The FBI agrees with the provision permitting screened incoming mail because, unlike with screened outgoing mail, Lee's ability to divulge classified information is virtually non-existent.

Lee's non-legal mail will be delayed for a reasonable time while the mail is copied and held by the warden, and copies of the mail will be forwarded to federal investigators for analysis. In signing the SAM compliance document, Lee's attorney(s) will certify that only case-related correspondence prepared in their office will be presented to Lee, and that they will not forward third-party mail that Lee may present to the attorney(s).

RECOMMENDATION:

The USA/DNM has requested that SAM be imposed on Lee for a period of 120 days. I concur. I recommend that you sign the attached memorandum to the Director of the USMS.

APPROVE: /Janet Reno/

DATE: January 13, 2000

DISAPPROVE: _____

OTHER: _____

Concurring Components:
USA/DNM, DOE, FBI

Nonconcurring Components:
None

Attachments

Office of the Attorney General
Washington, D. C. 20530

LAW ENFORCEMENT SENSITIVE

January 13, 2000

MEMORANDUM FOR JOHN W. MARSHALL
DIRECTOR
UNITED STATES MARSHALS SERVICE

FROM: THE ATTORNEY GENERAL

SUBJECT: Origination of Special Administrative Measures of Confinement Conditions on Federal Government Pre-Trial Detainee Wen Ho Lee

Wen Ho Lee (Lee) has been indicted on fifty-nine (59) counts related to compromising classified information. Lee is presently housed in a United States Marshals Service (USMS) contract facility in New Mexico.

Based upon information provided to me, I find that Special Administrative Measures (SAM) of confinement on Lee are reasonably necessary to prevent disclosure of classified information and that the unauthorized disclosure of such information would pose a threat to the national security of the U.S. and that there is a danger that Lee will disclose such information. Therefore, I am directing you to implement SAM on Lee in order to restrict Lee's access to the mail, the telephone, and visitors. This SAM will be in effect for 120 days subject to my further direction.

SPECIAL ADMINISTRATIVE MEASURES OF CONFINEMENT
USMS Inmate - Wen Ho Lee ("Lee" or "inmate")

1. **General Provisions:**

   a. **Adherence to Usual Detention Facility Policy Requirements** - In addition to the below-listed SAM, the inmate must comply with all usual Detention Facility (DF) policies regarding restrictions, activities, privileges, communications, etc. If there is a conflict between DF policies and the SAM, as set forth

herein, where the SAM is more restrictive than usual DF policies, then the SAM shall control. If usual DF policies are more restrictive than the SAM, then DF policies shall control.

b. **Interim SAM Modification Authority** - During the term of this directive, the Assistant Attorney General, Criminal Division, may modify the inmate's SAM as long as any SAM modification authorized by the Assistant Attorney General:

i. Does not create a more restrictive SAM;

ii. Is not in conflict with the request of the U.S. Attorney for the District of New Mexico (USA/DNM), Federal Bureau of Investigation (FBI), or DF, or applicable regulations [outside of the then-applicable SAM memorandum]; and

iii. Is not objected to by the USA/DNM, FBI, or DF.

c. **Inmate Communications Prohibitions** - The inmate is limited, within DF's reasonable efforts and existing confinement conditions, from having contact with other inmates and others (except as noted in this document) that could reasonably foreseeably result in the inmate's communicating information (sending or receiving) that could circumvent the SAM's intent of significantly limiting the inmate's ability to communicate (send or receive) information that could result in the unlawful disclosure of classified information.

i. The inmate is prohibited from passing or receiving any written or recorded communications to or from any other inmate, visitor, attorney, or anyone else except as outlined and allowed by this document.

d. **Use of Interpreters/Translators** - Translator approval requirement:

i. DF may use translators as necessary for the purpose of facilitating communication with the inmate.

ii. No person shall act as a translator without prior written clearance/approval from DF, which shall only be granted after consultation with the FBI and USA/DNM.

iii. Translators shall not be allowed to engage in, or overhear, unmonitored conversations with the inmate. Translators shall not be alone with the inmate, either in a room or on a telephone or other communications medium.

2. Attorney/Client Provisions:

a. **Attorney[1] Affirmation of Receipt of the SAM Restrictions Document** - The inmate's attorney--individually by each if more than one--must sign an affirmation acknowledging receipt of the SAM restrictions document. The Federal Government expects that the attorney, the attorney's staff, and anyone else at the behest of, or acting on the behalf of, the attorney, will fully abide by the SAM outlined in this

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[1] The term "attorney" refers to the inmate's attorney of record, who has been verified and documented by the USA/DNM, and who has received and acknowledged receipt of the SAM restrictions document. As used in this document, "attorney" also refers to more than one attorney where the inmate is represented by two or more attorneys, and that the provisions of this document shall be fully applicable to each such attorney in his/her individual capacity.

document; that expectation is set forth in the SAM restrictions document.

i. The USA/DNM shall present, or forward, the "attorney affirmation of receipt of the SAM restrictions document" to the inmate's attorney.

ii. After initiation of SAM and prior to the inmate's attorney being permitted to have attorney/client-privileged contact with the inmate, the inmate's attorney shall execute the attorney affirmation of receipt of the SAM restrictions document and return the original to the USA/DNM.

(1) If the attorney refuses to sign the SAM acknowledgement document, then the attorney's refusal to sign must be noted on the document.

(2) Once the SAM acknowledgment document has been signed by the attorney, the SAM will not preclude the attorney from communicating with his/her client as outlined herein, or as otherwise dictated by DF.

(3) If the attorney refuses to agree to abide by the SAM restrictions, or refuses to sign the SAM attorney affirmation of receipt of the SAM restrictions document, the SAM will prevent the attorney from communicating with the inmate. This communication restriction shall remain until the attorney agrees to and signs the SAM attorney affirmation of receipt of SAM restrictions document.

iii. The USA/DNM shall maintain the original of the SAM acknowledgement document and forward a copy of the signed document to the Office of Enforcement Operations, Criminal Division, Washington, DC.

b. **Attorney Use of Interpreters/Translators**

i. **Necessity Requirement** - No translator shall be utilized unless absolutely necessary where the inmate does not speak a common language with the attorney.

ii. **Attorney Immediate Presence Requirement** - Any use of a translator by the attorney shall be in the physical and immediate presence of the attorney--in the same room. The attorney shall not patch through telephone calls, or any other communication, to or from the inmate to or from a third party.

iii. **Translation of Inmate's Correspondence** - An attorney of record may only allow a federally approved translator to translate the inmate's correspondence as necessary for attorney/client-privileged communication.

c. **Attorney/Client-Privileged Visits** - May be contact or noncontact at the discretion of DF.

d. **Attorney May Disseminate Inmate Conversations** - The inmate's attorney may disseminate the contents of the inmate's communications to third parties for the sole purpose of preparing the inmate's defense--and not for any other reason--on the understanding that any such dissemination shall be made solely by the inmate's attorney, and not by the attorney's staff.

e. **Unaccompanied Attorney's Precleared[2] Paralegal(s)[3] May Meet With Client** - The inmate's attorney's precleared paralegal(s) may meet with the client/inmate without the necessity of the inmate's attorney being present.

i. This provision only pertains to meetings with one inmate at a time.

ii. An investigator may not meet alone with the inmate.

f. **Precleared Translators May Accompany Attorney's Precleared Paralegal(s)** - When necessary, a precleared translator may meet with the inmate in the presence of the inmate's attorney's precleared paralegal(s) without requiring the presence of the inmate's attorney.

g. **Simultaneous Multiple Legal Visitors** - The inmate may have multiple legal visitors provided that the multiple legal visitors consist of the inmate's attorney or precleared staff member.

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[2] "Precleared" when used with regard to an attorney's (or co-counsel's) staff, or "precleared staff member," refers to a paralegal, investigator, or a translator, who is actively assisting the inmate's attorney with the inmate's defense, who has submitted to a background check by the FBI and USA/DNM, who has successfully been cleared by the FBI and USA/DNM, and who has received a copy of the inmate's SAM and has agreed–as manifested by his/her signature–to adhere to the SAM restrictions and requirements. As used in this document, "staff member" also refers to more than one staff member, and the provisions of this document shall be fully applicable to each such staff member in his/her individual capacity.

[3] A "paralegal" will also be governed by any additional DF rules and regulations concerning paralegals.

h. **Legally-Privileged Telephone Calls** - The following rules refer to all legally-privileged telephone calls or communications:

i. **Attorney's Precleared Staff May Participate in Inmate Telephone Calls** - The inmate's attorney's precleared staff are permitted to communicate directly with the inmate by telephone

ii. **Potential Defense Witness Telephonic Communications With Inmate** - Potential expert or fact witnesses may telephonically communicate with the inmate under the following conditions:

(1) The witness's identity is confirmed and his/her name is cleared by the FBI and the USA/DNM.[4]

(2) The inmate's attorney (not just the attorney's staff) is present (in the same room as the witness) for and participating in the telephone call with the inmate.

(3) Any conversation that is not in the English language will be contemporaneously translated (by a precleared translator).

iii. **Inmate's Initiation of Legally-Privileged Telephone Calls** - Inmate-initiated telephone communications with his attorney or precleared staff are to be placed by a DF staff member and

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[4] If an inmate's attorney does not wish to divulge a potential witness's identity to the prosecutors or their investigators, then the FBI and USA/DNM shall create a "firewall" to accommodate the defense attorney's desire for secrecy while simultaneously allowing for the FBI to perform a background check and clearance on the proposed witness.

the telephone handed over to the inmate only after the DF staff member confirms that the person on the other end of the line is the inmate's attorney or precleared staff member. This privilege is contingent upon the following additional restrictions:

(1) The inmate's attorney will not allow any non-precleared person to communicate with the inmate, or to take part in and/or listen to or overhear any communications with the inmate.

(2) The inmate's attorney must instruct his/her staff that:

(a) The inmate's attorney and precleared staff are the only persons allowed to engage in communications with the inmate.

(b) The attorney's staff (including the attorney) are not to patch through, forward, transmit, or send the inmate's communications through to third parties, except as specifically authorized by this document.

(3) No telephone call/communication, or portion thereof, except as specifically authorized by this document:

(a) Is to be overheard by a third party

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[5] For purposes of the SAM "third party" does not include officials of the DF, FBI, Immigration and Naturalization Service (INS), Department of Justice (DOJ), or others when made in connection with their official duties.

(b) Will be patched through, or in any manner forwarded or transmitted to a third party.

(c) Shall be divulged in any manner to a third party.

(d) Shall be in any manner recorded or preserved.[6] The inmate's attorney may make written notes of attorney/client-privileged communications.

(4) If DF, FBI, or USA/DNM determine that any call or portion of a call involving the inmate contains any indication of a discussion in furtherance of any crime or actual or attempted circumvention of SAM, the inmate's telephone privileges may be negatively impacted.

i. **Inmate's Attorney May Provide Documents to the Inmate** The inmate's attorney may provide his/her client with the following additional items: discovery materials, court papers (including indictments, court orders, motions, etc.), materials determined by the inmate's attorney to be material to the preparation of the inmate's defense, and/or material prepared by the inmate's defense team and reviewed by the inmate's attorney, so long as any of the foregoing documents that are translated by a precleared translator.

i. The USA/DNM may authorize additional documents to be presented to the inmate. If any document not listed or described above needs to be transmitted to the inmate, consent for the transmission of the

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[6] Except by DF, FBI, INS, DOJ, or other duly authorized federal authorities when made in connection with their official duties.

document can be obtained from the USA/DNM without the need to formally seek approval for an amendment to the SAM.

j. **Inmate to Return Writing and Drawing Materials to Attorney** - The inmate's attorney, or the attorney's precleared staff, may provide the inmate with writing or drawing materials as long as the attorney, or his/her staff, retain such materials and the writings/drawings pertain to preparation of the inmate's defense and are only further disseminated by the attorney to third parties as reasonably necessary for purposes solely related to preparation of the inmate's defense.

k. **Legal Mail** - The inmate's attorney may not send, communicate, distribute, or divulge the inmate's mail, or any portion of its contents (legal or otherwise), to third parties, except as provided in subsection 2(d) of this Memorandum.

i. In signing the SAM acknowledgement document, the inmate's attorney, and precleared staff, acknowledge the restriction that only inmate case-related documents will be presented to the inmate, and that the attorney will not forward third-party mail that the inmate may present to the attorney.

3. Inmate's (Non-Legal) Contacts:

a. **(Non-Legal) Telephone Contacts**

i. **Telephone Call Limits** -

(1) **Immediate Family Members** - The inmate is limited to non-legal telephone calls only to/from his immediate family members.[7]

(2) **English Requirement** - All (other than attorney/client-privileged) communications will be in the English language unless a fluent FBI/DF-approved translator is readily available to contemporaneously monitor the communication.

(3) **Quantity and Duration** - The quantity and duration of the inmate's non-legal telephone calls with his immediate family members shall be set by DF.

ii. **Rules - Telephone Calls** - The following rules refer to all non-legally-privileged telephone calls or communications:

(1) No telephone call/communication, or portion thereof,

(a) Is to be overheard by a third party.

(b) Is to be patched through, or in any manner forwarded or transmitted, to a third party.

(c) Shall be divulged in any manner to a third party.

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[7] The inmate's "immediate family members" are defined as the inmate's (DF-verifiable) spouse, natural children, parents, and siblings.

(d) Shall be in any manner recorded or preserved.[8]

iii. **Telephone SAM Restriction Notifications** - For all non-legal telephone calls to the inmate's immediate family member(s):

(1) DF shall notify (remind) the inmate of the telephone SAM restrictions prior to each telephone call.

(2) DF shall verbally notify the inmate's immediate family member(s) on the opposite end of the inmate's telephone communication of the telephone SAM.

(3) DF shall document each such telephone SAM notification.

iv. **Family Call Monitoring** -

(1) A call with the inmate's immediate family member(s) shall be:

(a) Contemporaneously monitored (as directed by the FBI).

(b) Contemporaneously recorded (as directed by the FBI) in a manner that allows such telephone call to be analyzed for indications the call is being used to pass messages soliciting or encouraging the disclosure of classified information, or to otherwise attempt to circumvent the SAM.

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[8] Except by DF, FBI, INS, DOJ, or other duly authorized federal authorities when made in connection with their official duties.

(2) Each inmate/immediate family member telephone call shall be provided by DF on a single, individual, cassette tape (per call) for forwarding to the FBI. These recordings shall be forwarded to the FBI (as directed by the FBI) on a call-by-call basis as soon as practicable after each call.[9]

v. **Improper Communications** - If telephone call monitoring or analysis reveals that any call or portion of a call involving the inmate contains any indication of a discussion in furtherance of any crime, the soliciting or encouraging the dissemination of classified information, or actual or attempted circumvention of SAM, the inmate shall be permitted no further calls to his immediate family members for a time period to be determined by DF. If contemporaneous monitoring reveals such inappropriate activity, the telephone call shall be immediately terminated.

b. **(Non-Legal) Visits** -

i. **Limited Visitors** - The inmate shall be permitted to visit only with his immediate family members.

ii. **English Requirement** - All (other than attorney/client-privileged) communications during inmate visits will be in the English language unless a fluent FBI/DF-approved translator is readily available to contemporaneously monitor the communication/visit.

iii. **Visit Criteria** - All non-legal visits will be:

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[9] A subpoena is not necessary for DF to provide copies of the recorded telephone calls directly to the FBI.

(1) Permitted only after DF confirms the proposed visitor's identity and immediate family member relationship to the inmate.

(2) Closely monitored by DF.

(3) Permitted only with a minimum of 14 calendar days advance written notice to the DF facility where the inmate is housed.

(4) Without any physical contact.

(5) Limited to one visitor at a time.

c. **(Non-Legal) Mail** - Any mail not clearly and properly addressed to/from the inmate's attorney and marked privileged (incoming or outgoing):

i. **No Outgoing (Non-Legal or Non-Immediate-Family Member) Mail** - The Inmate is not permitted to send/transmit (non-legal) outgoing mail--to any person or entity, except his immediate-family members.

ii. **Copied** - All (non-legal) mail shall be copied (including the surface of the envelope) by the head of the DF, or his/her designee, of the facility in which the inmate is housed.

iii. **Forwarded** - All (non-legal) mail shall be forwarded, in copy form, to the location designated by the FBI.

iv. **(Non-Legal) Mail Pre-Screening and Analysis**

(1) The FBI will examine, analyze, and approve for dispersal/forwarding all (non-legal) mail.

(2) After FBI analysis and approval, the inmate's (non-legal) mail will be forwarded by the DF to the inmate's attorney for ultimate dispersal.

(3) The DF will forward the inmate's (non-legal) mail to the inmate's attorney after the review and analysis period not to exceed:

(a) Five (5) business days for any mail where the Federal Government does not have a reasonable suspicion to believe that a code was used.

(b) Ten (10) business days for any mail which includes writing in any language other than English to allow for translation.

(c) Thirty (30) business days for any mail where the Federal Government has reasonable suspicion to believe that a code was used.

v. **Mail Seizure** - If mail is determined to contain overt or covert discussions of or requests for illegal activities, the soliciting or encouraging of dissemination of classified information, or actual or attempted circumvention of SAM, the mail shall not be delivered. The inmate shall be notified in writing of the seizure of any mail.

CONCLUSION

The SAM set forth herein, especially as it relates to attorney/client-privileged communications and family contact, is reasonably necessary to prevent the inmate from revealing classified information. Moreover, these measures are the least restrictive that can be tolerated in light of the potential of this inmate to divulge such classified information.

The SAM with respect to mail privileges is reasonably necessary to prevent the inmate from receiving or sending critically timed messages. While I recognize that eliminating the inmate's mail privileges entirely may be an excessive measure except in the most egregious of circumstances, I believe that delaying mail receipt and permitting the FBI, the DF, and other authorized personnel, to examine a copy of the mail is sufficient at this time to adequately interrupt any communications the inmate may send or receive, and ensures that the mail is not used to divulge classified information. Under this procedure, the inmate can send and receive personal news from immediate-family members.

To the extent that the use of a translator is necessary, the government has the right to make sure that the translator given access to the inmate is worthy of trust.

Any questions that you or your staff may have about this memorandum or the SAM directed herein should be directed to Michael A. Brave, Chief, Intelligence and Investigative Operations Unit, Office of Enforcement Operations, Criminal Division, U.S. Department of Justice. He can be contacted at Post Office Box 7600, Washington, DC, 20044-7600; telephone - (202) 514-3684; facsimile - (202) 514-3120.

Distribution List

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MEMORANDUM OF TELEPHONE CONTACT

Subject: Wen Ho Lee.
Originator: Mr. Larry M. Wortzel, PhD., Director, Asian Studies Center, The Heritage Foundation, Washington, DC.
Received by: Darrell G. Smith, Chief Investigator, Senate Judiciary, Criminal Justice Oversight Subcommittee.
Date/Time: January 21, 2000; 12:30 pm.

Mr. Wortzel stated that: In addition to the information he provided to me on January 13, he has recently obtained supplemental information. He has been in touch with Debbie Young, employee at DIA (202) 231–4350, who advised that the notice which was generated to him, when he was still at the U.S. Embassy in Beijing, has been located and reflects the following information:

Instead of the fall of 1995 or 1996, the conference in Beijing, China was actually held from 10/30/97 through 11/8/97.

The Jianguo Hotel, is correct in regard to the location where the conference was held.

Based on the listing contained in the notice, neither Wen Ho Lee nor Sylvia Lee are reflected as official members of the delegation from Los Alamos. He assumes that since Sylvia Lee stated to him that the Chinese paid for her way, that they also probably paid for Wen Ho Lee as well, since Wen Ho Lee is not listed as one of the members of the delegation.

Teresa Richardson is listed as the American administration person from Los Alamos who was acting as the liaison person for Los Alamos.

This memorandum contains a summary of information provided by Mr. Wortzel on January 21, 2000.

DARRELL G. SMITH,
Chief Investigator,
Criminal Justice Oversight Subcommittee.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Albuquerque, NM, May 2, 2000.

Hon. NORMAN C. BAY,
U.S. Attorney, District of New Mexico, Albuquerque, NM.

DEAR NORMAN, Confirming our telephone conversation on April 26th, please be advised regarding my concerns in the event that the special administrative measures (SAM) as authorized by United States Attorney General Janet C. Reno were to be relaxed so as to allow Dr. Wen Ho Lee to potentially make an unauthorized disclosure of classified United States information.

I am deeply concerned that in the event the special administrative measures were loosened, our ability to detect an unauthorized disclosure of classified information would be seriously jeopardized. Additionally, I am of the firm conviction that any loosening of the SAM would enable Dr. Lee to communicate with an agent of a foreign power regarding the disposition or usage of the materials contained in the seven missing tapes.

You may recall that Special Agent Robert A. Messemer testified in two detention hearings that there was no reasonable assurances to the community arising from any combination of court imposed restrictions which could reasonably guarantee our national security. The Tenth Circuit Court of Appeals upheld the district court's detention order.

As you well know, Dr. Lee has not afforded us with an opportunity to re-interview him regarding the whereabouts of the tapes or to furnish us with sufficient details regarding the timing and means of the purported destruction of the seven missing tapes containing Secret and Confidential Restricted Data relating to the research and design of nuclear weapons.

Accordingly, we are not satisfied that the tapes, in fact, have been destroyed.

Notwithstanding the fifty-nine count indictment for which Dr. Lee is currently charged, our investigation is continuing. Our ability to effectively undertake our current investigation would be adversely affected in the event Dr. Lee were to be released from the provisions of the SAM.

As a father and husband myself, I am naturally sensitive to the concerns of the Lee family and their desire to communicate with one another for mutual support and succor. It is precisely my personal concern and compassion for Dr. Lee that we in the FBI have fully supported the idea, as first expressed by Dr. Lee's counsel,

to modify the SAM to afford Dr. Lee with his weekly family visits on Saturdays in lieu of Fridays.

Therefore, in view of the above and in consideration of the overriding national security implications in the event the SAM were to be relaxed from its current implementation, I highly recommend without reservation that the Attorney General authorize a 120 day extension of the SAM upon the expiration of the original measures.

Sincerely,

DAVID V. KITCHEN,
Special Agent in Charge.

SANTA FE COUNTY
SHERIFF'S DEPARTMENT,
Albuquerque, NM, March 10, 2000.

MEMORANDUM

To: Samuel Montoya, County Manager.
From: Raymond L. Sisneros, Sheriff.
Subject: County Inmate Wen Ho Lee.

This is to inform you that earlier this week I received some phone calls from unknown persons concerned that Mr. Lee was being mistreated and not properly cared for in the jail.

