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Senate

(Legislative day of Tuesday, December 18, 2001)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the Honorable E. BENJAMIN NELSON, a Senator from the State of Nebraska.

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Dear Father, sovereign of this Nation, we press on with the work of the Senate with the message and meaning of this sacred season in our hearts. Although the Senators worship You in different liturgies based on their religious backgrounds, they all believe in You as sovereign of this Nation. Help them and their staffs work together in a way that exemplifies to our Nation that people who trust in You can trust one another; that people who experience Your goodness can be people of good will. May this historic Chamber be a place of creative exchange of insight that leads to greater unity around shared convictions about what is best for America. You are here listening, watching, judging. When we end this week, may we hear Your affirmation: ''Well done, you have pulled together for the sake of America.'' Amen.

PLEDGE OF ALLEGIANCE

The Honorable E. BENJAMIN NELSON led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. BYRD).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, December 20, 2001.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable E. BENJAMIN NELSON, a Senator from the State of Nebraska, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. NELSON of Nebraska thereupon assumed the chair as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2002—CONFERENCE REPORT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now proceed to consideration of the conference report to accompany H.R. 3061 which the clerk will report.

The assistant legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3061) making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies for the fiscal year ending September 30, 2002, and for other purposes, having met, have agreed that the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment and the Senate agree to the same, signed by all conferees on the part of both Houses.

(The conference report is printed in the House proceedings of the RECORD of Wednesday, December 19, 2001.)

The ACTING PRESIDENT pro tempore. The Senator from Nevada.

Mr. REID. Mr. President, I ask unanimous consent that the time that has been assigned run equally against all parties during this time. There is no one here on the bill.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

NEBRASKA SENATORS

Mr. REID. Mr. President, until someone comes to work on these bills, I would like to mention one thing. I wanted to say this last night. The hour was late. The Presiding Officer was the same.

I have had the good fortune during the time I have served in the Senate to work with some outstanding Senators. The two who come to my mind are from the State of Nebraska. Senator Jim Exon was such a unique individual. I have so many fond memories of this great big man who had such a big body, but in that big body was a great big heart. He was a tremendous Senator. I miss him a great deal.

Then, of course, to serve with BOB KERREY is an experience. He was truly a free spirit, someone who was not only an American hero, having the Congressional Medal of Honor, but someone who was as valiant in his legislative duties as he was in his military duties.

Following in the footsteps of these two men whom I enjoyed serving with so much is the Presiding Officer, a man who served as Governor of the State of Nebraska and came to the Senate with great credentials from my perspective. On paper, the Presiding Officer has all the credentials to be a great Senator. A lot of people are good on paper in all walks of life. But in the short time I have served with the Presiding Officer as a Senator from Nebraska, his credentials certainly have served him well in the Senate because the Presiding Officer is as good a person as he is on paper.

I extend my congratulations to the people of Nebraska for sending to the Senate a person with such great qualities. I am sure the people of Nebraska appreciate Senator BEN NELSON. But I am not sure they appreciate him enough. For those of us who work personally with the Presiding Officer on a daily basis, in some of the most difficult legislative matters that ever come before this country, I can say without hesitation that Senator BEN NELSON is in the same caliber as Nebraskans who have served before him and with whom I have had the honor of serving: Senators Exon and KERREY.

Nebraska should be very proud of the dignity and the service of the three people I have had the good fortune of serving with in the Senate.

The ACTING PRESIDENT pro tempore. The Senator from Wyoming.

ECONOMIC STIMULUS

Mr. THOMAS. Mr. President, I rise to make a couple of general comments. As we move towards perhaps the final day, certainly very close to the final day of our time here, I hope we can move forward. We have three appropriations bills that we have been looking forward to discussing and have to finish before we end. There will probably be some discussion on particularly the Defense appropriations.

Nevertheless, the bill and the issue that I suppose we will talk about the most, and seems to be one that is not agreed to, is that of economic stimulus. Certainly that will be coming forward. We have talked about it for a very long time. The President has talked about it. We have had meetings about it. The House obviously has worked out a separate proposal for us. I am hopeful that as we undertake this effort, we will decide, as we should on all of the topics that come before us, what do we want to see as the result.

So often we get wrapped up entirely with the details of what is going on here, and the details obviously are important, but what is more important is what it is we want to accomplish and how will what we are talking about do that.

Certainly, I hope we talk about what is the purpose of an economic stimulus package. Obviously, we are in a recession. No one seems to know exactly what the best techniques are to deal with stimulating the economy. We have listened to all kinds of economists, including our nationally celebrated economists. There are different ideas about that. Certainly, we want to see if we can't create more jobs, if we can't strengthen the economy.

If it is called an economic stimulus, then certainly that has to be the purpose.

How do you do that? You do it by creating jobs and investment. You do it by putting more money in the hands of the people in the countryside, particularly those who have suffered, of course. That is another alternative. The proposals we have had do both of those things in varying degrees. So I hope we can do that.

There are those, of course, who believe that at this point an economic stimulus is not necessary. I don't agree with that, but it is a point of view. I was thinking this morning, listening to the TV, about politics. This is politics. Well, having different views is not unusual. Everyone in the country has different views. In many places, that is defined as standing up for what you believe. When we disagree here, it is suddenly called politics. I understand that. There are legitimate, different views.