Today at 9:30 a.m., I personally met with Mr. Lee for about 20 minutes in his jail cell. I explained my role as Jail Monitor and the calls I received. Other than being incarcerated he had no complaints. The staff was treating him very well and singled out Warden Barreras and Deputy Warden Romero as treating him great. He told me he has seen a doctor when requested, and has not been sick or ill at any time during his incarceration. His only request was for additional fruit at the evening meal which I relayed to Warden Barreras. I gave him my business card and told him to contact me through his attorney if there was any mistreatment or other issues regarding his incarceration.

At no time did we discuss his case or any fact relating to it. I emphasized my role as the Jail Monitor.

Because of the high profile nature of this case, I felt it was necessary to either confirm or disapprove the allegations. Mr. Lee was very surprised about the calls and stated, "I haven't complained to anyone about the jail because I am being treated very well."

Please brief the Commissioners in case they are confronted by any concerned parties that may try to make demands.

THE DEPARTMENT OF ENERGY,
Washington, DC, May 4, 2000.

Hon. JANET RENO,
Attorney General of the U.S., Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL RENO: At the request of the Department of Justice, I enclose a recertification under 28 C.F.R. 501.2 that the unauthorized disclosure of classified information described in the indictment in the above referenced case would pose a threat to national security. I understand that this certification will assist you in continuing special administrative measures during the period of Dr. Lee's pretrial confinement designed to protect the extremely sensitive weapons information that the indictment alleges Dr. Lee diverted to his own possession. I fully support doing all that is necessary to protect against further compromise of this information.

At the same time, I want to emphasize my concern that, to the extent consistent with protection the sensitive weapons information to which the indictment of Dr. Lee pertains, Dr. Lee's civil rights as a pre-trial detainee should be honored. I understand that, in response to a request by Dr. Lee's counsel, the Department of Justice has arranged for a translator to be present when he speaks with his family so that he can speak Chinese. I further understand that arrangements have been made to permit him to visit with his family on weekends, to have access to Los Alamos National Laboratory with his lawyers under appropriate safeguards so that he can prepare his defense, and to have access to a radio and reading material of his choice, as well as a reasonable period of exercise every day. Finally, I understand that the conditions of his confinement are in no respect more restrictive than those of others in the segregation unit of the detention facility, where he is confined spe-

cifically to protect against further compromise of classified information. Based on this information, I am satisfied that his civil rights are being adequately protected.

Yours sincerely,

BILL RICHARDSON.

U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY, DISTRICT OF NEW MEXICO,

Albuquerque, NM, July 17, 2000.

Re: *United States* v. *Wen Ho Lee*, Crim. No. 99–1417 JP.

LAWRENCE BARRERAS,
Senior Warden, Santa Fe County Detention Center, Santa Fe, NM.

DEAR WARDEN BARRERAS: I write to confirm our conversation of this morning and to thank you for your favorable response to our request to arrange for the following three modifications of the conditions of confinement for the defendant Wen Ho Lee ("Lee"). First, we request that Lee be permitted to enjoy his daily recreation without any wrist, leg or belly restraints. Second, we request that he be afforded recreation on Saturdays and Sundays as well as his current weekday recreation hours. Finally, we request that he be allowed extra fruit.

REMOVAL OF RESTRAINTS DURING RECREATION PERIODS

As I understand it, Lee is housed in administrative segregation at the Santa Fe County Correctional Facility. As is the case of all others housed in administrative segregation, Lee enjoys at least one hour per day of recreation. During such recreation periods, as is the case for all other administrative segregation inmates, Lee's hands were handcuffed to a belly chain. Given that, unlike most or all of the other inmates housed in administrative segregation, Lee was not placed in such segregation because he violated any of the detention facility's rules, or posed a risk of violence toward any staff or fellow inmate at the facility, our request was that he not be in a belly chain or otherwise handcuffed during his recreation periods.

As I understand it, the reason Lee has been handcuffed during his recreation period is because the rules of the detention facility required it as opposed to the explicit conditions of the Attorney General's SAM order. However, because the SAM order provides that the more restrictive conditions of the SAM order or the detention facility's rules apply and because the SAM order does not require restraints during recreation, you are free to remove the restraints during recreation. I have been advised that the Marshal's Service has no opposition to your accommodation of our request in this regard. I greatly appreciate your willingness to modify your facility's general rule in the case of this one inmate's housing conditions, and I appreciate your recognition of the unique circumstances of this situation.

WEEKEND RECREATION PERIODS

While, due to lack of correctional officer personnel, no inmate housed in administrative segregation is afforded recreation on weekends, I appreciate your willingness to arrange for such recreation for Lee on weekends. During our conversation today, you indicated that you would arrange for such weekend recreation provided that any additional costs would be considered by the Marshal's Service. I would appreciate your addressing this directly with the Marshal's Service in the hopes that you can resolve this issue as per our request.

ADDITIONAL FRUIT

While I was unaware of this issue, I thank you for advising me of it and your willingness to allow Lee more fruit.

Please call me at (505) 224–1516 should you require any additional information. I had been under the mistaken impression that these modifications had already been made so I would be grateful if you would notify me as soon as they are implemented. Thank you again for your assistance in this matter.

Very truly yours,

GEORGE A. STAMBOULIDIS
(For Norman C. Bay, U.S. Attorney).

CORNELL CORRECTIONS,
Santa Fe, NM, July 18, 2000.

Mr. GEORGE A. STAMBOULIDIS,
Assistant U.S. Attorney, U.S. Department of Justice, Albuquerque, NM.

DEAR MR. STAMBOULIDIS: As per our conversation and in reply to your letter dated July 17th, 2000 I will arrange to have restraints removed from inmate Wen Ho Lee during his scheduled recreation times, and we will continue to give inmate Wen Ho Lee additional fruit.

I did not agree to provide inmate Wen Ho Lee weekend recreation as it will involve additional staff costs. I indicated that I am willing to accommodate the request if per diem is arranged through the USM office for that service. This matter will have to be coordinated through your office.

If you have further questions please contact me at 471–4941 ext., 214.

Sincerely,

LAWRENCE BARRERAS,
Senior Warden.

LAW OFFICES OF FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE, P.A.,
Albuquerque, NM, July 26, 2000.

Re: *United States* v. *Wen Ho Lee,* Crim. No. 99–1417 JP (D.N.M.)

GEORGE A. STAMBOULIDIS,
Assistant U.S. Attorney, Office of the U.S. Attorney, Albuquerque, NM.

DEAR GEORGE: On July 12, you stated in open court that, through the efforts of your office, Dr. Lee would be permitted to exercise without restraints. I have no doubt that you made this statement in good faith and believed that it was true. Unfortunately, in the two weeks since you made your statement, Dr. Lee has not been permitted to exercise without restraints, and has, in fact, received almost no exercise at all. I do not know whether this is a deliberate effort on the part of someone in the government to make Dr. Lee's conditions more onerous or, more likely, simple bureaucratic indifference. Whatever the case, I ask that you please do everything in your power to make your statement to the Court become a reality.

Very truly yours,

JOHN D. CLINE.

CORNELL CORRECTIONS,
Santa Fe, NM, August 1, 2000.

Mr. GEORGE A. STAMBOULIDIS,
Assistant U.S. Attorney, Department of Justice, Albuquerque, NM.

DEAR MR. STAMBOULIDIS: In response to your letter dated July 30th, 2000 inmate Wen Ho Lee began recreating without restraints on July 18th, 2000 at 8:30 a.m. As of August 5th, 2000 he is also allowed participation in the recreation yard 7-days a week for a period of 1-hour per day.

In reply to inmate Wen Ho Lee's housing conditions: inmate Wen Ho Lee is permitted to have a radio in his cell, this gives him the ability to listen to news programs; he receives reading materials per the SAM guidelines.

In addition, an exception to the rule was made to grant inmate Wen Ho Lee visits on Saturdays opposed to the regular Friday visiting schedule; this was done in order to accommodate his family. Supervisors are the only staff that are assigned to oversee his escort and visit. Inmate Wen Ho Lee also receives extra fruit at dinnertime, daily.

If you have further questions or require additional information please contact me at 471–4941 ext. 214.

Sincerely,

LAWRENCE BARRERAS,
Senior Warden.

U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEY, DISTRICT OF NEW MEXICO,
Albuquerque, NM, September 7, 2000.

Hon. JANET RENO,
Attorney General of the United States,
Washington, DC.

DEAR ATTORNEY GENERAL RENO: The United States Attorney's Office for the District of New Mexico requests that you, pursuant to your inherent authority as the Attorney General of the United States, direct the United States Marshal Service to extend again the special administrative measures that have been taken in effect since January 13, 2000 with respect to the pretrial detention of Wen Ho Lee. You renewed the special administrative measures once before on May 12, 2000. The requested special administrative measures continue to be necessary to prevent the disclosure of highly sensitive classified information.

As you know, Wen Ho Lee ("Lee") was directed on December 10, 1999 on charges of illegally transferring nineteen TAR files containing Secret and Confidential Restricted Data relating to the research and design of nuclear weapons in the U.S. arsenal. The indictment also charged Lee with downloading most of this information onto ten portable computer tapes, seven of which still are missing.

Lee has been in custody since the day the indictment was returned. Both a United States Magistrate Judge and then a United States District Judge found that Lee posed such a risk of danger to the nation that there was no condition or combination of conditions under which Lee could be released pending trial. The risk Lee posed, and continues to pose, is that he may reveal to an unauthorized possessor either the whereabouts of the missing tapes or how to use the information on those tapes.

On February 29, 2000, the Tenth Circuit Court of Appeals upheld the district court's detention order, observing that

> [t]he "potentially catastrophic" risk to the safety of the community, indeed the nation, presented by Lee's ability to communicate information about the location of the missing tapes or their contents if he is released pending trial . . . is unprecedented. . . . We can conceive of few greater threats to the safety of the community than the risks presented in this case.

On August 24, 2000, after three days of hearings on Lee's Renewed Motion for Pretrial Release, Judge Parker granted Lee's motion. Judge Parker reasoned that "[i]t is no longer indisputable, as the government made it appear in December 1999, that the missing tapes contain crown jewel information about the nation's nuclear weapons program." Nonetheless, Judge Parker ordered that Lee be released subject to extremely strict conditions designed to prevent Lee from communicating with any third party, indicating that any such communications still pose a danger to national security. Lee was scheduled to be released at noon September 1, 2000.

On September 1, 2000, the government obtained authorization from the Solicitor General to appeal Judge Parker's release order and to request a stay of that order. The government filed its Notice of Appeal and Request for Stay approximately half an hour before Lee was scheduled to be released. During the hearing on the government's Request for Stay, the Tenth Circuit issued a stay until further order of that Court. The government filed an emergency request for stay in the Tenth Circuit later on September 1, 2000, which currently is pending.

Nothing has changed since the special administrative measures were first imposed to reduce the risk of Lee disclosing highly sensitive classified information to an unauthorized possessor. Consequently, we request that the special administrative measures imposed on January 13, 2000 and renewed on May 12, 2000 be extended for another 120 days upon the expiration of the original measures.

Sincerely,

NORMAN C. BAY,
U.S. Attorney.

UNCLASSIFIED STATEMENT OF DCI GEORGE J. TENET AS REQUESTED BY THE SSCI

The Central Intelligence Agency did not play a decision-making role in the question of whether or not Wen Ho Lee should be prosecuted for mishandling sensitive nuclear weapons information. The Agency was asked to look at the potential value to unauthorized recipients of the information FBI said was included on the tapes Wen Ho Lee was alleged to have made, some of which were missing. The Agency did not make any recommendations about how the investigation should proceed or whether or not Wen Ho Lee should be prosecuted.

At a December 4, 1999 meeting at the White House Situation Room, we were asked to summarize the potential value of the information FBI said was included on the tapes. Based on FBI's verbal summary of the tapes, they appeared to contain US nuclear weapon design codes and specific descriptions of the materials and geometry of several nuclear weapon primaries and secondaries. We briefed the attendees that this information would help primarily from a design perspective, providing significant insight and guidance almost equating to a graduate course in nuclear weapons design. But for a country to design, develop, test, and deploy a nuclear weapon, more is required than design codes; for example, a country must possess the requisite fissile material, the fabrication technology to build the device, and the engineering expertise to weaponize the device for delivery. The actual value of the information depends in large part on the capabilities of the country or group that received it. Our analysis included countries with robust nuclear weapons programs; with nuclear weapons programs but little or no testing; with limited or no programs but with high technological capabilities; and without technological capabilities.

Our participation in the meeting was limited to providing a brief summary of the potential value of the information if obtained by others.

DEPARTMENT OF ENERGY,
Washington, DC, April 3, 2001.

MEMORANDUM FOR THE SECRETARY

From: Gregory H. Friedman, Inspector General.
Subject: Special Review of Profiling Concerns at the Department of Energy (I01HQ003).

In November 2000, the former Secretary of Energy requested that the Office of Inspector General review the extent to which "profiling" of Federal and contractor employees has occurred in the Department of Energy (Department) security process. Specifically, we were asked to review whether, based on employees' national origin, the Department unfairly treated employees during the security clearance renewal process, and in actions taken as a result of security violations. In short, information reviewed by the Office of Inspector General did not support concerns regarding unfair treatment based on national origin in the security processes reviewed.

Scope and methodology

Our review focused on Headquarters, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, Los Alamos National Laboratory, Oak Ridge National Laboratory, and Sandia National Laboratories. We worked with representatives from a number of Department organizations to identify instances in which individuals alleged that unfair treatment occurred based on national origin in the security clearance renewal process and in actions taken as a result of security violations. These included: The Office of the National Ombudsman; Office of Economic Impact and Diversity; Office of Hearings and Appeals; Office of Security Affairs; and the Operations Offices in Albuquerque, Oakland, and Oak Ridge. We also worked with security personnel to review security-related data.

To put the scope of our review in context, at any given time, there are a number of Department personnel, both Federal and contractor, pursuing grievances and other concerns with respect to alleged discrimination, bias, or disparate treatment based on race, age, gender, religion, and other factors in the employment arena. An examination of these matters was not part of our review. Consequently, we are not in a position to comment on the general climate in the Department with respect to these concerns.

Concerns regarding "profiling" in the Department of Energy were heightened in the aftermath of the espionage investigation and arrest of a former nuclear weapons scientist at the Los Alamos National Laboratory. We did not address whether the former Los Alamos scientist was himself a victim of unfair treatment. This matter has been part of a review by the Department of Justice and, thus, it was not included in the scope of our review.

Findings

Our review identified four cases involving possible unfair treatment. None of the cases was the subject of a formal complaint of discrimination. Nevertheless, we examined the general circumstances of these cases, and found that they did not support concerns regarding unfair treatment based on national origin in the security processes reviewed.

Our review disclosed that the Department's security does not systematically record, track or maintain information concerning individuals' national original in a centralized database. The "Questionnaire for National Security Positions," which must be completed by each employee for a Department of Energy security clearance, does request information concerning an individual's country of birth and citizenship. Similar information is also requested for certain members of the individual's family. We were informed that the questions are included in order to determine whether the individual's or relatives' potential affiliations with other countries warrant further customary and appropriate review and analysis. Security officials asserted that to systematically record national origin and similar information, other than as described above, could be perceived as engaging in the very "profiling" sought to be avoided.

In January 2000, the Office of the National Ombudsman was established as a component of the Office of Economic Impact and Diversity to provide an opportunity for employees to confer with a neutral designee to discuss concerns, recommendations, and complaints they perceived were interfering with work, productivity, or morale. The National Ombudsman summarized for the Office of Inspector General the concerns expressed to him about the security process. He developed the information through one-on-one encounters, surveys, and "town hall meeting." These concerns included:

Alleged insensitive remarks and offensive attitudes;
The appearance of double standards;
Questionable and ambiguous policies and rules;
Possible abuse of authority;
Potential disparate treatment.

The National Ombudsman stated his belief that there are ". . . strong and continuing allegations about bias and profiling. . . ." However, the Ombudsman declined to identify the individuals who had expressed concerns, citing his commitment to maintaining the confidentiality of those with whom he spoke. Additionally, he indicated that he did not generally maintain records of his encounters, and could not provide statistical data, which may have identified improper patterns of unfair treatment. He stated that he recognizes the need for the Office of the National Ombudsman to have a system in place to capture important information brought to the office. He expects that such a system will be developed.

The National Ombudsman further advised that when themes or trends are identified by his office with respect to discrimination and disparate treatment, a memorandum may be sent to appropriate Department managers. The National Ombudsman advised that no such memoranda had been sent relative to the issues within the scope of the Office of Inspector General review.

Our review was one of a number of initiatives underway serious public and employee concerns about unfair treatment. The Department, for example, initiated several steps designed to combat and eliminate the possibility of discrimination of any kind. This included the formation of the Task Force Against Racial Profiling. The Task Force recommended, in part, that a team be established to promptly address security practices which may involve questions or issues of racial "profiling." The Task Force's Implementation Team Report of January 2001 states that a Security Issues Resolution Team has been established to address such safeguards and security matters. The Office of Economic Impact and Diversity has informed us that the Security Issues Resolution Team had not received or processed any allegations.

Additionally, we were informed that the Office of Economic Impact and Diversity and its subordinate offices will focus on and launch several initiatives during Fiscal Year 2001 and beyond relating to unfair treatment. According to the Office of Economic Impact and Diversity's most recent annual report, the office plans, in part, to "conduct the year 2001 Department-wide electronic survey to measure the workplace climate;" "develop and implement action plans to address racial profiling in the workplace;" and "extend the review and reporting of employee concerns at DOE to include the activities of contractor employees." Furthermore, the Office of the National Ombudsman has identified a goal to analyze "trends and patterns of employment, *security clearances,* and accountability actions [emphasis added]" and participate in the "review of Department-wide policies, processes, and procedures."

General Accounting Office reviews

The U.S. General Accounting Office (GAO) recently initiated a review of personnel actions at Department weapons labs over the past decade to determine if there has been differential treatment in the handling of cases involving minorities. The current review follows a December 1994 GAO report on suspensions of security clearances for minority contractor employees at the Department's Albuquerque, Oak Ridge, and Savannah River Operations Offices.

GAO reported that the number of security clearances suspended for any particular group was relatively small. Nevertheless, GAO found that the clearances of certain racial or ethnic groups at the reviewed offices were suspended more often that would be statistically expected. GAO further reported that the Department did not monitor suspensions of security clearances for "minority groups" and was not aware of the statistical disparities. GAO noted that disparities in the number of clearances, in and of themselves, did not mean that the Department is or is not discriminating against racial or ethic groups.

GAO recommended that the Department (1) investigate the reasons for the disparities identified by GAO in the number of security clearances suspended for contractor employees and take action to correct any problems the investigation identifies, and (2) require that data on the racial and ethnic background of contractor employees whose clearances are suspended at all locations be compiled, monitored, and reviewed to identify any statistical disparities, and investigate and take appropriate corrective action if such disparities occur.

We learned that the Department disputed the methodology used by GAO in its statistical analysis and took the position that regulations prohibit requiring employees to provide information on race, ethnicity, or gender for use in granting or suspending clearances. Nevertheless, in response to the GAO report, the Department indicated that the Office of Safeguards and Security would provide listings of individuals whose clearances are revoked through Fiscal Year 1996 to the Office of Economic Impact and Diversity, which would attempt to collect information on employees' race and ethnicity on a voluntary basis. Documentation made available to the Office of Inspector General indicates that a list was generated by the Office of Safeguards and Security for Fiscal Year 1995. We could not confirm, however, that the Office of Economic Impact and Diversity took follow-up action on the Fiscal Year 1995 list or that a list was generated or analyzed for Fiscal Year 1996.

Conclusion

Information reviewed by the Office of Inspector General did not support concerns regarding unfair treatment based on national origin in the security processes examined. Despite our efforts to obtain all relevant information, there is no assurance that the four cases cited above were the only instances at the Department of Energy in which a Federal or contractor employee believes he or she has been the victim of "profiling." Indeed, the National Ombudsman observed, based on his own interviews, that allegations of "profiling" emerged frequently and among many groups. However, factors beyond our control, such as the Ombudsman's understandable commitment to affording confidentiality to those with whom he spoke, may have resulted in an underreporting to the Office of Inspector General of the total number of employees who believe they have been the victims of "profiling" in areas that were a part of our review.

Recommendations

Based on our assessment, we recommend that the Department, including the National Nuclear Security Administration:

(i) Examine its actions in response to the 1994 GAO report to ensure that all appropriate steps have been taken to implement the recommendations;

(ii) Determine if there are, in fact, statutory restrictions or other rules limiting the collection of data on national origin, race or ethnicity for Federal and contractor employees in relation to security processes;

(iii) Determine whether to implement a process for identifying statistical disparities in security processes; and

(iv) Facilitate innovative initiatives by the Office of Economic Impact and Diversity, including the Office of the National Ombudsman and the Security Issues Resolution Team, to identify, address, and resolve cases or concerns about "profiling."

Over and above the fundamental question of fairness to all individuals, disparate treatment—both real and perceived—can have a detrimental effect on morale within the Department's workforce. Consequently, management at both the federal and contractor levels must ensure that the Department's zero tolerance policy for such treatment is executed in a way that promotes confidence in the basic fairness of the security process.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, October 8, 1999.

Hon. JANET RENO,
Attorney General of the United States, Department of Justice, Washington, DC.

DEAR MADAM ATTORNEY GENERAL: I am in receipt of your classified response to me dated October 1, 1999 (though apparently delivered to our Senate Security afterward), and shall address with you in due course the principal issue that is the subject of that correspondence—the reasons for the inquiry recently begun by you and Director Freeh into the efficacy of earlier investigations into the compromise by China of our government's sensitive W–88 nuclear technology.

In the meantime, however, I must ask for your prompt attention to a matter of grave concern that was raised only peripherally in your recent letter, and that had been broached by you in only the most vague terms in he course of our September 24, 1999 meeting. I refer to your letter's acknowledgment that, at the time of your June 8 appearance before this Committee, the Department of Justice had not "pulled together" all the documents pertaining to the Department's investigation into possible espionage by Mr. Wen Ho Lee, and to your concession in our recent meeting that some of your testimony at the June 8 hearing was therefore inaccurate. I was surprised to learn of the nature and contents of some of these documents, as they bear directly on the Committee's consideration of the facts surrounding the investigation of Mr. Lee.

I am deeply concerned that the Department's apparent failure to provide you with key documents prior to the time of your testimony before the Senate Judiciary Committee may reveal serious neglect by Department officials.

Indeed, there appears to be an alarming frequency with which the Department staff fails to share with you (and, in turn, the Congress) pertinent information concerning the most important investigations being undertaken by federal law enforcement authorities. Most recently, in the course of the report by the Department's own Inspector General that contends the Department's campaign finance investigation was conducted ineptly [Inspector General's Report, Unclassified Executive Summary, "The Handling of FBI Intelligence . . .," July 1999, at 4–5], it is concluded that you were not properly apprised by Department staff of the existence of key pieces of information. Further, as has been made clear by your recent statements, you were not apprised of key documents within the possession of the Department and the Bureau that pertained to the use of incendiary devices in the final hours of the confrontation at Waco.

I am also concerned that this most recent example of a belated discovery of documents means that this Committee, too, has been thwarted in its efforts to obtain all relevant documents concerning the role played by the Department and the Federal Bureau of Investigation in investigating this matter. As you know, I repeatedly asked you and other Department officials whether the Judiciary Committee had received all documents pertaining to its investigation of Mr. Lee. [See, e.g., May 5, 1999 hearing, placing AG on notice of the Judiciary Committee's intent to inquire into the Department and Bureau's investigatory actions concerning Mr. Lee; June 4, 1999 letter to AG, constituting a "formal request for all documents generated within the Department of Justice that related in any way to an application under [FISA] concerning Mr. Wen Ho Lee"; June 14, 1999 letter to AG requesting "a log of all documents, by date and description—whether extant or not, and including all notes, letters and communications (including any electronic mail)—that were generated by any employee or agent of the Department . . . that pertain in any manner to the consideration of a FISA application concerning Mr. Wen Ho Lee"; July 22, 1999 letter (with Sen. Specter) to AG "request[ing] . . . all documents in the Department's possession relating to . . . the Department's decision not to prosecute Mr. Wen Ho Lee").].

Accordingly, and regrettably given this late date, I would ask that you prepare for me promptly a list, by date and description, of those documents that were not timely provided to this Committee, together with an explanation as to why such documents were not submitted to this Committee in accord with the Committee's more-than-four-month-old document requests. Moreover, I ask that you provide me with your view as to which of these documents—or which parts of these documents—would be properly declassified so as to be shared with the public.

Please submit your response to me by October 13, 1999, or the Committee will need to consider pursuing other options to exercise its oversight functions.

Sincerely,

ORRIN G. HATCH,
Chairman.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, November 10, 1999.

Hon. FRED THOMPSON,
Chairman, Senate Governmental Affairs Committee,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In my testimony before your Committee on June 9, 1999, I provided, on several occasions, my assessment of the Department of Energy (DOE) Administrative Inquiry (AI) that, in part, formed the bases upon which the FBI predicated its investigation of Wen Ho Lee. I understand that I stated at different times that:

(1) I "had full credibility in the report";
(2) I had "found nothing in DOE's AI, nor the conclusions drawn from it," to be erroneous; and
(3) I stated there is a "compelling case made in the AI" to warrant focusing on Los Alamos.

At the time of my testimony, these statements were based on my personal review and understanding of the facts and the FBI evaluation of the AI. I believed then that these statements were accurate given that understanding.

I have, subsequent to that testimony, asked for and become aware of additional facts that I want to bring to your attention, in order to be certain that the record before your Committee is complete and accurate.

(1) In November, 1998, and December, 1998, and again in January, 1999, there were some written analyses by FBI Albuquerque (FBI AQ) which question the accuracy of certain representations and conclusions in the AI. Although these documents were sent to FBI Headquarters (FBIHQ), I was unaware of their existence before I testified in June.

Further, I have recently learned that the January, 1999, document was included in a briefing book provided to me, other Bureau Executives and Senior Department of Justice officials in May, 1999. It was included in a section about polygraph issues because that was the primary focus of the document. It transmitted the results of the DOE polygraph administered to Wen Ho Lee. I did not review that section of the briefing book to include the January, 1999, document at that time, inasmuch as I was familiar with the polygraph issue and I knew Wen Ho Lee had failed an FBI polygraph shortly after this document would have arrived at FBI Headquarters.

(2) In July, 1999 I engaged in a dialogue with SAC AQ regarding this AI. We agreed that a draft document would be provided to me regarding FBI AQ's analysis of this AI. Upon receipt of this draft on or about July 9, 1999, and a subsequent conversation with the SAC, I then learned there was a document submitted to FBIHQ in January, 1999. I have since become aware of the two (2) previous documents (November, 1998 and December, 1998), which contain statements questioning the scope of the AI. I understand all of these documents have been provided to your Committee.

As a result of my dialogue with SAC AQ, we agreed that AQ would conduct a number of interviews in an attempt to further understand and expand upon the technical portions of the AI. On August 20, 1999, FBIHQ located and interviewed one of the scientists who participated in the technical portion of the AI. This scientist stated that he had expressed a dissenting opinion with respect to the technical aspects of the AI. His statement 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."

Based upon a verbal briefing by FBI AQ of this August 20, 1999, interview, I requested that AQ submit to me a document establishing, for the record, FBI AQ's concerns with this AI. Upon receipt of this document, I shared it with the Director and it has since been shared with the Attorney General and the Secretary of Energy. Based upon this document and other factors, a review has been initiated by the FBI to re-evaluate the scope of the AI. I understand that you or your staff have received a briefing on the scope and direction of this new initiative and that it should not impact on any subsequent criminal investigation of Wen Ho Lee. 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.

On June 9, 1999, when I testified before you, I expressed opinions and provided complete and accurate facts as I understood them. The information I provided to you was in complete candor. Given the above information, if asked to describe the AI today, I would have a different response. While the FBI review is not complete, it

appears that the technical and dissemination aspects of the AI, at a minimum, deserve to be questioned and that is what the FBI is now doing. As soon as we resolve this issue, we will provide you with those details.

I would be pleased to discuss this with you or your staff in any format you choose. By this letter, I am only intending to amplify and clarify my prior testimony relating to the AI. I am not intending to imply anything about the underlying case involving Wen Ho Lee, the FISA issue or any other issues that have been explored before your Committee. As you know, those issues depend on varying degrees of information that exists independent of the AI, e.g., information developed pre-1996 or as a result of the criminal aspects of the current investigation.

Again, thank you for this opportunity. I am available at your convenience.

Respectfully,

NEIL J. GALLAGHER,
Assistant Director,
National Security Division.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, October 25, 1999.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate Washington, DC.

DEAR MR. CHAIRMAN: This is to provide a written response to your letter of October 8, 1999 to the Attorney General concerning matters related to the documents Attorney General Reno and FBI Director Freeh provided you on October 1st. As you may know, we have already had several discussions with Committee staff regarding some of the issues you raise. In addition, we discussed several of the documents and related issues during a meeting earlier today with Senator Specter and staff for the majority and minority of both the full Committee and the Subcommittee.

Turning to your letter, the Department of Justice and Bureau made diligent efforts to respond to the Committee's document requests dated June 4 and June 14, 1999 specifically related to the Wen Ho Lee FISA application. Your October 8th letter suggests that the Department's August 2 response to your July 22, 1999 document request was incomplete. We look forward to meeting with your staff to clarify this matter.

We have also located or obtained some additional documents after writing you on October 1st. These documents include a classified review prepared by Special Agent-in-Charge Stephen W. Dillard (Dillard Review) that we received on October 14, 1999 and three slightly different copies of a February 22, 1999 FBI memorandum that transmitted several documents to the Department's Internal Security Section, including a document dated January 22, 1999 that is mentioned in the discussion below.[1] We provided copies of the transmittal memorandum to Senator Specter and the staff during our meeting on October 22, 1999.

After we received the Dillard Review, we promptly asked the appropriate agencies to review it for release to Congress. We will provide the Dillard Review to the Committee as soon as those agencies complete their review. We will be pleased to discuss any of these documents in meetings with your staff. Please be advised that the Dillard Review when produced will contain redactions for national security and because it contains restricted access data, it will require a high security clearance for review.

Neither the Attorney General nor Fran Fragos Townsend were aware of the October 1st documents or those enclosed today when they testified before the Committee on June 8, 1999. When the Attorney General became aware of the October 1st documents, she promptly directed that they be provided to the Committee because they are related to issues that arose during the June 8th testimony and in staff briefings. Pursuant to the request in your letter, set forth below is a chronological explanation of the Department's acquisition of the October 1st documents.

On September 8, 1999 Director Freeh provided the September 3, 1999 Albuquerque memo (Tab V in the previously provided October 1 documents) to the Department and asked to meet with the Attorney General to discuss the contents of the memorandum. That briefing took place on September 14, 1999. Also on September 8th, the Department learned that the September 3rd memorandum from Albuquerque had been the subject of discussion and refinement between Albuquerque

[1] As reflected in the October 1st document index provided to the Committee, the FBI shared a draft of the Dillard Review with the Attorney General on September 23, 1999.

and the National Security Division (NSD) at FBI Headquarters. At the September 14th briefing, the Attorney General was told of the August and October, 1995 Albuquerque documents (Tabs C and D) and the September 1999 interview of Special Agent Van Magers (Tab V). It is our understanding that Director Freeh had first learned of the existence of the August and October 1995 documents earlier that day.

On September 15, 1999 the Attorney General asked to review the drafts of the September 3, 1999 Albuquerque memo. On September 16, the Attorney General was provided with drafts dated July 9, 1999 and August 26, 1999 (Tabs S and T) along with transmittal memoranda (Tab W). Separately, on September 16, 1999 the FBI provided the Attorney General a copy of the Senate Governmental Affairs Committee staff questions (Tab II). The issues raised by the Senate Governmental Affairs Committee staff and other considerations caused Deputy Director Bryant to direct SAC Dillard to review the 1995–1996 period of the Kindred Spirit investigation.

On September 16, after reviewing the drafts of the September 3rd memo, the Attorney General requested copies of the documents referred to therein (i.e., documents dated 11/98, 12/98, 1/99 and 1/22/99) from the FBI. On September 17, 1999, pursuant to a separate request from the Attorney General, Assistant United States Attorney Randy Bellows provided copies of an FBI memorandum from Albuquerque dated November 19, 1998 (Tab P), the January 22, 1999 Albuquerque memorandum (Tab Q), and a March 4, 1996 FBI routing slip and attached materials (Tab CC)[2] On September 17, 1999, the FBI also provided the Attorney General a copy of the January 22, 1999 Albuquerque memorandum (Tab Q) and a draft investigative plan for the reopening of the investigation (Tab X). As discussed above, the FBI provided the January 22 memorandum to the Internal Security Section on February 22, 1999.

On September 20, 1999 the Attorney General requested a copy of the November 10, 1998 memorandum in the November 19, 1998 document. The FBI provided the November 10, 1998 document on September 21 (Tab O). On September 24, 1999 pursuant to the Attorney General's request, we received documents from Mr. Bellows (Tabs A, B, E, F, G, H, I, K, L, N, R). These documents, which we produced on October 1, 1999, related to the DOE Administrative Inquiry.

On September 22, 1999, the Attorney General asked that the FBI prepare a chronology of its decision to reopen the investigation into the compromise of nuclear technology. On September 24, 1999, the FBI's National Security Division provided a draft chronology (Tab Y). On September 28, 1999 the FBI provided the Attorney General: two interview reports, one dated September 16 and the other September 21, 1999; and an FBI briefing paper dated July 20, 1995. (Tabs AA, DD, HH). After the FBI provided these documents, the Office of Intelligence Policy and Review (OIPR) double checked for related materials. OIPR located the one page review form and an entry in an electronic log (Tab J and M). On September 29, 1999, again pursuant to the Attorney General's request, Mr. Bellows provided an FBI memorandum dated January 29, 1999 regarding the status of the Wen Ho Lee investigation (Tab GG). Finally, on September 30, 1999, pursuant to the Attorney General's request, the FBI provided us two interview reports both dated July 20, 1999. (Tab EE and FF).

The DOE Administrative Inquiry report dated May 28, 1996 was also provided on October 1st. (Tab Z). Although the Department of Justice obtained the Administrative Inquiry on May 24, 1999 and the Attorney General referred to it during June 8th testimony, the Administrative Inquiry is a Department of Energy report and we could not release it to the Committee without DOE's consent. Because the Department understood that the Committee wanted to review the Administrative Inquiry, we contacted DOE and obtained its consent to provide the Administrative Inquiry to the Committee on October 1st and did so on that date.

We will be glad to have senior Justice Department and FBI personnel to further brief the Committee and Subcommittee's majority and minority staffs at their convenience on matters pertaining to the Department's acquisition of these documents. In addition, we will continue to search for other documents related to the Attorney General's testimony and are continuing our efforts to obtain additional information regarding the time and manner in which various entities within the Department came to acquire copies of the documents. On a related matter, it is premature to

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[2] Pursuant to the Attorney General's direction and with the concurrence of Director Freeh, Mr. Bellows is conducting a complete review of the Department of Justice and FBI's handling of the Los Alamos National Laboratories and Wen Ho Lee investigation (Tab BB). He began his review in May, 1999 and issued a document production request to the FBI on June 7, 1999. Mr. Bellows had not acquired any of the documents attached to our letter of October 1 prior to the Attorney General's testimony. Mr. Bellows had advised the Attorney General that the report of his review will be completed by January of 2000.

consider declassifying the October 1st documents because they directly pertain to ongoing investigative efforts.

Please do not hesitate to contact me if I may provide you with additional information.

Sincerely,

JON P. JENNINGS,
Principal Deputy Assistant Attorney General.

Department of Energy
Washington, DC 20585

JAN 31 2000

Honorable Arlen Specter
Chairman
Subcommittee on Alleged Chinese Espionage
Senate Committee on the Judiciary
Washington, D.C.

Dear Chairman Specter:

I have reviewed the draft Interim Report of the Judiciary Oversight Subcommittee on Alleged Chinese Espionage that recently was provided to the Office of Counterintelligence. I thank you for the opportunity to provide comments on this draft.

Certain portions of the report may contain classified information; therefore, the Department of Energy (DOE) requests that public dissemination of this document await the results of a Departmental classification review, which is already underway. The results of the classification review will be provided to the Subcommittee under separate cover.

I strongly disagree with a number of the report's assertions regarding my involvement with the Kindred Spirit investigation during the September 1998-February 1999 time period. I am particularly disturbed by the report's conclusion that my decision to interview Mr. Lee was based on the upcoming publication of a congressional report as opposed to sound counterintelligence investigative practice.

I am also concerned about what I believe are inaccuracies regarding the sequence of events surrounding the DOE polygraph of Mr. Lee in December 1998. I would like the opportunity to explain my role in the investigation, and believe that until now I have not been afforded sufficient opportunity to address the serious congressional concerns regarding DOE's actions. I was first made aware of these concerns on December 14, 1999, when you met with the Federal Bureau of Investigation (FBI), Department of Justice, and DOE representatives to discuss the Subcommittee's Chinese espionage inquiry.

Attached for clarification is a written statement on the sequence of events surrounding the interview of the espionage subject, the DOE polygraph, and the interaction between DOE and the FBI throughout the September 1998-February 1999 time period. Also attached is a copy of a letter dated January 4, 2000 from FBI Assistant Director, Neil J. Gallagher that attempts to clarify some

misperceptions about what actually took place. I hope that these documents will assist the Subcommittee in assessing the management of the Kindred Spirit investigation.

Sincerely,

Edward J. Curran, Director
Office of Counterintelligence

cc: Hon. Orin G. Hatch
Hon. Patrick J. Leahy

Attachments: (2)

DEPARTMENT OF ENERGY,
Washington, DC, January 31, 2000.

Hon. ARLEN SPECTER,
Chairman, Subcommittee on Alleged Chinese Espionage,
Senate Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN SPECTER: I have reviewed the draft Interim Report of the Judiciary Oversight Subcommittee on Alleged Chinese Espionage that recently was provided to the Office of Counterintelligence. I thank you for the opportunity to provide comments on this draft.

I strongly disagree with a number of the report's assertions regarding my involvement with the Kindred Spirit investigation during the September 1998-February 1999 time period. I am particularly disturbed by the report's conclusion that my decision to interview Mr. Lee was based on the upcoming publication of a congressional report as opposed to sound counterintelligence investigative practice.

I am also concerned about what I believe are inaccuracies regarding the sequence of events surrounding the DOE polygraph of Mr. Lee in December 1998. I would like the opportunity to explain my role in the investigation, and believe that until now I have not been afforded sufficient opportunity to address the serious congressional concerns regarding DOE's actions. I was first made aware of these concerns on December 14, 1999, when you met with the Federal Bureau of Investigation (FBI), Department of Justice, and DOE representatives to discuss the Subcommittee's Chinese espionage inquiry.

Attached for clarification is a written statement on the sequence of events surrounding the interview of the espionage subject, the DOE polygraph, and the interaction between DOE and the FBI throughout the September 1998-February 1999 time period. Also attached is a copy of a letter dated January 4, 2000 from FBI Assistant Director, Neil J. Gallagher that attempts to clarify some misperceptions about what actually took place. I hope that these documents will assist the Subcommittee in assessing the management of the Kindred Spirit investigation.

Sincerely,

EDWARD J. CURRAN,
Director, Office of Counterintelligence.

Attachments: (2).

JANUARY, 31, 2000.

I, Edward J. Curran, have been assigned as the Director of the Office of Counterintelligence (OCI) for the Department of Energy (DOE), Washington, DC since April 1, 1998. I was detailed from the Federal Bureau of Investigation (FBI), Washington, DC to this position by the Director of the FBI, Louis Freeh. At the time of my detail, I was the Section Chief of the Eurasian Section of the National Security Division, FBI Headquarters (FBIHQ). My current position was mandated by President Decision Directive/NSC (PDD)–61, signed by President Clinton in February of 1998. PDD–61 required the FBI to detail a senior counterintelligence officer to DOE to: initially evaluate DOE's counterintelligence program; submit recommendations for improvement; and then serve as the Director of OCI. In order to carry out those responsibilities, PPD–61 gave me the authority to have direct access to the Director of the FBI, the Director of Central Intelligence, and the Secretary of Energy.

On December 14, 1999, I accompanied General Eugene Habiger, Director of the DOE's Office of Security and Emergency Operations, to a briefing before Senator Arlen Specter, Chairman, Subcommittee on Administration Oversight and the Courts, Committee on the Judiciary, U.S. Senate. General Habiger informed me that FBI Director Freeh asked him to attend this briefing because Director Freeh was going to request Senator Specter to postpone his Committee's review of the Mr. Wen Ho Lee espionage matter that was scheduled to begin the next day. Director Freeh asked General Habiger to attend and explain the potential damage caused by the missing tapes.

At the conclusion of the briefing, I was asked by Senator Specter and his Chief Investigator, Mr. Dobie McArdle, why I had denied the FBI Albuqerque charts on Mr. Wen Ho Lee. Mr. McArdle said that the FBIAQ stated that since I denied the FBI access to the DOE charts the FBI was working under the assumption that Mr. Lee had passed the polygraph and the FBI's investigation was essentially terminated. The FBI said that if they had known he had failed, the FBI would have gone back to the Department of Justice (DOJ) and requested a resumption investigative activity. They believe that they would have been authorized coverage with the added knowledge of a deceptive polygraph. I asked Mr. McArdle where he was getting this information, he referred to a communication from FBIAQ.

I informed both Senator Specter and Mr. McArdle that I was shocked by this allegation and in my estimation this entire matter had been very closely coordinated

with the FBI in every aspect. I personally had spoken with the Special Agent in Charge, Mr. Dave Kitchen, FBIAQ, before, during and after DOE's interview and polygraph of Mr. Lee. I was never asked for anything that was not immediately provided to the FBI and I never gave instructions to anyone within DOE to withhold any information, files or records. I told Senator Specter that on January 22, 1999, I was told by Mr. David Renzelman, DOE polygraph quality control, that the FBI requested the polygraph charts of Mr. Lee. I immediately instructed him to provide the FBI whatever data they needed. Up until that time, I was under the impression they already had the charts. I recall having a conversation with Mr. Kitchen the day of the DOE polygraph test, December 23, 1998, in which he said he was very satisfied with the test. The DOE interview and polygraph of Mr. Lee was never intended to be a substitute for an FBI interview and polygraph. DOE's primary purpose was to remove Mr. Lee from access to the X Division and hopefully polygraph him, while the FBI concluded their investigation. DOE personnel were instructed, by me, that the interview was not to be confrontational and the interview was to be low keyed so as not to alert him that the FBI was conducting an investigation. It was always my understanding the FBI would then interview Mr. Lee and request him to take an FBI polygraph.

Senator Specter stated that this was one of the reasons for having hearings, since this is one of the issues which needs to be resolved and obviously there is a difference of opinion as to the events of the case.

On December 14, 1999, I called Mr. Neil Gallagher, Assistant Director, National Security Division (NSD), and expressed my concern about the document referred to by Mr. McArdle, alleging that I refused to provide polygraph charts to the FBI. I asked Mr. Gallagher for the dissemination list of the memo. He said he had not previously seen the document, although he had believed it to be of minor importance. I told him I did not consider it minor since I was being falsely quoted in an official document, and the document had been disseminated to a Senate Oversight Committee. Mr. Gallagher said he was going to review the matter and if the facts in the memo were untrue then he would so advise Senator Specter.

On December 14, 1999, I called Mr. Kitchen, FBIAQ, concerning the memorandum. He immediately apologized for the memo, indicating he had not seen it before it was disseminated and he would not have allowed it out of the office. He said the facts were untrue and there was nothing that FBIAQ had asked for that they had not received from DOE.

In the attached letter dated January 4, 2000, Mr. Gallagher responded to the issues I raised concerning the blind memo. Mr. Gallagher states in the letter that the original blind memo had been provided to Senator Specter's Committee, in addition to the DOJ and other Congressional Committees. Mr. Gallagher states in the letter they could find no documentation in FBI files attributing the statements I allegedly made. He continues to state that FBIAQ had asked for the charts but did not insist on them.

Mr. Gallagher's memo dated January 4, 2000, states that the FBIAQ communication was prepared by FBIAQ as a result of a telephone conversation between Assistant Special Agent in charge (ASAC), William Lueckenhoff and Deputy Assistant Director, Sheila Horan, NSD, and was intended only to be a "rough" update of the status of the investigation. Mr. Gallagher goes on to state "as a blind memorandum it was not intended to capture official witness statements or other evidence.

Every detail of this case was coordinated between DOE and the FBI. I personally wanted the FBI to do the interview rather than DOE, but they stated that they were not ready to interview him because they first wanted to interview some neighbors and associates of Mr. Lee. DOE had been asking the FBI to bring this case to a conclusion since the use of an investigative technique in August. I did not believe I had the luxury of waiting any longer since the investigative activity in August and this was Mr. Lee's first opportunity to leave the U.S. I was very concerned as to what he would do and say on his trip to Taiwan and then what he would do upon his return. Since the FBI was not going to interview Mr. Lee and bring this case to a conclusion prior to his departure to Taiwan, I made the decision, with the Secretary's approval, to remove Mr. Lee from access upon his return from Taiwan and until the FBI could conclude their investigation through interview and polygraph.

Mr. Lee returned from Taiwan on December 23, 1998. He was interviewed and removed from access and asked to take a polygraph. The FBI was aware that if Mr. Lee refused to take a DOE polygraph, his security clearance would have been removed and steps taken to terminate his employment; if Mr. Lee agreed to take the test and failed, his clearance would be removed and termination proceedings would be initiated. This activity was completely coordinated with the FBIAQ. On December 21, 1998, a memo was furnished to the Secretary of Energy from me setting

forth the above scenario. Mr. Lee took the polygraph test and representatives from FBIAQ were present. I have been told by DOE personnel on the scene that the FBI agents were provided a complete briefing on the results of the test and were informed of the one question that was very close to being deceptive. They were told that he had passed. The FBI people asked what was the procedure at this point and they were told the charts would be submitted for quality control. According to all the DOE personnel present, the FBI never asked for a copy of the charts or anything else connected with the test and if they had, they would have been given immediate copies. DOE personnel stated that the FBI did not have their polygraph examiner on the scene and no one ever told the FBI, that I said, they could not have copies of the charts or anything else.

Mr. Gallagher's letter continues to state that the FBIAQ immediately asked for the charts at the conclusion of the DOE's test but did not insist on them. I deny this is the case based on my discussions with DOE personnel involved in this matter. The first time the FBI asked for the polygraph charts, to my knowledge, was on January 22, 1999, and they were furnished to the FBI the same day. The FBI interviewed Mr. Lee on January 17, 1999, and again on January 21, 1999, without asking him to take an FBI polygraph. However, in their blind memorandum they stated that they received the charts on January 22, 1999, after making the original request 30 days before. FBIAQ goes on to state in the blind memorandum that it wasn't until February 3, 1999, following a review of the polygraph documentation sent to FBIHQ, that they became aware that issues were present, and that the polygraph was, in fact, inconclusive. FBIAQ goes on to state, that on February 7, 1999, FBI personnel from Washington, including polygraph examiners, traveled to Albuquerque to conduct the second polygraph of Mr. Lee. In Mr. Gallagher's January 4, 2000, letter to me, his last paragraph goes on to state "that FBIAQ was making inquiries as to the status of the charts, and FBI was concerned with the time factor. When the FBI was informed that the charts were available they were immediately obtained and transmitted to FBIHQ and the quality control review conducted." Mr. Gallagher states, "upon learning that the FBIHQ Polygraph Unit believed the results to be inconclusive, this was immediately relayed to me by telephone." This scenario portrayed by FBIAQ to Mr. Gallagher is not accurate.

On February 5, 1999, at approximately 3:00 PM, I telephoned Mr. Chuck Middleton at FBIHQ, Section Chief, NS2. I informed Mr. Middleton that I had to make a decision as to whether Mr. Lee was to be placed back into X Division at Los Alamos. The original agreement was to remove him from access for 30 days, in order to allow the FBI to conclude their investigation. I had extended that time for two additional weeks and I now needed to make a decision, as to where he would be placed. I asked Mr. Middleton if there was anything the FBI was working on which might affect my decision. Mr. Middleton reminded me that the decision was mine to make. I thanked him and assured him I was well aware of that, but asked if there was anything I should know that would impact my decision. He claimed that he knew nothing that would impact my decision. I immediately informed the DOE Operations Office in Albuquerque that as of Monday morning, Mr. Lee could return to X Division. At approximately 4:00 PM, the same day, Mr. Middleton called me and told me that he just found out that FBIHQ polygraph unit had just reviewed the DOE polygraph charts and found them to be deceptive, not inconclusive, as reported in Mr. Gallagher's letter and also reported in the blind memorandum. Mr. Gallagher's letter stated that I was immediately informed of this inconclusive decision received on February 3, 1999. For the record, I initiated the phone call to FBIHQ on February 5, 1999, and was only informed then. I immediately told Mr. Middleton that I was sending our polygraph personnel to Los Alamos to have Mr. Lee retested on the morning of February 8, 1999, before Mr. Lee would be allowed back to X Division. I was informed either that day or over the weekend by Mr. Middleton, that the FBI would polygraph Mr. Lee, Monday morning and DOE should stand down. I was subsequently informed by the FBI that Mr. Lee failed the FBI polygraph on February 10, 1999, but that they required more time with Mr. Lee before DOE terminated his employment. I asked them to make that request in writing, which they did in an FBI communication dated February 23, 1999.

The recommendation to interview Mr. Lee and remove him from access pending the completion of the FBI investigation was mine and approved by Secretary Richardson. My decision was based on sound fundamental counterintelligence reasons, which I am willing to reiterate and clarify. At no time did I make this decision based on any political issues nor did anyone ever suggest that I do so. This case was completely coordinated by me with the Special Agent in Charge of FBIAQ, Mr.

David Kitchen. He completely agreed with my decision and as of January 28, 2000, stated he is willing to state that to anyone, however, no one has ever asked him.

EDWARD J. CURRAN,
Director, Office of Counterintelligence.

DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, January 4, 2000.

Mr. EDWARD J. CURRAN,
Director, Office of Counterintelligence,
Department of Energy, Washington, DC.

DEAR ED: I have been provided a copy of the undated FBI blind memorandum captioned "KINDRED SPIRIT; LEE, WEN HO; LEE, SYLVIA; FCI–PRC." As we discussed telephonically, this document is in the possession of DOJ and I understand has been provided to one or more Congressional Committees. Also as we discussed, I told you I would cause an in-depth review to be made in the FBI and if appropriate, correct any misperceptions this document creates when viewed out of content. Having stated that, it is the purpose of this letter to (1) put that document into its proper context and (2) correct at least what I understand from you are two apparent misinterpretations of this document.

With respect to the document, I have been advised that it was created by FBI Albuquerque as a result of a telephonic discussion between the Assistant Special Agent in Charge and a Deputy Assistant Director of the National Security Division. It was intended only to be a "rough" update of the status of the investigation prepared by FBI Albuquerque. It was not intended to be further disseminated or to reflect all of the facts about any aspect of the investigation. As a "blind memorandum" it also is not intended to capture official witness statements or other evidence. In common parlance, it is the equivalent of a "note to the file." From what you described, it underscores the difficulty associated with utilizing any one document to characterize a long term investigation or for that matter a critical aspect of the investigation.

With respect to the details of this document, I would like to comment on two aspects in particular:

(1.) In the first paragraph there are reported details of the polygraph of Wen Ho Lee on December 23, 1998. These facts are accurate. However, as we discussed, your impression was that this paragraph suggested that there was not the high level of coordination between the FBI and DOE regarding this polygraph that you understood existed. To the contrary, from everything I know, this polygraph was coordinated appropriately. FBI Albuquerque agreed in advance with its role in a standby capacity as this was at the time a DOE administrative matter. My recent review did not identify any coordination issue or conflict with respect to the conduct of the polygraph.

(2.) The second paragraph reports on the status of an access to the polygraph charts (for subsequent FBIHQ Polygraph Unit quality control review). It also attributes a DOE response to you by name.

With respect to the attribution to you by name, I can find no FBI employee that can confirm such a statement. It may be that someone in DOE used your name, but even that is not certain. Any indication that you personally made a statement preventing the FBI access to the polygraph charts is inaccurate.

With respect to the remaining facts in this paragraph as to access to the charts they are accurate. However, they can in hindsight easily be taken out of context. When we were informed on December 23, 1998, Wen Ho Lee passed the polygraph, immediate access to the charts was requested but not insisted by the FBI. We were informed of the DOE internal handling procedures. At the time, in part because we were under the impression he had passed the polygraph, we waited for the charts to be provided as we understood they would be. FBI Albuquerque did make inquiries as to the availability of these charts and were concerned with the time factor involved. However, I can find no formal request made of DOE to expedite the process. When we were informed of the charts availability, in Albuquerque, they were immediately obtained and transmitted to FBIHQ, and the quality control review conducted. Upon learning that the FBIHQ Polygraph Unit believed the results to be inconclusive, this was immediately relayed to you telephonically.

I hope these comments place in proper context the blind memorandum and eliminates any misunderstanding on the two aspects noted above.

Sincerely yours,

NEIL J. GALLAGHER,
Assistant Director,
National Security Division.

DEFENSE SECURITY SERVICE,
Alexandria, VA, February 14, 2000.

Hon. ARLEN SPECTER,
Hon. ROBERT G. TORRICELLI,
Attention: Carlton Hoskins, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: This letter is in response to your February 10, 2000 letter sent as a follow-on to the February 8, 2000 telephonic request made by Mr. Carlton Hoskins, on behalf of the Judiciary Committee, to Mr. William Norris, of the Department of Defense Polygraph Institute (DoDPI). These requests were for the opinion rendered by DoDPI on the results of the polygraph examination performed by the Department of Energy (DOE) on Mr. Wen H. Lee on December 23, 1998. Attached is a copy of the Memorandum for the Record outlining the initial request made by DOE and the opinion rendered by the DoDPI staff.

If you have any questions, please contact a staff member of the Office of Congressional and Public Affairs Office at (703) 325–9471.

CHARLES J. CUNNINGHAM, Jr.,
Director.

Attachment.

28 JAN 1999

MEMORANDUM FOR RECORD

Subject: Critique of DOE PDD Examination conducted by Wolfgang Vinskey on 23 Dec 1998.
Examinee: Lee, Wen H.

1. On 27 Jan 1999 the QAP received a PDD examination from US Department of Energy requesting that QAP review the aforementioned exam and related documents for an additional opinion.

2. A quality control review was conducted by SA Gary Light, SA George Chigi, SA David Miller and SA Donald Dutton on 27 Jan 1999. Each DODPI examiner reviewed the charts utilizing a seven position scale. In each instance, the QC review by all DODPI personnel was opined to be No Opinion.

3. On 28 Jan 1999 SA Light and SA Chigi engaged in a telephone conversation with Mr. John Mata, Program Manager for DOE in which he was informed of the outcome by DODPI personnel. Mr. Mata was informed that DODPI determined that results of the examination to be No Opinion. Mr. Mata then inquired as to what we thought should be done at this point, and he was informed by SA Light that the examinee should be re-examined due to the inconclusive nature of the examination. Mr. Mata was asked if he wanted an official written record of the QC review by DODPI and he indicated that he did not desire a written report, stating that our verbal report was sufficient.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, September 18, 2000.

Hon. JANET RENO,
Attorney General,
Washington, DC.

DEAR ATTORNEY GENERAL RENO: I am writing to request the Senate Judiciary Subcommittee on Administrative Oversight and the Courts Task Force on the Department of Justice Oversight be provided a copy of the following Wen Ho Lee documents:

(1) The complete FBI case file, including everything that was previously segregated as being related to the criminal case;

(2) Notes and memoranda prepared for any meetings related to the case, including but not limited to the meeting at the White House in December 1999 (just prior to the indictment);
(3) All correspondence between the FBI/DoJ and the DoE regarding the classification level of the information Dr. Lee downloaded;
(4) Every document or record submitted by the government in the case;
(5) Every document or record submitted by Dr. Lee's lawyers to the government, including but not limited to the December 1999 offer to make Dr. Lee available to explain what happened to the tapes and the final sworn statement that Dr. Lee provide as part of the plea agreement, and the government's response to any such correspondence.

Sincerely,

ARLEN SPECTER.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, January 20, 2001.

Hon. PATRICK LEAHY, Chairman,
Hon. ORRIN HATCH, Ranking Member,
Committee on the Judiciary.

Hon. BOB GRAHAM, Chairman,
Hon. RICHARD SHELBY, Ranking Member,
Select Committee on Intelligence,
U.S. Senate, Washington, DC.

DEAR CHAIRMEN LEAHY AND GRAHAM AND SENATORS HATCH AND SHELBY: The Department of Justice appreciated the opportunity to testify on September 26, 2000, before the joint hearing of the Senate Judiciary Committee and Senate Select Committee on Intelligence regarding the investigation and prosecution of Dr. Wen Ho Lee. During that hearing and the follow-up hearing the next day before the Department of Justice Oversight Task Force of the Judiciary Committee's Administrative Oversight and the Courts Subcommittee, a number of questions were raised concerning the conditions of Dr. Lee's confinement.

This letter provides further information on this matter, which has been provided to me by persons within the Department involved in the case. It is important to remember the context in which we are dealing—a set of rules governing incarceration that are intended to cover the prison population at large, not an individual prisoner on a case-by-case basis.

The attention focused on the specifics of Dr. Lee's confinement has underscored a number of public policy concerns, the resolution of which involve a careful balancing of interests. For example, given the physical stature of this particular prisoner and the likely low risk he presented of causing physical harm to others, using restraints on him while he was outside of his cell seemed unnecessary to some. But, using restraints on him in the manner described below flows directly from a policy that sets bright line rules that apply to all prisoners under defined circumstances. These bright line rules are, in the Department's view, better than an alternative that would require detention facility personnel to make ad hoc decisions in each individual prisoner's case. A rule allowing such discretion would invite both favoritism and abuse.

With these overarching policy considerations in mind, the following provides additional details about the circumstances of Dr. Lee's confinement. There is no federal detention facility in New Mexico. Dr. Lee therefore was placed in the Santa Fe County (New Mexico) Detention Facility. This facility has a contract with the federal government to house federal prisoners and is about an hour's drive from Albuquerque. In addition, it was the joint and firm belief of the federal agencies involved that the gravity of the national security issues at stake required that until Dr. Lee's case was resolved he could not be allowed to communicate freely with others. Thus, the facility in which he was held had to be able to provide conditions of detention that would prevent such communications. The Santa Fe facility was able to provide confinement with that restriction under its administrative segregation policies. The facility also provides voluntary segregation for some inmates if they request it for their own protection, as in the case of a cooperating witness. However, the facility's voluntary segregation regime was not appropriate for Dr. Lee because it would have allowed him to make unmonitored phone calls and to have unmonitored conversations with other inmates.

While housed in the Santa Fe County Detention Facility, Dr. Lee was subject to all of that facility's other regulations for all prisoners in administrative segregation in addition to the ban on unmonitored communications. One of those requirements is that prisoners in administrative segregation must be in "full restraints" (handcuffs, waist chains, and leg irons) whenever they are outside of their cells within the facility, including during exercise periods. Dr. Lee was not in restraints while in his cell. In July 2000, after the issue was raised by Dr. Lee's attorneys, the restraints policy was modified uniquely for Dr. Lee so that he, unlike others in administrative segregation, could exercise without restraints.

Transportation of Dr. Lee from the detention facility to the courthouse for court appearances or meetings with his attorneys was conducted by the United States Marshals Service. When Dr. Lee left the detention facility for these reasons, he was delivered into the custody of the Marshals Service by detention facility personnel. The detention facility placed Dr. Lee in full restraints during these custody transfers, as is the case for all prisoners. Similarly, Marshals Service policies require that all prisoners, including Dr. Lee, be fully restrained during transport. The Marshals Service's "full restraints" policy, like that of the Santa Fe detention facility, requires use of handcuffs, waist chains, and leg irons.

Upon arrival at the federal courthouse in Albuquerque, Dr. Lee was placed in a holding area cell administered by the Marshals Service, at which time all restraints were removed. When Dr. Lee was moved form the holding cell to the suite of offices on the third floor of the courthouse that had been specially modified by the Department of Energy for him and his attorneys, he again was placed in full restraints. Once in the office suite, all restraints except leg irons were removed. Dr. Lee's counsel did not object to this security procedure. Upon delivery of Dr. Lee to the office suite, his attorneys closed the self-locking door and a Deputy Marshal stayed outside the room while Dr. Lee conferred privately with his attorneys.

At the conclusion of the workday, Dr. Lee's attorneys would open the office suite's locked door. Dr. Lee would again be placed in full restraints and transported within the courthouse to the Marshals' holding area. If he was not taken from the courthouse immediately, Dr. Lee was placed back in a cell and all restraints were removed. When the Marshals Service was ready to transport him back to Santa Fe County Detention Center, Dr. Lee would be placed in full restraints once more for the ride back to Santa Fe. On arrival at the detention facility, Santa Fe County personnel would take custody of Dr. Lee and transport him within the detention facility back to his cell, at which time all restraints again were removed.

If Dr. Lee had a court hearing, he was first brought to his attorneys' suite at the courthouse, under the procedures described above. After meeting with this attorneys, the leg irons would be removed and he would be escorted, wearing no restraints of any kind, to the court room. These procedures were then reversed after the court hearing: Dr. Lee would go back to his attorneys' suite, the leg irons would be replaced; and he would meet privately with counsel.

The above facts, provided by those within the Department who are knowledgeable about the policies involved and this particular matter, reflect a situation where there is a basic policy for detention and restraint and a deviation from that policy for unique reasons. The questions to be addressed include whether the basic policy was appropriate in this matter and, if so, whether the exception made to it was implemented properly. We believe the overarching question is whether there is a fair system in place so that prisoners across the board are treated fairly, not arbitrarily. This concerns us all, and we believe that the Department has tried to do its best to institute the best policies and practices that are the most humane, given the complexities of running detention institutions, ensuring safety, and treating prisoners fairly. If you have additional questions on this matter or if I may be of further assistance, please let me know.

Sincerely,

ROBERT RABEN,
Assistant Attorney General.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC January 19, 2001.

Hon. ORRIN HATCH,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: This letter is to follow up on my letters to Senator Leahy and to you on May 5, 2000. That letter responded to the Judiciary Committee's Resolution authorized by Committee on November 17, 1999 and to Senator Specter's fol-

low-up letter of April 14, 2000, which requested records relating the Department's input into the decision to grant waivers to Loral Space and Communications Ltd. and the Hughes Electronics Corporation to launch satellites from Chinese rockets. Although the Department on May 5 and on May 8, 2000 produced documents to the Committee, the Committee nevertheless issued a subpoena on May 12, 2000.

In my May 5 letter, I informed you that we had identified some documents in these files that were generated by other agencies and that we needed to consult with those agencies for a decision on release. We notified each agency that these documents were the subject of the Committee's subpoena. This is to inform you of the status of other agencies' responses to our notification efforts. The Defense Department and National Security Agency have agreed that their documents may be released to the committee; copies are enclosed. The State Department has indicated to us that its documents may be released with redactions; we have not yet received their redacted copies. The Commerce Department and Office of the United States Trade Representative have taken the position that their documents are outside the scope of the Committee's subpoena. The National Security Council did not respond to requests for a decision on release of documents originating there.

In addition, we have identified a small group of documents from FBI files that require review by the Criminal Division for pending case and grand jury information. We will notify you as soon as that review is complete. An identical letter has been sent to the Committee's Chairman, Senator Leahy.

Sincerely,

ROBERT RABEN,
Assistant Attorney General.

JANUARY 22, 2001.

To: Senator Specter
From: Dobie
Subject: Response from DOJ

I have attached two letters from DoJ: the first explains the detention of Dr. Wen Ho Lee, and the second responds to the subcommittee's request for documents on the DOJ's input on the Loral/Hughes waiver. The key points of each letter are provided below, but I have attached the letters in case you wanted to read them in full.

Robert Raben letter on Dr. Wen Ho Lee's confinement—20 January 2001

Responds to inquiries raised at the September 26 and 27, 2000 hearings on the Wen Ho Lee case.

Dr. Lee was held in the Santa Fe County (New Mexico) Detention Facility because there is no federal detention facility in New Mexico.

The "administrative segregation" policies of the detention facility—which included "full restraints" (Handcuffs, waist chains, and leg irons)—were the same as applied to any other inmate in administrative segregation, with two exceptions: (1) A ban on communications was imposed on Dr. Lee that was not imposed on others in administrative segregation; and (2) After July 2000, Dr. Lee was allowed to exercise without restraints, unlike others in administrative segregation.

Dr. Lee was transported by the U.S. Marshals Service, following standard procedures, which included full restraints.

When Dr. Lee was placed in the holding cell at the federal courthouse, restraints were removed.

While Dr. Lee met with his attorney, all restraints except leg irons were removed.

Robert Raben letter on Loral and Hughes documents—19 January 2001

Responds to several requests (November 17, 1999 resolution; Senator Specter's letter of April 14, 2000; and the Committee's subpoena of May 12, 2000).

Provides an update on "third agency" documents related to DoJ's input on the Loral/Hughes waiver in 1998.

DoD and NSA have agreed to provide documents, but we don't have them yet.

State Department will provide documents, but is still redacting them.

Commerce and USTR said their documents are outside the scope of the subpoena.

NSC did not respond to the request for documents.

June 25, 2001

Senator Arlen Specter
ATTN: Mr. Dobie McArthur
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

At the request of the Senate Judiciary Committee, I testified on April 25, 2001 before that Committee regarding "Issues Surrounding the Use of Polygraph." I was subsequently asked to evaluate the polygraph conducted by Department of Energy (DOE) of Mr. Wen Ho Lee on December 23, 1998 and agreed to provide my opinion as an expert on the result of Mr. Lee's polygraph. During a meeting with a representative from your staff, Dobie McArthur, on May 11, 2001, I requested the computer disk on which Mr. Lee's polygraph was recorded in order to properly evaluate said polygraph data. By letter dated May 22, 2001, Mr. McArthur provided a copy of a disk, which I understand to contain Mr. Lee's December 23, 1998 polygraph examination.

I have reviewed the contents of the disk and evaluated the polygraph charts contained thereon both with and without the use of the John Hopkins algorithm. For the reasons set forth below, I can render no opinion regarding whether or not deception is indicated in the polygraph of Mr. Lee conducted by DOE on December 23, 1998.

Background

The polygraph examination involves a process wherein a standardized questioning procedure is used with instrumentation to collect physiological data on respiration, electrodermal activity, blood pressure, and heart rate. The polygrapher is trained to evaluate these physiological patterns in order to form an opinion regarding the subject's truthfulness during the course of the examination. Several results are possible. A diagnosis may indicate that the subject of an exam was deceptive during the course of the exam or, alternatively, that no deception was indicated. On occasion, no opinion can be rendered due to a number of conditions both subject related and unrelated.

Algorithm Analysis

In addition to the evaluation of a polygraph by a trained polygrapher, computer analysis using algorithm-based scoring is also possible. Several algorithms have been developed, including one by the Johns Hopkins University Applied Physics Laboratory. Algorithms provide a statistical analysis using a mathematical model to render a probability of deception. However, a computer based algorithm has no mechanism for reviewing the appropriateness of the questions asked, and thus no way, for example, of discounting improper comparison questions. Given the limitations of technology, only a human being can evaluate the propriety of the questions asked and determine what impact, if any, they should be given in evaluating a polygraph.

Lee Polygraph

The following discussion represents my professional opinion regarding the December 23, 1998 Department of Energy (DOE) polygraph of Wen Ho Lee, placed within the context of the questions presented to me in your May 22, 2001 letter.

1. Please provide your evaluation of Dr. Lee's 23 December 1998 polygraph examination. Specifically, what numerical scores would you assign based on the data on the enclosed disk? [If there is a difference between what you would assign based on the use of the Johns Hopkins algorithm (or any other algorithm that you ordinarily use) and the scores you obtain by reading the charts, please identify and explain the possible reasons for that difference.]

I conducted a numerical evaluation of the physiological data provided to me on what is reported to be the polygraph examination of Wen Ho Lee. This evaluation was based on a process wherein arousals at relevant questions are compared with those at comparison questions, although not necessarily the adjacent comparison question. I mention this because this methodology, although appropriate in the polygraph technique used by the Wackenhut examiners utilized by DOE, is not uniformly accepted in other polygraph techniques. My evaluation produced the following scores: Questions #4 (+5), #5 (+4), #7 (-1), #8 (-2). I used the Johns Hopkins University Applied Physics Laboratory algorithm in my initial evaluation of the data. Although the use of the algorithm may have made the physiological tracings clearer in some situations, the degree of influence on my score would be minimal. I cannot state with certainty that it did not influence my numerical evaluation. However, it did not influence the overall outcome of my decision.

2) Would you assess the polygraph as No Significant Response, Significant Response or No Opinion? [I have also seen the terms No Deception Indicated and Deception Indicated used in this context. In your response, please use whatever terminology is most appropriate].

My diagnosis of this examination is that it is one from which no conclusive opinion can be reached.

3) How does your evaluation differ from the evaluation of the Wackenhut polygraph examiners?

By your May 22, 2001 letter, you provided me with polygraph score sheets which I understand to be those of DOE's contractor, Wackenhut, for the December 23, 1998 Wen Ho Lee polygraph and with the opinion of the DOE Office of Counterintelligence (OCI) quality control analysis. Based on the data provided to me, it appears the Wackenhut examiners reached a conclusion of no deception indicated. The report by DOE OCI states that they did not agree with that opinion, nor do I. My numerical evaluation does not allow me to render a conclusive opinion on this examination.

4) If there are substantial differences between your scoring and that of the Wackenhut polygraph examiners, what are they and where are they? If such differences exist, what do you think accounts for them?

In the package you provided to me by letter dated May 22, 2001, were included polygraph score sheets which I understand to be those of the Department of Energy's contractor, Wackenhut, for the December 23, 1998 Wen Ho Lee polygraph. There are what I believe to be substantial differences in the scores my evaluation produced and those of the Wackenhut examiner. In particular, the scores at questions # 7 and 8 differ. I cannot account for the differences between my results and those of the Wackenhut examiners.

5) If there are substantial differences between your scoring and that of the Wackenhut polygraph examiners, are these differences within the range that one would normally expect to occur when an exam is scored by two different trained examiners, or are the differences outside the norm? If the differences in the scores are outside the norm, how do you account for such differences?

One would expect two properly trained examiners evaluating the same data to draw a similar, but not necessarily identical, conclusion. This was not the case when comparing my evaluation with that of the Wackenhut examiner. I cannot account for the differences.

6) Can you comment on the appropriateness of the questions used in the exam? Were all of the questions properly structured? Were the

relevant and control questions sufficiently distinct so as to generate a useful difference in response?

Both comparison questions # 3 and 9 are inappropriate in that they should have been separated from the relevant issue by time, place or category. In particular, significant physiological reactions that occur at comparison question 3 could be because it addresses a relevant issue. These comparison questions were not sufficiently distinct from the relevant questions so as to generate a useful basis of comparison.

It is not clear from the relevant questions whether or not the Lee polygraph conducted by Wackenhut was a screening test or a specific issue test. The two tests use different types of questions; the Lee test appears to combine screening and specific issue questions, a technique that is not generally employed. The relevant questions as a group are atypical of what one would expect to see in an examination. It is possible, however, that the examiner possessed some unique information not among the information provided to me that could justify the use of these relevant questions.

7) Do you detect any signs that the examinee is attempting to use countermeasures during the exam?

I found no conclusive evidence of countermeasures attempted during the examination.

8) If there are other pertinent observations about this exam, please identify and explain them.

The Johns Hopkins University Applied Physics Laboratory algorithm analysis demonstrates a probability of deception at 93% after editing the physiological tracings. This is considered to be in the inconclusive range. The algorithm, however, has no way of discounting, or adjusting for, improper comparison questions.

Should you have any questions regarding the above or require additional information, please let me know. I may be reached through Melodie Syah Defense Security Service, Acting Chief, Office of Congressional and Public Affairs at (703) 325-4894.

Sincerely,

Michael H. Capps
Deputy Director for Developmental Programs

Copy to: Melodie Syah

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June 26, 2001

Senator Arlen Specter
Attn: Mr. Dobie McArthur
711 Hart Senate Office Building
Washington D.C. 20510

Re: Your Letter of May 22, 2001 regarding the Dr. Wen Ho Lee Polygraph Examination on December 23, 1998

Dear Senator Specter:

The following is a review of the Dr. Wen Ho Lee polygraph examination conducted on December 23, 1998 by the Department of Energy.

Case Synopsis

On December 12, 1998 Lee, suspected of espionage, was examined by the Department of Energy (DOE) and was found to be non-deceptive, by the original examiner and by two quality control supervisors. In late January 1999 the OCI for DOE did a Quality Control Review and was unable to render an opinion regarding the examination and recommended additional testing. On January 27, 1999 four instructors at the Department of Defense Polygraph Institute reviewed the examination and could not render an opinion and recommended reexamination.

Quality Control Review Summary

My review of the polygraph examination of Wen Ho Lee determined the results to be inconclusive. (See Score Sheet, attachment one) It is my opinion this examination was not set up, conducted and reviewed using well-established procedures for counter-intelligence polygraph testing. This lack of experience in Foreign Counter-Intelligence polygraph testing contributed to an incorrect decision, an unacceptable delay in the decision making process, and negated the potential of fully uncovering the truth with a timely posttest interrogation.

Overview of FCI Testing by the FBI

A review of this examination must take into account well established procedures developed by the FBI for counter intelligence polygraph examinations. Fundamental to all polygraph examinations is the understanding that testing in different areas requires different approaches and assumptions. As former foreign intelligence polygraph coordinator for the FBI I can state that the training of examiners, the selection of examiners to conduct FCI examinations, and the strategy for conducting these examinations was selective and specialized. Training was received in the 21 applicable Federal Statutes and their elements. Espionage In-Services were conducted covering all aspects of the recruitment process. Specialized espionage interrogation courses were attended. Training was received annually

regarding current espionage cases, and the lessons learned from these cases were incorporated into current practice. Examiners in high profile cases were selected by the polygraph unit to conduct these examinations. Only a handful of examiners would be selected for these examinations. The timeliness of making the final decision was considered critical. Developing information immediately when the deceptive examinee is most vulnerable is fundamental. The polygraph unit at FBIHQ was sent charts via facsimile on the day of the examination for a timely quality control.

Policy was well established that the FBI has the primary investigative role in espionage investigations, and always conducted its own polygraph examinations. There was never an occasion where we demurred to another agency in this regard.

It appears those who set up, conducted and reviewed this examination were unaware of all of the above and did not take the obvious and prudent measure of consulting with the FBI Polygraph Unit. This examination would not have been approved for conducting an examination of someone suspected of espionage.

Once you understand how an examination should be conducted you can place the conduct of this examination into perspective.

Responses by Question Number

Question One. You have requested my numerical scores for this examination, which were inconclusive and can be reviewed as attachment one. Subsequent to my numerical scoring, I processed the data from this examination through two computer algorithms. I ran the data twice. Once as raw data (Case One) as strictly read by the algorithm and a second time (Case Two) by excluding data that had been marked by the examiner as distortion.

The first algorithm, Chart, was developed by Axciton, and is considered to be an elementary program not intended for decision-making. This examination was run using Axciton software. The decisions were:

Case One. The probability of deception was .857, which is an inconclusive finding.
Case Two. The probability of deception was .646, which is an inconclusive finding.

The John's Hopkins Applied Physics Laboratory under government finding developed the second algorithm, Polyscore 4.0, and its accuracy is supported with research and government studies. It is not considered as a substitute for the original examiners opinion. Polyscore evaluated these charts as follows:

Case One. Deception Indicated. The probability of deception was 0.98.
Case Two. Deception Indicated. The probability of deception was 0.96.

It is recognized that many agencies of the government do not use the algorithm's findings in any manner in evaluating examinations. It is further recognized the examiners in this case might not have had Polyscore 4.0 installed on their computer. It is clear to me any prudent examiner with these algorithms installed would have run them in the several minutes it takes and used this input in deciding what further steps to take. The use of all available information in

making an informed decision would have alerted the original examiner and reviewers to take a closer look at the data and account for any discrepancies.

In accounting for the differences between Polyscore 4.0 and my own numerical scores, you need to understand the Algorithm assumes all the questions are correct and function as designed, and all distortions are seen, marked by the examiners and are excluded from the evaluation process. Since I considered there to be problems in these areas, I would have reason to disagree with the algorithms decision. It is my experience that when close decisions are made that it is better to label an examination as inconclusive, analyze why this might be and to reexamine.

Question 2. An examiner evaluates charts and either notes the presence or absence of reactions. The examiner then infers/opines these reactions indicate deception or non-deception. In the screening context the inference is not made. The general comparisons are as follows:

NSR (No significant Response)	=	NDI (No Deception Indicated)
No opinion	=	Inconclusive
SR (Specific Response)	=	DI (Deception Indicated)

Question 3. My evaluation differs from the Wackenhut examiners because I found the examination to be inconclusive and they found it to be non-deceptive.

Question 4. There are differences in my evaluations of certain reactions and distortions and this accounts for the differences in scoring. On chart one question C3 was clearly distorted by a slight sniff after the question was asked and caused a large secondary reaction in the cardio and Electro dermal (EDR) components. On chart two question C3 again a deep breath causes secondary reactions in the cardio and (EDR) components. Question C6 had a deep breath immediately after asking the question. On chart 3 question 9 a deep breath after answering causes a large secondary response in the cardio channel.

The differences in opinions are caused by the differences in identifying distortions in the tracings. Some of these differences are subtle and some are obvious. I have reviewed these charts at least a dozen times and have done so under every favorable assumption I could make and I have never found this examination to be non-deceptive.

Question 5. It is not outside the norm for one examiner to call an examination truthful, and another examiner to evaluate the examination as inconclusive. No one who has reviewed these charts after the day of the examination has concurred this examination was non-deceptive. The examiner was experienced in criminal specific testing, in chart evaluation and was employed to do screening examinations. We know from subsequent events Lee had problems that should have been surfaced by this examination, and were not. Several problems can account for this. First, I believe the fundamental problem with this examination was in question formulation. Precision in question formulation leads to more definitive response patterns. Second, there is the recognized tendency in a screening program to pass everyone. It occurs because examiners know in advance almost everyone should pass. They simply don't know or can't understand this negates the purpose of the screen and makes it easier for a spy to be missed. Examiners in such a rote mode could have been blinded and just passed Lee. A key role in the management of a screening program is to prevent this bias. An independent audit of the programs work product would establish if this problem existed.

Question 6. The issue of the appropriateness of the questions will generate differences in opinions from various agencies. The FBI never accepted the Department of Defense format known as the Test for Espionage and Sabotage (TES). This format is used in a particular area of security screening, and examinations in this area are conducted under a different set of assumptions from the normal protocols of test question construction for specific issue testing. TES is supported by research in a laboratory setting and is approved for use by the DOD under very strict guidelines. This current examination is not a TES examination, but TES influence is seen within the questions. It appears the examiner was following the guidelines of his agency.

A fundamental rule of test question construction is that you do not ask questions that use legal terms. You do not use the question, Did you murder John? You would ask, Did you stab John? You test specific acts. FBI experience in testing in real espionage matters has established this is the correct method of testing. It is my opinion the examiner and the entire quality control structure assumed what they did in screening would work as well in a specific espionage issue examination. These assumptions were incorrect.

The relevant questions were:

4 Have you ever committed espionage against the United States?
5. Have you ever passed any classified weapons data to any unauthorized person?
6. Have you ever had any contact with anyone to commit espionage against the United States?
7. Have you ever had personal contact with anyone you knew who has committed espionage against the United States?

The above relevant test questions with the exception of question 5 reflect a lack of experience in foreign counterintelligence (FCI) testing. The use of the term espionage has been determined to be ineffective in these examinations. For example, there are those who commit espionage for ideological reasons. These individuals would rationalize the providing of nuclear secrets to the PRC or to Taiwan did not injure the US, and did not give an advantage to a foreign nation, but merely allowed these nations a reasonable self-defense and this balance helps maintain world peace. Reviewing one of the espionage statutes in an abstract manner would not necessarily be effective. The sources and methods currently in use develop questions regarding the removal without approval of classified information, providing this information to unauthorized individuals, tasking, and receiving anything of value for the material. The pre-test of these questions should use concrete examples of what occurs in actual cases. Often a series of short examinations is given. Each examination becomes increasingly more specific. As an FBI supervisor I would not have approved of the use of questions 4,6, and 7.

The comparison questions were:

6. Are you the type of person who would falsify an official document to cover up your own mistake? Compared against a precisely worded relevant question, this question would function as a comparison question. Compared against a vaguely worded relevant question, there could be some relevance attached to this question by the examinee. While not hearing the set up of this question by the examiner so as to exclude it from the relevant questions, it is possible this question was perceived relevant by the examinee. A person falsifying entry logs, or sign out sheets for classified material might have focused on this question. Lee might have been doing this with the computer disks he took home.

7. Are you really an honest person? This is a weak question. Most people who have achieved some prominence believe themselves to be honest, and have a lifetime of rationalizing away any incongruities. A polygraph only measures what you believe to be true. If Lee is stealing secrets, he is not an honest person. If this question were compared with a precisely worded relevant question, it would function appropriately.

8. Did you ever do anything for which you are ashamed? Again, hearing the examiners presentation would allow an evaluation of this questions effectiveness. Normally this would be a strong comparison question and would function as designed to produce reactions.

The effectiveness of a control question can be evaluated by carefully listening to its introduction to see if it is important to the examinee and also by subsequently measuring its responses. The former was not possible in this case because the video is not available.

Question 7. I did not find any obvious signs the examinee was attempting to use countermeasures during this examination. The distortions noticed appeared to be naturally produced. There was no indication on the charts Lee was advised of the distortions he was creating after answering and sniffing. The examiner believed this was Lee's condition and natural response pattern. I cannot disagree with that assessment, although I would have mentioned it to Lee. The occasional distortions were significant in interpreting these charts.

Question 8. As I told you last year after you inquired about the Cheryl Atkinson piece on Lee I was quoted out of context and I felt this was deliberate. I had numerous telephonic conversations with Atkinson prior to the taped interview. She was fully briefed regarding polygraph procedures. I clearly and fully explained to her several times that the "scores" of the examiners were high on the non-deceptive side, but that subsequent testing and admissions indicated Lee was in fact deceptive. During the course of our conversations she suggested cover up and misconduct of various officials in the matter. Unfortunately, during the taped interview she asked only about the 'scores" and did not provide an opportunity for me to clarify. In my opinion this was deliberate, and the piece was manipulated to suggest wrongdoing by the government. Once I saw the piece, I called officials at the Energy Department and the FBI to clarify the matter.

Thank you for the opportunity to be of assistance to the committee.

Sincerely,

Richard W. Keifer

POLYGRAPH EVALUATION
NUMERICAL ANALYSIS

Chart # 1	Q- 4	Q-5	Q-7	Q-8
Respiration	C	+	+	+
EDR	-2	-2	-	-2
Cardio	C	-2	C	C
Sub Total	-2	-3	C	-1

Examinee KEN Ho LEE
Date of Exam 12/23/98
Examiner VINSKY

Chart # 2	Q- 4	Q- 5	Q- 7	Q- 8
Respiration	C	C	C	-
EDR	-	C	+	+
Cardio	-	C	C	-
Sub Total	-2	C	+	-

Comments
Ch 1 C 3 Distortional Answer
C 2 C 3 Distortional

Chart # 3	Q- 4	Q- 5	Q- 7	Q- 8
Respiration	+	C	+	C
EDR	+	C	+	+
Cardio	+	+	+	-
Sub Total	+3	+1	+2	C

Chart # 4	Q-	Q-	Q-	Q-
Respiration				
EDR				
Cardio				
Sub Total				

Chart # 5	Q-	Q-	Q-	Q-
Respiration				
EDR				
Cardio				
Sub Total				
TOTAL SCORE	-1	-2	+3	-2

Prepared by
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DI NDI (NC) NO

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

June 28, 2001

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

This responds to your letter of June 27, 2001, to the Attorney General posing questions concerning the Wen Ho Lee case.

As you know, Dr. Lee is obligated under his plea agreement to cooperate with the government until September 13, 2001, and a failure by Dr. Lee to fulfill his obligations could result in the reinstatement of charges against him or, if he should provide false information to the government, charges of perjury or making false statements. Pursuant to the agreement, Department of Justice attorneys and FBI agents periodically meet with Dr. Lee in order to question him about his activities during his employment at Los Alamos National Laboratory. Accordingly, we consider this matter to remain open at this time.

In the interim, however, in partial response to the first question in your letter, we can advise you that Dr. Lee has told the debriefing team that on December 23, 1998, the computer tapes at issue in the indictment were in his X-Division office at the Los Alamos National Laboratory.

We look forward to continuing to work with you as you conduct your oversight on this matter. Please let me know if you have any questions on this or any other matters.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: Senator Arlen Specter

FOR IMMEDIATE RELEASE
August 12, 1999

NEWS MEDIA CONTACT:
Brooke Anderson, 202/586-4940

Richardson Announces Results of Inquiries Related to Espionage Investigation

Secretary of Energy Bill Richardson today announced the results of inquiries into specific aspects of the espionage investigation at the Department of Energy's Los Alamos National Laboratory (LANL). Richardson had asked the independent Office of the Inspector General to look at the circumstances surrounding the security clearance, access and work assignments of the suspect at Los Alamos. A second inquiry looked at whether Los Alamos counterintelligence officials properly assisted the Federal Bureau of Investigations (FBI) with regard to computer search waivers. In a third investigation, Richardson asked the Inspector General to investigate allegations that Department officials blocked or prevented briefings to former Secretary Peña or the Congress about potential espionage at the labs.

Secretary Richardson said, "I believe the Office of Inspector General has done a thorough, fair and independent review, and I accept its conclusions and criticisms about the problems in this Department. This report makes it clear that Department of Energy (DOE) political and career management failed to give necessary attention to counterintelligence and security. That combined with the lack of accountability, unclear communication with other agencies and dysfunctional reporting relationships was fertile ground for the problems that occurred during the investigation. There was a total breakdown in the system and there's plenty of blame to go around."

"The espionage suspect should have had his job assignment changed to limit his access to classified information much sooner than it was, and cooperation with the FBI should have been stronger," Richardson said. "The Inspector General noted that the reforms we have undertaken are designed to address the systemic problems that led to these mistakes. I'm frustrated that the factual record isn't clearer about who knew what when about the suspect's access, and therefore should have acted. In some cases, there isn't sufficiently strong enough evidence in this report to carry out disciplinary actions. There were three lab employees whose responsibilities were clear, and they failed to meet their responsibilities, and I'm asking that the lab take appropriate action to discipline them."

Inspector General Report on Espionage Suspect's Security Clearance, Access and Work Assignments

The Inspector General looked at the circumstances surrounding the security clearance, access and work assignments of the suspect. In the course of the investigation, the Inspector General's office conducted 97 interviews of current and former DOE officials, Laboratory personnel and FBI officials.

In a classified report, the Inspector General cited:

- "systemic problems in the Department's management of counterintelligence matters"
- "a lack of adequate communications at all levels and confusion as to individual responsibilities and accountability. For instance, a misunderstanding of terms relating to 'limiting' [the suspect's] access through 'redirection' of his work assignments [that] may have contributed to delays in action, or inaction, by senior managers";
- "several senior level transitions were not structured so as to ensure that incoming

Departmental and Los Alamos officials were fully conversant with ongoing counterintelligence matters, including details of the history and status of [the suspect's] clearance, access, and work assignments";

- "senior managers and other key personnel, apparently relying on their advisors or others did not obtain sufficient confirmation that directed actions had, in fact, been appropriately executed";
- "indicators of long-term management deficiencies. The Department's management structure, during the time, was such that many participants contended that they had no direct responsibility for and, therefore, should not be held accountable for decisions and actions relating to this matter";
- "senior officials did not ensure that the positions taken by the Federal Bureau of Investigation, with regard to the suspect's clearance, access and work assignments, were clear and fully understood";
- "Certain senior officials with direct management responsibility for LANL were not aware of, nor did they seek, essential information on [the suspect] in this matter and, specifically, on the status of [the suspect's] clearance and continued access within the X Division";
- "senior officials with intelligence or counterintelligence responsibilities, who were also aware of the FBI's initial request to leave [the suspect] in his position, may not have adequately reassessed the status of [the suspect's] access following Director Freeh's comments and the change in the FBI's position and, consequently, failed to respond in an appropriate and timely manner"; and
- "Senior managers and other key personnel, apparently relying on their advisors or others, did not obtain sufficient confirmation that directed actions had, in fact, been appropriately executed";

The Inspector General noted that the Department has implemented a number of internal reforms, saying, "while concerns raised during this inquiry are significant, the Department has taken steps designed to address many of these issues. For example, the responsibility for departmental security matters has recently been centralized with the naming of a retired senior military officer as the Department's 'security czar.' Further the Department now has a separate office of counterintelligence with direct responsibility for counterintelligence matters throughout the complex. The director of this office, a recognized specialist in counterintelligence, reports directly to the Secretary on such matters."

The Inspector General reported that witnesses had "varying degrees of recollection" and they provided conflicting versions about the circumstances surrounding decisions related to the suspect's clearance, access and work assignments. The Inspector General was "unable to reconcile many of these conflicts."

Without assigning blame to any specific individuals, the Inspector General identified 19 officials at the Department of Energy and LANL who "had a degree of responsibility regarding Department intelligence and counterintelligence matters, or programmatic security; a degree of understanding with respect to the status of the FBI's request to keep [the suspect] in his position; and, a certain level of knowledge regarding [the suspect's] clearance, access, or work assignments."

Based on the report, Secretary Richardson concluded that, while a significant number of the 19 properly carried out their responsibilities based on the information available to them, others bear responsibility in varying degrees for failures in management, leadership or follow through. In some cases, the evidence is not sufficiently strong to carry out disciplinary action. However, Richardson will ask the director of Los Alamos to take disciplinary action against individuals at the Laboratory whose responsibilities in the matter were clear and, who by action or inaction, failed to meet those responsibilities.

Specifically, Richardson has asked the Director of Los Alamos to hold a senior lab official accountable for failing to follow through on an express request by senior DOE management to develop a plan for limiting the suspect's access, for failing to inform Department's management that the plan had failed, and for failing to take alternative actions to limit the suspect's access.

Also, in October 1997, the FBI Albuquerque field office related to a LANL official that there was no investigative reason to keep the suspect in classified access and that DOE should feel free to move the suspect to prevent any future losses. When confronted with this substantial change in the FBI's position, the counterintelligence official decided to leave the suspect in place without consulting senior management about the FBI's change in position or about his decision not to recommend that the suspect be removed from all classified information. As a result, the suspect held a security clearance and had access to classified information until late 1998.

The individual at the laboratory responsible for these failures is no longer in the same position, but

Secretary Richardson has asked the Director of Los Alamos to reevaluate the Lab's relationship with this individual.

Computer Waiver
The second inquiry into support of the FBI investigation determined that a counterintelligence official at Los Alamos performed poorly in his obligation to assist the FBI. Specifically, the individual did not carry out an adequate search of lab records to find the suspect had executed a written computer privacy waiver in April 1995. As a result, it was not until May 1999 that the FBI became aware that Los Alamos had maintained on file a paper waiver signed by the suspect. Failure to conduct a diligent search deprived the FBI of relevant and potentially vital information. Secretary Richardson has asked Los Alamos management to take appropriate personnel actions against this employee for this serious dereliction of duty.

Inspector General's Investigation into Allegations that Department Officials Blocked Briefings
The Inspector General's two month investigation examined allegations that Department officials blocked or prevented briefings to former Secretary Peña or the Congress about potential espionage at the labs. In the course of its investigation, the Inspector General's office conducted 82 interviews. They found that witnesses possessed varying degrees of recollection and there were conflicting versions about the reporting of LANL espionage allegations to the Secretary and the Congress. Despite a number of primary and follow-up interviews designed to clarify key matters, they were not able to reconcile the conflicting information. As a consequence, the Inspector General could not establish with any certainty that any Departmental official, knowingly or intentionally, improperly delayed, prohibited or interfered with briefings to Mr. Peña or to the congressional intelligence committees.

- DOE -

R-99-213

John J. Kelly
United States Attorney
District of New Mexico
201 3rd St., NW
Albuquerque, N.M. 87102

NEWS RELEASE

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For Immediate Release
December 10, 1999

Wen Ho Lee Indicted for Violating the Atomic Energy Act of 1954 and for Unlawful Gathering and Retention of National Defense Information

Albuquerque, New Mexico -- United States Attorney John J. Kelly announced today the return of an indictment against Wen Ho Lee, of White Rock, New Mexico. Lee, age 59, is an engineer formerly employed in the X Division at Los Alamos National Laboratory.

On December10, 1999, a federal grand jury in Albuquerque returned a 59-count indictment, charging Wen Ho Lee with violations of the Atomic Energy Act of 1954. As required by law, the indictment was authorized earlier this week by U.S. Attorney General Janet Reno. The indictment alleges that Wen Ho Lee tampered with, altered, and concealed classified information concerning the design, construction, use, and testing of nuclear and thermonuclear weapons while that information resided on the computer system at Los Alamos National Laboratory (LANL). The indictment further alleges that Lee unlawfully acquired and removed classified information from the Common File System at LANL by downloading the information onto portable computer tapes. In

addition to these violations of the Atomic Energy Act, the indictment alleges that Lee's activities described above constitute the unlawful gathering and retention of national defense information in violation of the Federal Espionage Act.

According to the indictment, Los Alamos National Laboratory is responsible for the safe stewardship of a substantial portion of the U.S. nuclear arsenal. The X Division at Los Alamos has responsibility for the research, design, and development of thermonuclear weapons. Located within X Division is the most sensitive nuclear weapons data and information possessed by the United States, information that, if improperly handled or disclosed, could cause serious damage to the national security. The indictment alleges that, between 1980 and December 23, 1998, Wen Ho Lee was an engineer assigned to X Division, with access to secret restricted data about the design specifics, construction, and testing of U.S. thermonuclear weapons.

The indictment alleges that in 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 is alleged to have gathered and collected this information from the secure, classified Los Alamos 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. In addition, the indictment alleges that in 1997 Lee downloaded directly from the classified system to a tenth portable computer tape current nuclear weapons design codes, auxiliary libraries, and utility codes necessary to compare computer generated, calculated results with actual test data. Seven of the tapes Lee made remain unaccounted for as of the date of the indictment.

The indictment includes 29 counts charging violation of Title 42, United States Code, Section 2276 -- the unlawful tampering, altering, concealing or removing of Restricted Data -- and 10 counts

charging violation of Title 42, United States Code, Section 2275 -- the unlawful receipt or acquisition of Restricted Data. (The term "Restricted Data" means all data concerning: 1) design, manufacture, or utilization of atomic weapons; 2) the production of special nuclear material; or 3) the use of special nuclear material in the production of energy.) In addition, the indictment contains 10 counts charging violation of Title 18, United States Code, Section 793(c) -- the unlawful gathering of national defense information -- and 10 counts charging violation of Title 18, United States Code, Section 793(e) -- the unlawful retention of national defense information.

The classified Restricted Data that Lee is alleged to have unlawfully collected and removed includes:

- Data files that contain information relating to the physical and radioactive properties of materials used to construct nuclear weapons;
- Input deck/input file information that includes descriptions of the exact dimensions and geometry of nuclear weapons that are used in connection with the design and simulated testing of nuclear weapons, and the computer instructions to set up a simulated nuclear weapons detonation;
- Source codes used for determining by simulation the validity of nuclear weapons designs and for comparing bomb test results with predicted results;
- Nuclear bomb testing protocol libraries reflecting the data collected from actual tests of nuclear weapons;
- Data concerning nuclear bomb test problems, yield calculations, and other nuclear weapons design and detonation information; and
- Computer programs necessary to run the design and testing files.

U.S. Attorney Kelly said today, "This case is being prosecuted because Wen Ho Lee has denied the United States its exclusive dominion and control over some of this nation's most sensitive nuclear secrets. Although Lee has not been charged with communicating classified information to a foreign power, the mishandling of classified information alleged in the indictment has, in the government's view, resulted in serious damage to important national interests." Kelly emphasized, however, "The indictment does not allege that Lee passed classified information to any particular foreign government, including the People's Republic of China."

David Kitchen, Special Agent in Charge of the Albuquerque Field Office of the FBI, stated, "The indictment against Wen Ho Lee concludes this phase of an enormous investigative effort. This could not have been achieved without the full cooperation of the Department of Energy and Los Alamos National Laboratory, as well as the support of the United States Attorney's Office and the Department of Justice. This investigation, with its inherent complexities, illustrates our ability to investigate effectively in the cyber-arena. The investigative team in this case has conducted more than 1,000 interviews, searched more than 1,000,000 computer files, and examined more than four terabytes of data. The FBI's Computer Analysis Response Team and the Department of Energy produced superb results in what can only be described as a true partnership. Director Browne deserves great credit for this help."

U.S. Attorney Kelly congratulated the FBI on an extraordinarily successful ten-month investigation. "The FBI is at its best in investigations like this. Without the breadth of resources of the Bureau, including specifically the National Infrastructure Protection Center, this case would not have been possible. I want to personally thank Director Louis Freeh and the agents in the FBI for their outstanding work in this investigation."

If convicted of any count under the Atomic Energy Act, Lee faces a maximum penalty of imprisonment for any term of years or life and a $250,000 fine. If convicted of any of the Federal Espionage Act counts, Lee faces a maximum sentence of 10 years imprisonment and a $250,000 fine.

The Lee case will be tried in Federal District Court, Albuquerque, New Mexico. First Assistant United States Attorney Robert J. Gorence will be the lead trial prosecutor. He will be assisted by Supervisory Assistant United States Attorney Paula Burnett, Assistant United States Attorney Laura Fashing, and Michael C. Liebman, a trial attorney with the Internal Security Section of the Criminal Division, U.S. Department of Justice.

The indictment is merely an accusation, and the defendant is presumed innocent unless proven guilty.

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United States Department of Energy News

FOR IMMEDIATE RELEASE
January 19, 2000

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Richardson Releases Task Force Against Racial Profiling Report and Announces 8 Immediate Actions

Names Jeremy Wu as New Departmental Ombudsman

Speaking to Energy Department employees and top management in Washington, D.C., and around the nation, Secretary of Energy Bill Richardson today vowed to continue to fight racial discrimination at the Department of Energy (DOE) and announced eight immediate actions the department is taking to ensure that racial profiling is not used at any DOE facility. He made the announcement after receiving a report and recommendations from the Task Force Against Racial Profiling that he established last June to investigate the climate at the Department's facilities and make recommendations to ensure that the Department's policies against racial profiling are carried out effectively.

"The Department will neither commit nor tolerate racial profiling," Richardson said. "I formed this task force because I was concerned that Asian Pacific Americans at our labs were feeling their patriotism and loyalty questioned in the wake of allegations about Chinese espionage. As a Hispanic, I know firsthand the damage of racial stereotyping, and I'm worried that this kind of atmosphere can foment a dangerous 'brain drain' where we lose our best scientists, hobbling our research quality, our leading edge science and ultimately our national security."

The actions outlined by Secretary Richardson include:

- the appointment of Jeremy Wu to serve in a newly created position of National Ombudsman and Director of the Office of the Ombudsman for the Department to be available for any employees who may have concerns and to monitor and review diversity management matters;
- an agency-wide equal employment and diversity "stand-down" to explain to all employees the Task Force's findings, provide data on minority hiring, and review the Department's diversity protections and practices;
- the expansion of outreach at leading universities to combat the recruitment and retention problems being experienced throughout DOE laboratory facilities (the "brain drain");
- changes in the equal employment systems and procedures to ensure concerns are addressed in a timely and effective manner, including the

establishment of local ombudsman functions at all Energy Department sites;
- outreach to the CEOs of the Department's contractors to inform them of the Task Force's work, findings and to reiterate the Department's policies against discrimination and racial profiling;
- better tracking and evaluating of diversity management activities through the strengthening of contract provisions with the Department's contractors;
- the appointment of Daphne Kwok, from the Organization of Chinese Americans, to serve on the Secretary of Energy Advisory Board; and
- the appointment of an implementation team with representatives from around the Department to review and make recommendations about implementing the remaining task force recommendations, to monitor and report regularly to the Secretary of Energy on implementation of the actions announced today.

The Task Force made several general observations, including noting an atmosphere of distrust and suspicion with employees feeling their loyalty and patriotism questioned because of racial factors. Asian Pacific Americans also cited a hostile work environment and speculated that their opportunities for promotions, choice job assignments and developmental training have been greatly reduced as a result of this atmosphere of distrust and suspicion.

The Task Force observed that the heightened security posture created a perception of ambiguity over the definition and treatment of both foreign nationals and naturalized U.S. citizens, resulting in increased anxiety at all levels of the workforce. In addition, it was believed that this atmosphere was hurting the Department's ability to recruit and retain highly qualified employees from all ethnicity groups. The Task Force also observed that while lab directors and other senior leadership embraced Secretary Richardson's stated policies of nondiscrimination and fairness, middle and lower-level management were less consistent and energetic in embracing and implementing those policies. The Task Force also reported that some employees believed that counterintelligence efforts were targeting employees of Chinese ethnicity.

"Looking at the Task Force's findings, I deeply regret that some employees lost their trust in the United States government," Secretary Richardson said.

The Task Force, comprised of 18 senior Department of Energy and contractor employees and Commissioner Yvonne Lee, U.S. Commission on Civil Rights, visited Department sites around the country. At Richardson's invitation, five Asian Pacific American leaders observed and actively participated in additional fact-finding delegation visits.

"I'm pleased that Dr. Wu will be joining the Department. This Ombudsman position is unique, and the person who occupies it will speak with my authority. When this guy knocks on your door, it's as if I'm knocking, so you better open up." Dr. Jeremy S. Wu, the new National Ombudsman and Director of the Office of Ombudsman for the Department of Energy will have direct access to Secretary Richardson. Prior to joining the Department of Energy, Dr. Wu served as Deputy Director, Office of Civil Rights at the U.S. Department of Agriculture, where he was responsible for administration, information technology, and complaint processing. Dr.Wu is the current President of Asian American Government Executives Network, an organization of top government officials, and the current Executive Vice President of the DC Chapter of the Organization of Chinese Americans.

In announcing that Daphne Kwok would join the Secretary of Energy Advisory Board, Richardson said, "Daphne's connection to the Asian Pacific American community will be invaluable in ensuring accountability. If the community has suggestions on what steps we should be taking, I trust that Daphne will let me know." At the Organization of Chinese Americans, Ms. Kwok coordinates programs and represents over 10,000 members of the Asian American

community. She has testified before the congressional Asian Pacific Caucus on the impact of federal counter-intelligence and security investigations at the Department of Energy on Asian Pacific Americans.

After he established the Task Force on Racial Profiling last June, Richardson held meetings with Asian Pacific American employees at the Energy Department's Los Alamos National Laboratory, Lawrence Livermore National Lab and Sandia National Labs, to hear their concerns about racial profiling directly. He also sent memorandums to all employees, encouraging them to bring any issues and concerns to the attention of the Task Force. Finally, he sent directives to all managers throughout the Energy Department complex to say that the Department will not tolerate racial profiling and has held several meetings with leaders from the Asian Pacific American community on these issues.

The Task Force Against Racial Profiling Final Report is available on the Department of Energy's web site, http://www.doe.gov/news/docs/rprofilerpt.pdf.

- DOE -

R-00-011

[From the National Review, July 31, 2000]

ENERGY LOSS: WHAT HAPPENED TO THE NATION'S SECRETS

(By Notra Trulock)

New revelations about security lapses at Los Alamos National Laboratory underscore the Clinton administration's continuing failure to safeguard America's nuclear secrets. For more than a year, administration officials have assured the nation that these secrets were secure: Energy secretary Bill Richardson and his political appointees were vigorously implementing new policies and procedures, and the lax security arrangements of the past would not longer be tolerated. The problem is fixed, so let's put this behind us and move on, high-ranking Department of Energy (DOE) officials urged.

But the new security scandals prove that these assertions were—in the succinct phrasing of a recent congressional report on DOE counterintelligence—"nonsense."

Recent reports from inside the DOE indicate that management has interfered in security self-assessments at DOE facilities in New Mexico and, at another DOE lab, permitted sales of computer equipment containing classified nuclear-weapons information to China. Just what is going on inside the DOE complex? Can all of this be explained away as mere incompetence?

In truth, the recent scandals were utterly predictable. While Secretary Richardson probably has good intentions, he has entrusted the implementation of his new policies to many of the same Clinton administration political appointees responsible for much of the mess in the first place. Congress is setting great store in the establishment of a new "semiautonomous" entity inside DOE: the National Nuclear Security Administration, headed by Gen. John Gordon. Gordon has the credentials and experience to do the job, but he will be saddled with many of the same personnel who have resisted all efforts to reform the agency. Officials from within the DOE Office of the Secretary handpicked his staff for him; these officials have repeatedly chosen "science" over security, as if these were somehow incompatible.

How did we get here? My intent is to provide some background and context for understanding the mess within DOE and its national laboratory complex. This is a tale of cover-ups, complacency, bungling, and outright dishonesty. I watched as senior DOE officials repeatedly lied under oath during congressional testimony. Lurking in the background, of course, were the Chinese fundraising allegations and investigations of the transfer of missile-guidance technology and supercomputers to China. I never saw any direct evidence of a linkage between fundraising and these scandals. But the facts—that the Chinese were spying, and that other foreign intelligence services were feasting on the DOE labs—are undeniable. The consequences of the loss of nuclear secrets, technological know-how, and classified information during this period could be devastating to our national security.

THE CHINESE SPY THREAT

Our first indications that the Chinese had penetrated our nuclear-weapons labs came in early 1995. We gradually became aware of a broad Chinese intelligence assault on the labs, one that had been underway for at least 15 years. Key officials in the Clinton White House were alerted to our findings in the summer of 1995, but for the next two years their response was, at best, feeble. In May 1999, the Cox Committee report finally told the world about China's success against U.S. nuclear secrets, but, by that point, the damage was done.

The administration's response was to "shoot the messenger." They sought to undermine the credibility of our warnings of Chinese espionage—and in the process, they drowned out our warnings of long-standing security vulnerabilities and counterintelligence shortfalls.

As DOE's director of intelligence, I bore the brunt of many of these attacks; I was demoted in 1998 and forced out of the department in 1999. My successor told me that I had single-handedly "destroyed DOE," and that I was a pariah in the department. I soon read in the Washington Post and elsewhere that I was a "dangerous demagogue," a "great impostor," "obsessed," and even that I resembled Star Trek's Captain Kirk. (I never did figure out whether that was a compliment or a criticism.) Reporters, citing "anonymous" sources, accused me of unfairly singling out one man, Wen Ho Lee, as the culprit in the case. Racism and xenophobia were imagined in media accounts to explain the events of the past four years. This was pretty heavy stuff for someone who has spent most of his career trying to stay out of the public eye; but it has become routine treatment for whistle-blowers in this administration. I was not alone; other DOE security officials were subjected to equal or worse treatment at the hands of the Clinton political appointees within the department.

I was director of intelligence from 1994 to 1998; in 1995, I also became director of counterintelligence (CI) at the department. I was thus responsible for the management of all intelligence and CI activities within the department and at the DOE laboratories. When I took over, I found the CI program in total disarray. Despite numerous espionage attacks on the labs—dating back to the Manhattan Project in the 1940s—CI was a fairly new program at DOE. The Bush administration, recognizing the threat to the labs, had done a number of important reviews and began to implement a viable CI program. The program faltered, however, because it commanded little respect from lab scientists and DOE managers. The arrival of the Clinton team in 1993 stopped the program in its tracks. FBI agents on loan to DOE were drive out of the department, and security in general received little attention from the new appointees. Funding was reduced, hiring was frozen, and personnel slots were cut.

Meanwhile, the labs were opening up at an alarming rate. Visits from, and exchanges with, foreign visitors—particularly those from such sensitive countries as China and Russia—were encouraged, and areas of the labs were opened up to facilitate the burgeoning presence of these visitors. These trends had started late in the Bush administration, but the new team relaxed even further the security rules governing such visits. The influx of foreign visitors quickly outstripped the ability of the CI team at the labs to keep up with it. Lab managers considered CI mostly a nuisance, in any case, and Washington's new emphasis on "openness" provided the excuse to further reduce CI funding and staff. The Lawrence Livermore lab had (and has) a good CI program, staffed with experienced CI professionals, but lab management was steadily reducing its funding and trimming its staff.

Counterintelligence at Los Alamos was widely considered a joke within both the DOE complex and the CI community. Funding for CI was in a steep decline, and the CI staff there was inexperienced and inept. Later reports documented the bungled management of the Lee case by the Los Alamos CI staff; CI officials were also complicit in the relaxation of safeguards on foreign visitors. Washington had been signaling, through its decisions on budgets and programs, that CI was largely a waste of time and money; this message found a very receptive audience at the labs. It was an ideal climate for espionage—under the guise of scientific exchanges and visits.

China's espionage objectives against the DOE labs were clear: Nuclear deterrence is a cornerstone of Chinese strategic planning. China has opted for a nuclear force that could survive a nuclear attack and retaliate with enough weapons to inflict great damage on the attacker. They have not sought a large missile inventory similar to that of the U.S. or Russia; they have calculated, instead, that a survivable capability would deter the U.S. or Russia from using force to thwart Chinese regional objectives—vis-a-vis Taiwan, for example.

The keys to such a survivable nuclear force were new mobile missiles and the development of smaller, lighter, and more efficient warheads. The current Chinese ICBM force is roughly similar to that fielded by the U.S. in the 1960s—heavy, inaccurate, and with slow reaction times in the event of a crisis. The Cox Committee report documented how the Chinese obtained the crucial technological know-how to meet these objectives from the U.S.—through espionage and misguided technology transfers.

China fixed on the U.S. W–88 nuclear warhead, designed at Los Alamos, as the benchmark to guide its own warhead developments. China's selection of the W–88—hailed as the most modern nuclear warhead in the world—was initially surprising: The technical sophistication of the warhead seemed far beyond China's grasp. But the Chinese succeeded; by stealing a proven road map from the U.S. to guide their efforts, they avoided the expensive and time-consuming scientific blind alleys the U.S. had experienced before perfecting the technology.

We don't know for sure when the Chinese assault on U.S. nuclear secrets began. The initial exchange of scientists between China and the U.S. began late in the Carter administration. By the early 1980s, our scientists were already expressing concern about the depth of Chinese knowledge about U.S. nuclear-weapons developments and scientific trends. Lab apologists and others have asserted that much of China's knowledge came from the proliferation of nuclear information in the public domain—but in fact, Chinese scientists were asking detailed and well-informed questions about classified U.S. nuclear programs, and their command of detail did not come from reading Aviation Week & Space Technology. Surprisingly, however, until the mid 1990s, no one questioned the expanded interactions with the Chinese.

For reasons that remain classified, by 1995 DOE intelligence officers and lab experts were suspecting the possible acquisition of W–88 information by the Chinese. As our deliberations continued, the CIA alerted us to the existence of a Chinese document containing very detailed information about the W–88 warhead. The docu-

ment, now known as the "walk-in" document, has been the subject of much speculation; DOE officials, among others, have spread disinformation about this document in an attempt to discredit this important clue to Chinese espionage successes. The document did provide key evidence of Chinese acquisitions not just of the W–88, but of nearly all other U.S. missile warheads. There was (and is) considerable additional evidence, still classified, which corroborates our conclusion of Chinese nuclear espionage. The U.S. Intelligence Community Damage Assessment, completed in 1999, largely validated our conclusions.

THE ADMINISTRATION RESPONDS: AN OSTRICH STRATEGY

Many observers have minimized the importance of Chinese espionage, underscoring another conclusion of the damage assessment: "To date, the aggressive Chinese collection effort has not resulted in any apparent modernization of their deployed strategic force or any new nuclear weapons deployment." But no one had ever claimed otherwise; our focus was on the contribution U.S. nuclear secrets would make to future Chinese developments. They now have the technology; what they do with it will become clear over the next ten years.

Critics have also contended that even if the Chinese had stolen W–88 information, they could not actually manufacture such warheads. Such assertions were heard even from members of the intelligence community, mostly junior intelligence analysts lacking hands-on experience in developing nuclear weapons. Our lab experts, on the other hand, believed that any country with a modern aerospace industry or manufacturing infrastructure capable of producing precision munitions could also assemble such warheads. (CIA intelligence specialists testified before Congress that China would be unable to develop the "exotic materials" necessary for the W–88 warheads. When asked to give some examples of such materials, the specialists had to admit that they were clueless about the actual components of the W–88.)

We repeatedly warned administration officials about China's intelligence objectives and its aggressive attack on the labs. By mid 1997, we were able to forecast Chinese targets and objectives, particularly in the area of nuclear-weapons codes, simulations, and databases. Not once were our warnings heeded; sadly, we subsequently learned that our nuclear secrets had been placed on unclassified computer systems at the labs that were highly vulnerable to outside computer attacks. Such attacks were occurring at an alarming rate. It was not until 1999 that FBI computer forensic experts uncovered the magnitude of the potential loss of our nuclear secrets through computer attacks.

The administration had been very slow in responding to our warnings. The FBI's prosecution of the espionage case, formally underway since mid 1996, had been dilatory at best. Months went by with little or no FBI action; more than a year passed before the FBI even attempted to obtain technical coverage of the key suspect in the case. What the FBI did with the list of eleven other potential suspects provided to them by DOE in 1996 remains a mystery. We have since learned that the FBI missed numerous opportunities for breakthroughs in the case, largely through neglect and ineptitude.

Our first encounters with White House officials came in mid 1995, when DOE informed White House chief of staff Leon Panetta and CIA director John Deutch. DOE also had an obligation to inform Congress's intelligence committee in a timely fashion; by the spring of 1996, however more than a year after our initial findings we still had not made the trip to Capitol Hill. Deutch had pledged to handle this matter, but we had good reason to believe that he did not follow through. En route to Capitol Hill, we met with Sandy Berger, the President's deputy national security adviser. This meeting took place in April 1996 on a Saturday morning in the White House situation room. DOE and CIA officials met with Berger and another NSC staff member. Berger was told of our conclusions about the scope and magnitude of Chinese nuclear espionage and the DOE lab vulnerabilities that enhanced the Chinese prospects for success; Berger approved our plans to brief Congress. There was another briefing, that summer, for the NSC's Robert Bell; we also met with Vice President Gore's national security adviser on the same topic. There was little other contact or follow-up with the White House in 1996. That summer, we completed our obligations to notify Congress.

Despite a subsequent 1997 meeting with Berger, who had since been elevated to national security adviser, and a flurry of activity within the administration intended to finally initiate security reforms at DOE, nearly three years passed before we visited Capitol Hill again. Twice in 1998, DOE blocked efforts to transmit information to Congress regarding new developments in Chinese espionage. The only rationale offered was that "Congress only wanted to hurt the president on his China policy."

Meanwhile, DOE and the administration studied the issue to death. Most of the changes that DOE and lab officials are boasting about today were first proposed in 1996 and 1997, but fiercely resisted by lab managers and DOE officials. Even a Presidential Decision Directive, issued in 1998, mandating CI and security reforms met stiff resistance. More than a year passed before any concrete measures were taken, and the president's own Foreign Intelligence Advisory Board concluded in 1999 that DOE's response to even this presidential mandate was "gruding and belated."

The recent scandals show that the fault line between science and security within the labs has not been overcome. "Lab culture" is often cited as a serious threat to security, but this is little more than a convenience excuse for DOE incompetence and management complicity. In truth, the "culture" takes its cues from DOE headquarters, and in recent years these cues have emphasized "openness," interaction with nuclear scientists from Russia, China, India, and other sensitive countries, and the presence of such scientists in large numbers at our national labs (even—indeed especially—those entrusted with the design of our nuclear warheads).

Another threat arises from DOE's permission of unfettered travel by our scientists to sensitive countries. The security incidents associated with such travel are only now becoming known to the public, but the potential for espionage and the compromise of our most crucial secrets is staggering. In their travels, our scientists have had their laptop computers searched, briefcases rifled, and telephone conversations monitored; foreign intelligence services routinely seek to entrap the scientists. DOE officials and the administration have simply looked the other way, and have valued continued access to foreign scientists above security of the risks.

This, then, has been the atmosphere fostered by DOE within our national labs for much of the 1990s. Arrogance, complacency, disregard for the simplest counterintelligence safeguards, and a stubborn disbelief in the continuing existence of foreign intelligence threats have all combined to make our national labs a ripe target for espionage. Clearly, Secretary Richardson's reforms and efforts of the past year have fallen short of his guarantee that our nuclear secrets are now safe.

The fact is, we have yet to come to grips with espionage at our labs. These labs will continue to maintain and develop knowledge, information, and technology that are highly prized by foreign intelligence services. The attacks will continue, and the cyber capabilities of China, Russia, and others only compound the threat. DOE's response to the peril has, thus far, been pitiful. Moreover, a serious damage assessment has yet to be performed to measure the true extent of potential future threats. Who in this administration has even started to think about the implications of a technologically sophisticated opponent gaining access to hard information on U.S. warhead vulnerabilities? Undoing the damage to our nuclear-weapons policy and management will be one of the many challenges confronting the next administration.

WHL

POTUS REMARKS UPON DEPARTURE ON PATIENTS BILL OF RIGHTS

September 14, 2000

[...]

Q Mr. President, could you take a question? I was wondering, Mr. President, if you share the embarrassment that was expressed yesterday by the federal judge in New Mexico about the treatment of Wen Ho Lee during his year of confinement under federal authorities?

THE PRESIDENT: Well, I always had reservations about the claims that were being made denying him bail. And let me say -- I think I speak for everyone in the White House -- we took those claims on good faith by the people in the government that were making them, and a couple days after they made the claim that this man could not possibly be let out of jail on bail because he would be such a danger -- of flight, or such a danger to America's security -- all of a sudden they reach a plea agreement which will, if anything, make his alleged defense look modest compared to the claims that were made against him.

So the whole thing was quite troubling to me, and I think it's very difficult to reconcile the two positions, that one day he's a terrible risk to the national security, and the next day they're making a plea agreement for an offense far more modest than what had been alleged.

Now, I do hope that, as part of that plea agreement, he will help them to reconstitute the missing files, because that's what really important to our national security, and we will find out eventually what, if any, use was made of them by him or anybody else who got a hold of them.

But I think what should be disturbing to the American people -- we ought not to keep people in jail without bail, unless there's some real profound reason. And to keep someone in jail without bail, argue right up to the 11th hour that they're a terrible risk, and then turn around and make that sort of plea agreement -- it may be that the plea agreement is the right and just thing, and I have absolutely no doubt that the people who were investigating and pursuing this case believe they were doing the right thing for the nation's security -- but I don't think that you can justify, in retrospect, keeping a person in jail without bail when you're prepared to make that kind of agreement. It just can't be justified, and I don't believe it can be, and so I, too, am quite troubled by it.

Q -- clemency here? Are you thinking in terms of clemency for him, for Wen Ho Lee?

THE PRESIDENT: Well, I'd have to look at that. It depends on, if he's in fact -- he has said he's going to plead guilty to an offense which is not insubstantial, but it's certainly a bailable offense, and it means he spent a lot of time in prison that any ordinary American wouldn't have, and that bothers me.

[...]

THE WHITE HOUSE
Office of the Press Secretary

September 14, 2000

PRESS BRIEFING
BY
JOE LOCKHART

The James S. Brady Briefing Room

1:35 P.M. EDT

Q Joe, tell me about -- the President, was just talking about, about Wen Ho Lee. Has he registered these feelings to the Attorney General or just to Department lawyers?

MR. LOCKHART: I think you can assume by what he said there that is he is troubled by part of this, so I would expect that he will be looking for a more full explanation from them, have them look at this particular question that he raised and to report back.

Q But, Joe, he said he'd always been troubled by this, suggesting from the very outset. And, yet, he didn't express reservations to Justice -- thought it would have been improper or --

MR. LOCKHART: No. I think he said -- and I'm not going to try to decipher his words here, I thought he was very clear and I think no one could dispute that -- that there had been some questions, there was a rationale for holding someone without bail that seemed to disappear in a few day period. And I think his expression of trouble was in any case where people are held without bail. It's a basic tenet of our justice system and I think, as he said out there, he was troubled by the fact that this seemed to evaporate quickly.

Q Joe, just to follow up, if he was troubled by this from the outset and he felt an injustice was being done to this man, why didn't he step in sooner?

MR. LOCKHART: I would look at what he said --

Q He said, I always had trouble with this.

MR. LOCKHART: Josh, what he said when he was out there talking to you just a few moments ago was, there were a number of assurances that were made about the reasons for. And what he's troubled about here is that those seemed to evaporate between a hearing just a few days ago and the plea agreement that was announced yesterday.

Q Joe, he used the term "they," as in that he is not somehow part of federal law enforcement. Why would he do that?

MR. LOCKHART: Obviously, this case was prosecuted by the U.S. Attorney and those who are charged with that. The President is not charged with that.

Q Is anybody to be held accountable for conduct that the President says is very troubling?

MR. LOCKHART: I think as I said at the beginning here that he'll be looking for some answers to how this came about.

Q Well, I understand looking for answers, but my question is will anybody be held accountable?

MR. LOCKHART: Well, I think we tend to -- which is probably quite the opposite of what you tend to do -- is look for answers before we make judgments. You may want to make a judgment before you have the answers.

Q Was this criticism directed against the entire Justice Department, including Janet Reno, or just the prosecutors?

MR. LOCKHART: No, I think we'll look to have more information on this, but I wouldn't see it as a blanket criticism of anyone.

[...]

Q Joe, you said that you thought that the President's remarks about Wen Ho Lee shouldn't be seen as a blanket criticism of anyone. Does the President still think that Janet Reno and Bill Richardson are doing a good job and that they retain his confidence?

MR. LOCKHART: Yes. Susan?

[,,,]

Q Joe, the President has occasion from time to time, at official political events, to run into Asian American groups an Asian American activists. Have they raised the Wen Ho Lee case with him? And has he made any statements to them, similar to what you just made to us --

MR. LOCKHART: I'm not aware of any exchanges on that subject.

[...]

Q Joe, just to go back to Wen Ho Lee. If I understand you correctly, you're saying we should read the President's comments as to refer to what's happened in the last few weeks as this case has unwound, if you will. Would it be fair to assume that in the year or so before that, that Mr. Lee was in custody, the President didn't express any reservations to Justice?

MR. LOCKHART: Let me take another crack at this. The President expressed an unease with the concept of holding someone without bail. But what was troubling here was, after a series of assurances that this must be done because of the risk, that he thought that the timing of making that argument in a bail hearing and then just a few days later making a plea agreement that allowed him to go free raised some troubling questions. It seems to me that that's pretty straightforward.

Q And when you say the President expressed an unease, you mean he did that here in the Rose Garden or he's done that on previous occasions and, if so, where or when?

MR. LOCKHART: No. I think what he expressed here is that he has -- as a student of the law, that all Americans should have -- we should have a high threshold for the concept of holding someone without bail. But in this case, there were explicit assurances and reasons given, in this case.

And what's troubling is how quickly those seem to evaporate. And that's the point he was making. And it was limited to a very narrow piece to this, and I think it doesn't eliminate the crime that the gentleman pleaded guilty to and the important work that has been done on this. But there is a troubling aspect to this and he articulated what it was.

Q Has he, to your knowledge, expressed this unease prior to today? And, if so, when or where?

MR. LOCKHART: Not to me.

Q Does the President think he was deceived or misled or perhaps just not fully informed --

MR. LOCKHART: No. I think he said that the sequence of events raised some troubling questions. I think he certainly hopes that some answers are provided to ease that concern.

Q Does the President think Lee is deserved an apology?

MR. LOCKHART: I didn't ask him that question and I don't know the answer to it.

[...]

Q Joe, does the President believe that Asian Americans will express concern over the prosecution of Dr. Lee -- is there some questions about the role of race in this case --

MR. LOCKHART: I actually have never discussed that particular case. But I think the President has spoken clearly, in the aftermath of 1997 and some of the campaign finance investigations, that there are questions and that times in this country Asian Americans have been singled out unfairly. But in this particular case, he's never expressed that to me.

[...]

END 2:00 P.M. EDT

FW: 2000-9/15 POTUS and PM Vajpayee in photo op

September 15, 2000

[...]

Q Mr. President, if you always had doubts about whether Wen Ho Lee should be in jail, why didn't you share those with us until yesterday? And what do you say to Asian Americans who are concerned that his ethnicity may have played some role in the fact he was detained for so long?

THE PRESIDENT: First of all, I don't believe that. I don't think there's any evidence of that. Let's look at the facts here.

He has admitted to a very serious national security violation. And the most important thing now is that he keep his commitment to the government to work hard to figure out what happened to those tapes, what was on the tapes, to reconstitute all the information. That's very important.

In America, we have a pretty high standard, and we should, under our Constitution, against pre-trial detention. You have to meet a pretty high bar. I had no reason to believe that that bar had not been met. I think the fact that in such a short time frame there was an argument that he needed to stay in jail without bail, and then all of a sudden there was a plea agreement which was inconsistent with the claims being made, I thought -- that raises a question not just for Chinese Americans, but for all Americans, about whether we have been as careful as we ought to be about pre-trial detention.

And that's something that -- you know, in a government like ours, that was basically forged out of the concern for abusive executive authority, we sometimes make mistakes, but we normally make mistakes the other way, where we're bending over backwards. So that was my narrow question. Our staff has talked to the Justice Department about it. I'm sure I'll have a chance to talk to the Attorney General. It would have been completely inappropriate for me to intervene. And I don't believe she intervened. This was handled in the appropriate, normal way.

But I want you to understand, there was a serious violation here. He has acknowledged that. We have to get to the bottom of what was on all the tapes. But the narrow thing that I want to illustrate here is that when the United States, whenever we hold anybody in prison who can't get bail or who is interned for a long period of time before being charged and convicted and sentenced, we need to hit a very high threshold. That is the specific thing I

wanted to focus on. And I think that there ought to be an analysis of whether or not that threshold was crossed, in light of the plea bargain.

But the American people shouldn't be confused here. That was a very serious offense and we've got to try to reconstitute what was on the tapes. That's the number one thing we have to do for the national security now.

[end]

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 15, 2000

PRESS BRIEFING
BY
JOE LOCKHART

The James S. Brady Briefing Room

1:00 P.M. EDT

[...]

Q Joe, does the White House take issue with the characterization of the President's remarks yesterday on the Wen Ho Lee case as a rebuke of the Attorney General, of the Justice Department, of federal investigators?

MR. LOCKHART: I think I said yesterday it was not a rebuke of any particular person. I think the President made clear today that it was not -- that he did not view his remarks as directed toward the Attorney General. The President believes very strongly in her, the job she's done and in her abilities.

There are questions, though, as he said, that should be answered, and we hope they will be.

[...]

Q Joe, on Wen Ho Lee, what sort of follow up review is the White House considering?

MR. LOCKHART: Well, there were some discussions yesterday between the White House staff and the Justice Department. I think as the President -- get it today, he will take an opportunity at some point to talk to the Attorney General. I don't know what form it will take, but I think we're looking for some sort of process that can look at the narrow question that the President posed about holding someone pretrial, you know, without the possibility of bail.

I think he put into perspective today many of the important issues about what is crucial here is finding out what happened to the tapes, looking at a very serious national security violation by the gentleman in question. But there are questions about the legal issues surrounding the pretrial bail, and the timing of the bail hearing versus the arguments made in the bail hearing and the arguments made subsequently

in the plea bargain. That needs some examination. I think he was fairly clear on that.

Q Is he considering, though, appointing some sort of outside person?

MR. LOCKHART: The conversations haven't gone that far. I know that there was some very helpful advice provided on editorial pages about how we should do this -- the very same pages that provided exactly the opposite advice some months ago. But I think we'll ignore the editorials and rely on our own counsel.

Q Joe, do you think -- the President said he doesn't think racial bias was a factor here. Do you think that just an atmosphere of hysteria may have been a factor in --

MR. LOCKHART: I'll tell you, we take these kinds of issues very seriously. And I think when there are troubling questions, we think there should be answers. And I think the President was very clear on what the American people deserve. And it's certainly our hope, although it is not a hope that we genuinely believe anything will be done about, that others will take some time and do some examination.

I think there was a climate of -- a very difficult climate that was generated in this town when this story came out, a climate generated by some very explosive and near-hysterical investigative reporting, a climate that was fueled by explosive comments from political leaders, including members of Congress. And I hope everybody takes a moment, looks at how they handled this situation, and looks to see if in the future they can do better -- just as I think the executive branch will do.

Q Joe, do you believe that the media reporting and the explosive atmosphere that you've described affected the prosector's decisions on which charges to bring and how this case was --

MR. LOCKHART: That would be a question you would have to put to the prosecutors, and they will stand up, I'm certain, and answer their questions. It's certainly my hope that those who wrote the stories will also be willing to stand up and talk about their motivations and whether there is anything they can learn in the aftermath of their reporting.

Q What about the question of an apology? The judge raised the fact that he could not apologize for the executive branch, but he could apologize for what he thought had happened in his courtroom. Is there any thought being given to contacting Mr. Lee and making any kind of formal apology?

MR. LOCKHART: I think given the limited and the proper role, and hands-off role that was played here by the White House, there is no discussion of that.

I think the President's obligation, as he addressed directly yesterday and then again this morning, was when questions are raised, when they are legitimate questions, when people are troubled by things -- and he, indeed, is troubled, himself, by some of these questions -- we should look at it. We should look at it and see what it is we can learn from this experience and see if anything needs to be done to improve in the future.

Q So who should apologize in this case here? Is Mr. Lee due an apology?

MR. LOCKHART: I'm in no position to make a judgment on that.

Q Joe, can you clarify something I think you said this morning? The President, when he had the opportunity, I guess, to talk about this earlier but chose not to talk about it until yesterday, you suggested that the press would have jumped on him if he had made a statement

earlier --

MR. LOCKHART: No. I think, quite rightly, the President -- again, we're looking at a very narrow band of issues here in this case, and we shouldn't loose sight of that. But there were -- he had an understanding of the reasons for holding this gentleman without bail, and within the last week or so -- and I think, as he said this morning, it is a very high standard in this country, as it should be. I think he said that we often lean in the other direction on this, for good reason.

The questions are generated, the specific questions are generated from the fact that between a bail hearing on one day and three or four days later, those reasons seem to have dissipated in a plea agreement, as far as the risk of -- posed by allowing the gentleman before a trial out of prison.

So I think he has a general, as I think most Americans do, high standard, and always a sense of unease when someone is being held without the possibility for bail. And in this question -- the questions are generated and derived from, just in the last week, you know, the difference between where they were from the bail hearing and where they were in the trial, or the plea agreement.

Q But it wasn't a fear of an adverse press reaction that kept him from speaking out earlier?

MR. LOCKHART: No, I think the -- I think what I was referring to yesterday, and I think he touched on a little bit this morning is, that there were certainly -- and the little that he knew about this -- there was a case made for why they had to go in this direction. And I think that you would all understand, and would have, I think, had a field day reporting, if somehow he tried to intervene in this case, as somehow being politically motivated.

Q Could the President -- does the President think he could have done anything to sort of calm the hysteria you described earlier?

MR. LOCKHART: Well, let me tell you something, because I happened to be around here during that period, and I think most of you who talked to me on a variety of bases, heard a pretty clear and consistent message, which is -- and particularly with some news organizations -- that we believe that you were out ahead of yourself. There were a lot of people jumping to a lot of conclusions, and we ought to sit back and make suer that we know all the facts.

So I don't think that in this particular case that, at least from this particular podium in this particular building, we'll take the blame for creating whatever sort of environment we were in, in this case. And I would suggest that those of you who didn't talk to me during that period talk to your colleagues who did.

[...]

END 1:25 P.M. EDT

SUMMARY

Executive Business Meeting
Senate Judiciary Committee
Thursday, October 14, 1999, 10:00 a.m.
Dirksen Room 226

I. Executive Business:

Resolution on issuance of subpoenas pursuant to Rule 26 – Specter.
APPROVED, AS AMENDED [LEAHY AMENDMENT]
18 YEAS 0 NAYS

II. Nominations:

District Court Judges – **UNANIMOUSLY REPORTED FAVORABLY**

Ronald A. Guzman, of Illinois, to be United States District Judge for the Northern District of Illinois

William J. Haynes, Jr., of Tennessee, to be United States District Judge for the Middle District of Tennessee

Barbara M. Lynn, of Texas, to be United States District Judge for the Northern District of Texas

Sentencing Commissioners – **HELD OVER**

Diana E. Murphy, of Minnesota, to be United States Sentencing Commission Member and Chair

Ruben Castillo, of Illinois, to be United States Sentencing Commission Member

Sterling R. Johnson, Jr., of New York, to be United States Sentencing Commission Member

Elton J. Kendall, of Texas, to be United States Sentencing Commission Member

ATTENDANCE LIST
SENATE JUDICIARY COMMITTEE

DATE OF MARK-UP: October 14, 1999
[Time: 10:00 a.m.]

TOPIC OF MARK-UP: Subpoena Resolution [Specter]; District Court Judge Nominations; and Sentencing Commissioner Nominations.

MEMBERS	PRESENT
Mr. Thurmond	X
Mr. Grassley	X
Mr. Specter	X
Mr. Kyl	
Mr. DeWine	
Mr. Ashcroft	
Mr. Abraham	X
Mr. Sessions	X
Mr. Smith	X
Mr. Leahy	X
Mr. Kennedy	
Mr. Biden	
Mr. Kohl	X
Mr. Feinstein	X
Mr. Feingold	
Mr. Torricelli	X
Mr. Schumer	
Mr. Hatch, Chairman	X

SENATE JUDICIARY COMMITTEE

DATE: October 14, 1999

VOTE ON: Specter Resolution on the issuance of subpoenas pursuant to Rule 26.

APPROVED UNANIMOUSLY, AS AMENDED [Leahy Amendment]

YEAS	NAYS	
X		Mr. Thurmond
X		Mr. Grassley
X		Mr. Specter
P		Mr. Kyl
P		Mr. DeWine
P		Mr. Ashcroft
X		Mr. Abraham
X		Mr. Sessions
P		Mr. Smith
X		Mr. Leahy
P		Mr. Kennedy
P		Mr. Biden
X		Mr. Kohl
X		Mrs. Feinstein
P		Mr. Feingold
X		Mr. Torricelli
P		Mr. Schumer
X		Mr. Chairman
18	0	TOTAL

10/14 Specter Resolution, as amended

Approved 18 years O Hays

Leahy Amended Version of Resolution Approved by Judiciary Comm. ON 10/14/99.

RESOLUTION

Be it resolved that, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary hereby authorizes its Chairman, in consultation with the ranking member, to issue to the Honorable Attorney General Janet Reno the subpoena attached as Exhibit 1 to this resolution, which commands Attorney General Reno to produce certain documents within the possession, custody, or control of the Department of Justice including, but not limited to, the FBI, to the Judiciary Committee offices within one week of the date on which the subpoena is issued, ON condition that the requested documents are not provided ~~within one week~~ by Tuesday, to the extent that the requested documents are not protected by grand jury secrecy rules and would not adversely effect an ongoing criminal investigation.

Attachment A

Definitions

A. The term "document" as used in this subpoena includes all memoranda, reports, agreements, notes, correspondence, filings, records, and other documents, data or information in any form, whether physical, electronic or otherwise.

Instructions

A. This subpoena is continuing in nature. Any document not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto.

B. If you believe any responsive documents are protected by a privilege, please provide a privilege log which (1) identifies any and all responsive documents to which a privilege is asserted, (2) sets forth the date, type, addressee(s), author(s) (and, if different, the preparer and signatory), general subject matter, and indicated or known circulation of the document and (3) states the privilege asserted in sufficient detail to ascertain the validity of the claim of privilege.

C. If you have knowledge that any subpoenaed document as defined herein has been destroyed, discarded or lost, identify the subpoenaed document and provide an explanation of the destruction, discarding, loss or disposal.

D. Subject to the foregoing, please produce the following:

1. Any and all documents relating to the investigation of allegations of Chinese espionage at U.S. nuclear facilities including, but not limited to, Wen Ho Lee, produced or obtained prior to September 22, 1999 (the date the Department of Justice announced that it was initiating a re-investigation).
2. The full text of Charles La Bella's memorandum concerning his recommendation for appointment of a campaign finance independent counsel and any supporting documents.
3. Any and all documents relating to the allegations against, cooperation from and plea bargain with Peter H. Lee.
4. Any and all documents relating to the allegations against, cooperation from and plea bargain with Johnny Chung.
5. Any and all documents relating to the allegations against, cooperation from and plea bargain with Charlie Trie.
6. Any and all documents relating to the allegations against, cooperation from and plea bargain with John Huang.

10/14 Specter Resolution, as amended
Approved 18 years 0 days

Leahy Amended Version of Resolution Appd by Judiciary Comm. on 10/14/97

RESOLUTION

Be it resolved that, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary hereby authorizes its Chairman, in consultation with the Ranking member, to issue to the Honorable Attorney General Janet Reno the subpoena attached as Exhibit 1 to this resolution, which commands Attorney General Reno to produce certain documents within the possession, custody, or control of the Department of Justice including, but not limited to, the FBI, to the Judiciary Committee offices within one week of the date on which the subpoena is issued, on condition that the requested documents are not provided ~~within one week~~ by Thursday, to the extent that the requested documents are not protected by grand jury secrecy rules and would not adversely effect an ongoing criminal investigation.

10/14 Not Offered Hatch

Purpose: An Amendment In the Nature of an Addition to the Resolution

IN THE SENATE OF THE UNITED STATES- 106TH CONG., 1ST SESS.

Committee Resolution

Mr. Hatch (for himself) proposes an amendment to a Committee resolution, as follows:

At the end of the Resolution add the following:

Viz:

Whereas the Senate Committee on the Judiciary is required to conduct its business in compliance with the Standing Rules of the Senate;

Whereas, pursuant to Rule 26.1 of the Standing Rules of the Senate, only standing committees and any subcommittee of any such committee is authorized to hold hearings, to sit and act at such times and places during the sessions, recesses and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witness and the production of documents, to take such testimony and to make such expenditures out of the contingent fund of the Senate as may be authorized by resolutions of the Senate;

Whereas, pursuant to Rule 25.4(b)(4) of the Standing Rules of the Senate, no committee may establish any subunit of that committee other than a subcommittee, unless the Senate by resolution has given permission therefor;

Whereas, pursuant to Rule 25.4(b)(1) of the Standing Rules of the Senate, each Senator may serve on not more than three subcommittees of each committee listed in Rule 25.2, including the Senate Committee on the Judiciary:

Now, therefore; be it

Resolved,

(A) Senator Specter is been reassigned from the Subcommittee on the Constitution, Federalism and Property Rights and added

to the Subcommittee on Administrative Oversight and the Courts, and Senator Abraham is reassigned from the Subcommittee on Administrative Oversight and the Courts and added to the Subcommittee on the Constitution, Federalism and Property Rights

(B) That, after consultation among the Chairmen and Ranking Members of the Senate Committee on the Judiciary and its Subcommittee on Administrative Oversight and the Courts, that Subcommittee shall conduct bipartisan oversight of the actions at the Branch Davidian compound in Waco, Texas by Federal, State and local government officials, including the Department of Justice, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms; the Department of Defense; and the law enforcement agencies of the State of Texas, including the Texas Rangers; and the investigation of these activities by the above-referenced personnel, agencies and departments; and Justice Department investigations and prosecutions of matters related to campaign finance and Chinese espionage within the jurisdiction of the Committee on the Judiciary;

(C) That the bipartisan oversight investigation conducted by the subcommittee be conducted on a bipartisan basis in accordance with the established rules of the Judiciary Committee and the Subcommittee on Administrative Oversight and the Courts;

(D) That any oversight investigation of the Waco incident be conducted in consultation with Special Counsel John C. Danforth; and

(E) That any oversight investigation be conducted in a manner which does not directly interfere with ongoing criminal prosecution.

SUMMARY
Executive Business Meeting
Senate Judiciary Committee
November 17, 1999
SD 226 at 11:00 A.M.

I. **Executive Business:**

Resolution of issuance of subpoenas pursuant to Rule 26. [Specter]
APPROVED, NOT UNANIMOUSLY, BY VOICE VOTE
All Democrats requested to be recorded as objecting to the Specter resolution.

Prior to the vote, a Leahy substitute resolution was defeated, not unanimously, but voice vote. Senator Biden requested to be recorded as objecting to the Leahy substitute.

II. **Nominations:**

Circuit Court

Thomas L. Ambro, of Delaware, to be United States Circuit Court Judge for the Third Circuit -- **APPROVED BY UNANIMOUS CONSENT**

Kermit Bye, of North Dakota, to be United States Circuit Court Judge for the Eighth Circuit -- **APPROVED BY UNANIMOUS CONSENT**

District Court

George B. Daniels, of New York, to be United States District Court Judge for the Southern District of New York

Joel A. Pisano, of New Jersey, to be United States District Court Judge for the District of New Jersey

BOTH DANIELS AND PISANO WERE APPROVED BY UNANIMOUS CONSENT

ATTENDANCE LIST
SENATE JUDICIARY COMMITTEE

DATE OF MARK-UP: November 17, 1999
Time: 11:30 a.m.

TOPIC OF MARK-UP: Resolution of issuance of subpoenas pursuant to Rule 26 [Specter]; the nominations of Thomas L. Ambro, Kermit Bye, George B. Daniels and Joel A. Pisano; and consideration of S. 1561, Date-Rape Drug Control Act of 1999 [Abraham]; and, H.R. 1658, Civil Asset Forfeiture Reform Act; S. 1172, Patent Term Restoration Review Procedure for Certain Drug Products [Torricelli].

MEMBERS	PRESENT
Mr. Thurmond	X
Mr. Grassley	X
Mr. Specter	X
Mr. Kyl	X
Mr. DeWine	
Mr. Ashcroft	X
Mr. Abraham	X
Mr. Sessions	X
Mr. Smith	X
Mr. Leahy	X
Mr. Kennedy	
Mr. Biden	X
Mr. Kohl	
Mrs. Feinstein	X
Mr. Feingold	
Mr. Torricelli	X
Mr. Schumer	X
Mr. Hatch, Chairman	X

SENATE JUDICIARY COMMITTEE

DATE: November 17, 1999

VOTE ON: Resolution on issuance of subpoenas pursuant to Rule 26. [Leahy substitute.]

DEFEATED BY VOICE VOTE, NOT UNANIMOUSLY

**Note: Senator Biden requested to be recorded as opposing the Leahy substitute.

MEMBERS INDICATED WERE PRESENT WHEN THE VOTE WAS TAKEN

	Present for vote
Mr. Thurmond	X
Mr. Grassley	X
Mr. Specter	X
Mr. Kyl	
Mr. DeWine	
Mr. Ashcroft	X
Mr. Abraham	X
Mr. Sessions	X
Mr. Smith	X
Mr. Leahy	X
Mr. Kennedy	
Mr. Biden**	X
Mr. Kohl	
Mrs. Feinstein	X
Mr. Feingold	
Mr. Torricelli	
Mr. Schumer	X
Mr. Hatch, Chairman	X
TOTAL	12

Approved, Not Unanimously

11/17/99

RESOLUTION

Be it resolved that, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary hereby authorizes its Chairman, in consultation with the ranking member, to issue the subpoenas listed below, on condition that the requested individuals do not voluntarily appear to testify before the Subcommittee on Administrative Oversight and the Courts when invited, or, in the case where documents have been requested, on condition that the requested documents are not provided to the Committee within two weeks, to the extent that the requested documents are not protected by grand jury secrecy rules, and would not adversely effect an ongoing criminal investigation.

I. Transfer of Nuclear Weaponry to China

A. Alleged Espionage

Subpoena #1 -- Attorney General Janet Reno (Previously Authorized)

1. Any and all documents relating to the allegations against, cooperation from and plea bargain with Peter H. Lee including, but not limited to, the following:

   A. A copy of the plea agreement with Peter Lee.
   B. All sentencing documents submitted to the court in the Peter Lee case, including but not limited to: (1) Attachments A-N of the Department's Sentencing Memorandum of March 26, 1998 and (2) All papers referred to by AUSA Shapiro on pages 25 and 27 of the sentencing transcript.
   C. The video-taped confession of Peter Lee.
   D. Transcripts of all interviews with Peter Lee.
   E. All documents outlining the evidence against Peter Lee.
   F. All questions and answers from Peter Lee's polygraph test.
   G. Statement of Dr. Thomas Cook, Los Alamos technical staff member.
   H. Statements of Dr. Jeffrey Thompson, Dr. Gary Lindford, and Dr. Erik Storm on behalf of Peter Lee.
   I. Statement of Dr. Roy Johnson, Lawrence Livermore Nuclear Laboratory.
   J. Statement of Dale Nielsen, Sr., Associate Director, Emeritus, Lawrence Livermore Nuclear Laboratory.
   K. Statement of Dr. Bruce Lake, Peter Lee's supervisor at TRW.
   L. Statement of Dr. Richard Twogood, naval radar expert.
   M. Copies of Peter Lee's falsified travel documents.
   N. Copies of the e-mail and transcripts referred to in page 12 of FBI Agent Cordova's statement.

O. All documents underlying the request for the FISA warrants for Peter Lee.

2. Any and all documents relating to the investigation of allegations of Chinese espionage at U.S. nuclear facilities including, but not limited to, Wen Ho Lee, produced or obtained prior to September 22, 1999 (the date the Department of Justice announced that it was initiating a re-investigation) including, but not limited to, the following:

   A. The complete record of prior investigations of Wen Ho Lee (including Tiger Trap and the one that preceded Kindred Spirit).
   B. The complete record of Wen Ho Lee's relationship with other U.S. government agencies.
   C. The Dillard review.
   D. A complete set of DOJ/FBI documents on the Wen Ho Lee case from mid-1988 to April 1999.
   E. All questions and answers from the polygraph tests of Wen Ho Lee.
   F. All 302's from the FBI interviews with Wen Ho Lee.

Subpoena #2 -- Secretary of Energy Richardson

1. Any and all documents relating to the Department's investigation of Wen Ho Lee including, but not limited to, the following:

   A. The results of the DOE panel that reviewed the 1995 "walk-in" document relating to the W-88 warhead.
   B. All polygraph questions asked to Wen Ho Lee and the results thereof.

2. Any and all documents relating to the Department's investigation of Peter Lee including, but not limited to, the following:

   A. The Department's damage assessment on information revealed by Peter Lee in 1985.

Subpoena #3 -- CIA Director Tenet

1. Any and all documents relating to the Agency's investigation of Wen Ho Lee including, but not limited to, the following:

   A. The 1995 "walk-in" document relating to the W-88 warhead.
   B. The CIA assessment of the 1995 "walk-in" document.
   C. The complete record of Wen Ho Lee's relationship with other U.S. government agencies.

#4 Peter Lee

#5 Dr. Thomas Cook, DOE expert on hohlraums (used to test nuclear devices).

#6 Jonathan Shapiro, former AUSA in California, Peter Lee prosecution team.
#7 Dr. Roy Johnson, Lawrence Livermore Nuclear Laboratory Classification Officer.
#8 Dr. Richard Twogood, private expert on naval radar.

B. Satellite Technology Transfer.

Subpoena #9 -- Attorney General Janet Reno

1. Any and all documents relating to the Department's input into the decision to grant waivers to Loral Space and Communications Ltd. and the Hughes Electronics Corporation to launch their satellites from Chinese rockets and/or relating to the Department's assessment and investigation of alleged technology transfers to China from Loral and Hughes including, but not limited to, the following:

   A. The text of the Independent Review Committee report that Nick Yen faxed to the Chinese in May 1996.
   B. All documents which outline concerns about the impact of the February, 1998 sanctions waiver on the potential criminal case against Loral and Hughes.

Subpoena #10 -- Secretary of Defense Cohen

1. Any and all documents relating to the Department's input into the decision to grant waivers to Loral Space and Communications Ltd. and the Hughes Electronics Corporation to launch their satellites from Chinese rockets and/or relating to the Department's assessment and investigation of alleged technology transfers to China from Loral and Hughes including, but not limited to, the following:

   A. Classified reports on the impact of information transferred by Loral and Hughes to China.
   B. All licensing documents related to the case.

Subpoena #11 – Secretary of State Albright

1. Any and all documents relating to the Department's input into the decision to grant waivers to Loral Space and Communications Ltd. and the Hughes Electronics Corporation to launch their satellites from Chinese rockets and/or relating to the Department's assessment and investigation of alleged technology transfers to China from Loral and Hughes including, but not limited to, the following:

   A. Classified reports on the impact of information transferred by Loral and Hughes to China.

B. All licensing documents related to the case.

II. Waco.

Subpoena #12 -- Attorney General Janet Reno

1. Any and all documents relating to the actions of any Department personnel, including the FBI, at the Branch Davidian compound in Waco, Texas from February 28, 1993 to April 19, 1993, and the investigation of these activities including, but not limited to:

   A. All video and or audio recordings made during the standoff.
   B. All 302's from HRT members ans SWAT team members involved in the standoff.
   C. All arson team reports and the FBI operations plan used by the HRT.
   D. The master index of evidence which cross references the Texas Rangers' evidence numbers with FBI "K" and "Q" numbers, FBI laboratory numbers, and trial evidence numbers.
   E. All forensic and ballistic tests performed by or for the FBI on Waco evidence, as well as summaries and results of those tests.
   F. Trial materials prepared for the criminal case, including all pre-trial interviews of HRT personnel.
   G. Files compiled from the Office of the Deputy Director of the FBI.
   H. Any and all document indexes prepared by the Department of Justice or its sub-agencies in preparation for criminal or civil trial, the 1995 hearings before the House of Representatives and the Senate, or ongoing Congressional or Independent Counsel investigations.

Subpoena #13 -- Secretary of Defense Cohen

1. Any and all documents relating to the actions of any Department personnel, including the Special Forces, Army, and National Guard, at the Branch Davidian compound in Waco, Texas from February 28, 1993 to April 19, 1993, and the investigation of these activities including, but not limited to, the following:

   A. A matrix showing: (1) when Special Forces, Army, or National Guard personnel were present at the Branch Davidian compound, and (2) indicators of major items of equipment or other types of support to law enforcement.
   B. All documents which support the matrix.

#14 Bill Blagg, USATTY, WDTexas.
#15 Bill Johnston, AUSA, WDTexas.
#16 Marie Hagen, Torts Division, DOJ.

#17 James Francis, Jr., Texas Rangers.
#18 Dick Rogers, Hostage Rescue Team.
#19 Jeffrey Jamar, FBI On-Scene Commander.
#20 David Corderman, FBI.
#21 Richard Intellini, FBI - Corderman's supervisor.
#22 Charles Riley, Hostage Rescue Team.
#23 Lon Horiuchi, FBI Sharpshooter.
#24 Albert Ligni, FBI.
#25 The pilot or pilots of the FBI aircraft from which FLIR tapes were made.

III. Oversight of Department of Justice on Campaign Finance Investigations and Prosecutions.

Subpoena #26 – Attorney General Janet Reno (Previously Authorized)

1. The full text of Charles La Bella's memorandum concerning his recommendation for appointment of a campaign finance independent counsel and any supporting documents.
2. Any and all documents relating to the allegations against, cooperation from and plea bargain with Johnny Chung including, but not limited to, the ten pieces of intelligence mentioned in the DOJ Inspector General report and all supporting analysis.
3. Any and all documents relating to the allegations against, cooperation from and plea bargain with Charlie Trie including, but not limited to, the ten pieces of intelligence mentioned in the DOJ Inspector General report and all supporting analysis.
4. Any and all documents relating to the allegations against, cooperation from and plea bargain with John Huang including, but not limited to, the ten pieces of intelligence mentioned in the DOJ Inspector General report and all supporting analysis.

#27 David Vicinanzo, Chief, DOJ Campaign Finance Task Force, John Huang and Charlie Trie prosecution teams.
#28 Daniel O'Brian, Supervisory Attorney, DOJ Camp. Fin. Task Force, John Huang prosecution team.
#29 Lawrence Ng, DOJ, John Huang prosecution team.
#30 Charles LaBella, Supervisory Attorney, DOJ Camp. Fin. Task Force, Johnny Chung prosecution team.
#31 Michael T. McCaul, DOJ, Johnny Chung prosecution team.
#32 James McMahon, DOJ, Johnny Chung prosecution team.
#33 John Sullivan, DOJ, Johnny Chung prosecution team.
#34 Daniel O'Brian, DOJ, Johnny Chung prosecution team.
#35 Nora Manella, DOJ, Johnny Chung prosecution team.
#36 David Scheper, DOJ, Johnny Chung Prosecution team.

#37 Geoffrey Hobart, DOJ, Charlie Trie prosecution team.
#38 George Vien, DOJ, Charlie Trie prosecution team.

Oct 18, 2000

Resolution

Be it resolved that, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary hereby authorizes its Chairman, in consultation with the Ranking Member, to issue to the Honorable Bill Richardson, Secretary of Energy, the subpoena attached as Exhibit 1 to this Resolution, if by November 8, 2000, Secretary Richardson has not produced the documents described in Attachment A, and/or has not agreed to testify before the Senate Judiciary Committee on or before December 5, 2000.

In the event the subpoena is served, the Chairman, in consultation with the Ranking member, may determine an appropriate date on which to compel the witness' testimony and/or production of documents.

ATTACHMENT A

Definitions

I. The term "document" as used in this subpoena includes all records, notes, memoranda, documents, data or information in any form, whether physical, electronic or otherwise.

II. The term "you" means you and any other employee or independent contractor of the Department of Energy.

Instructions

I. This subpoena is continuing in nature. Any document not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto.

II. If you believe any responsive documents are protected by a privilege or ongoing investigation, provide a privilege log that (1) identifies any and all responsive documents to which a privilege is asserted, (2) sets forth the date, type, addressee(s), author(s) (and, if different, the preparer and signatory), general subject matter, and indicated or known circulation of the document (to senior Department of Energy employees or anyone outside the Department of Energy), and (3) states the privilege asserted in sufficient detail to ascertain the validity of the claim of privilege.

III. If you have knowledge that any subpoenaed document as defined herein has been destroyed, discarded or lost, identify the subpoenaed document and provide an explanation of the destruction, discarding, loss or disposal.

IV. Subject to the foregoing, produce the following:

A. All documents related to the Department of Energy's (DoE) investigation of Dr. Wen Ho Lee, including the DoE's cooperation with the Federal Bureau of Investigation and all other intelligence agencies in assessing any allegations against Dr. Lee. This includes, but is not limited to, the following:

1. the documents related to racial profiling that Judge Parker requested for his *in camera* review;
2. the "Top Secret" memorandum prepared by Dr. Stephen Younger that describes the material Dr. Lee downloaded;
3. computer and electronic monitoring systems records related to Dr. Lee (from the NADIR system, the CFS logging system, the electronic monitoring system that detected Dr. Lee's attempts to regain access to the

X-Division after his clearance was removed, and any other system which would contain similar records);

4. the December 29, 1998 memorandum prepared by Ed Curran for Secretary Richardson which contains a chronology of events related to the December 23, 1998 polygraph of Dr. Lee;
5. all documents in the DoE CARDS system, or its predecessor system of records, related to Dr. Lee;
6. all documents about Dr. Lee in DoE counterintelligence files maintained by Robert Vrooman or any of his predecessors, successors, or subordinates;
7. all documents related to Dr. Lee's clearance and access, including the chronology prepared by Richard Schlimme;
8. all documents related to the decision to fire Dr. Lee;
9. all documents related to the decision to polygraph Dr. Lee on December 23, 1998;
10. all documents related to the DoE's knowledge of any relationship between Dr. Lee and Mrs. Sylvia Lee and the FBI or any member of the intelligence community;
11. all documents related to the decision to prosecute Dr. Lee;
12. all documents related to the decision to accept the plea deal with Dr. Lee; and
13. all documents related to the Kindred Spirit Administrative Inquiry.

Resolution

Be it resolved that, pursuant to its authority under Rule 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary hereby authorizes its Chairman, in consultation with the Ranking Member, to issue to the Honorable Secretary of Energy, Bill Richardson, the subpoena attached as Exhibit 1 of this Resolution, provided that said person refuses or fails to appear voluntarily to testify before the Senate Judiciary Committee on or before October 13, 2000.

In the event the subpoena is served, the Chairman, in consultation with the Ranking member, may determine an appropriate date on which to compel the witness' testimony.

Exhibit 1

UNITED STATES OF AMERICA

Congress of the United States

To Honorable Secretary of Energy Bill Richardson

, **Greeting:**

Pursuant *to lawful authority, YOU ARE HEREBY COMMANDED to appear before the* Committee on Judiciary *of the Senate of the United States, on* , 20, *at* o'clock m., *at their committee room* SD-246 , *then and there to testify what you may know relative to the subject matters under consideration by said committee.*

Hereof fail not, *as you will answer your default under the pains and penalties in such cases made and provided.*

To

to serve and return.

Given *under my hand, by order of the committee, this* day of , 20.

Chairman, Committee on