I hope we can keep in mind that certainly one of the major purposes of an economic stimulus is to stimulate the economy, to create jobs. We are not looking for a continuing assistance program. We are looking for something that will cause jobs to come back, so people can spend money. The other thing that, obviously, we want to do is assist those who have suffered as a result of the September 11 tragedy.

I look forward to it. I hope we can do something that will have an impact. Frankly, we will be limited in time, but I hope we don't establish new entitlement programs through this kind of emergency program. We ought to really be serious about seeing what we can do that is effective in measuring against the results we would like to have.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

STIMULUS PACKAGE

Mr. REID. Mr. President, I didn't want this morning to disturb the mood of our last day here. Therefore, I didn't do anything about the message delivered from the House this morning. When she came in and bowed—and I appreciate the dignity that creates here—I had a big smile on my face. I wrote on my pad here ''laugh,'' because it is laughable.

A stimulus package now? What in the world are they trying to do in the House of Representatives? They are going home at 1:30 this afternoon. Did they think, after we worked on this so long and hard, we are going to accept that in the Senate? It makes the original bill they did that was so bad look good.

So I hope the American public understands the charade. That is what it is. The House of Representatives worked until 4:30 this morning coming up with a stimulus package strictly for political purposes. It has no substantive merit whatsoever. They knew that, and they know it has no chance of passing over here. That is too bad.

We started out with a stimulus package that made sense. Senator BYRD and I wanted to do something to create jobs. We knew that for every billion dollars spent on road building, 42 thousand jobs are created, and those 42,000 people would, of course, pay taxes and buy refrigerators and cars. The Republicans would not go along with that. We were always attempting to protect the American worker—their unemployment benefits, health benefits.

Because of the very narrowminded of the Republican House of Representatives, we are unable to do anything. That is too bad. I am disappointed that we have, on the last day of the session, this silly package brought to us from the House of Representatives. That is what it is—a silly package.

COMPLIMENTING SENATOR HARKIN

Mr. REID. Mr. President, changing the subject for a minute, while I still have the floor, I have spent 2 or 3 weeks with the Senator from Iowa on the farm bill. He has done a wonderful job getting the bill out of committee, trying to satisfy the disparate groups throughout America that have farm interests. He has done that. Again, because of a filibuster, we were unable to bring the bill forward. He is here again today as chairman of the Labor-HHS Appropriations Subcommittee, which is, other than Defense, the biggest money-spending bill we have.

There are so many important provisions for the State of Nevada and every State in our Nation. I hope people in Iowa understand what a resource they have in TOM HARKIN, chairman of the Agriculture Committee, chairman of the Labor-HHS Appropriations Subcommittee, one of the most senior members of the Appropriations Committee. I didn't have a chance, because of the parliamentary situation in the

last few days, to say anything complimentary about my friend. I want him to understand, on behalf of the entire Democratic caucus, how much we appreciate what he does. He is a resource that is invaluable to the Senate and this country.

Mr. HARKIN. I thank my friend from Nevada for the very kind words. I, again, thank him for all of his great support and help as we tried to get the farm bill through, but it was stopped by the other side. I thank my friend from Nevada for his great help on getting our appropriations bill through.

As Senator REID said, this is the second largest appropriations bill—second only to Defense. But what is important is that this is the appropriations bill that binds our country together. This is the bill that makes America unique in the world. This is the appropriations bill that says to every kid in America: No matter where you are born, no matter the circumstances of your birth, you are going to get a good education; we are going to put the resources out there. No matter what your resources are, we are going to get you the funds you need to go to college, or for job training if you don't want to go to college.

This provides the underpinning of our medical research. This bill underpins the health care of America in so many ways. This is the bill that provides all of the support for our jobs, our Job Corps, our training programs, all of the worker training programs that come through the Department of Health. This is the bill that covers the Department of Education, the Department of Health and Human Services, and the Department of Labor, and all biomedical research.

So I am very proud and I feel very privileged to be a Senator, but also to be on the Appropriations Committee and to chair this subcommittee that I believe speaks about what America really is. I am also on the Defense Appropriations Subcommittee. That is the committee that defends our interests around the globe. This is the subcommittee that makes America what America is in the world community—unique among nations.

I am proud and privileged to bring to the Senate Chamber this morning the conference report on the Labor, Health and Human Services, Education and related agencies appropriations bill.

First, I thank my good friend and longtime partner in this effort, Senator SPECTER. We have had a great partnership for a number of years. Some time ago, I was chairman of this subcommittee, and he was my ranking member. Then when the other party took control of the Senate, he became chairman and I was ranking member. Now I am chairman again and he is ranking member again. We have had a great partnership, going back now just about an even dozen years. I thank him and his staff, who I will name after a bit, for helping put together this bill on a truly bipartisan basis.

The conference report is a good bill. It is one I can strongly recommend to my colleagues. Senator SPECTER and I worked with our subcommittee members, the House leaders, Congressmen OBEY and REGULA, to help shape it. We have done our best to accommodate the literally thousands of requests we have received from our colleagues.

I wish to highlight some of the main features of our conference report.

First, it takes a number of important steps to improve the quality, affordability, and accessibility of health care in America. We included a record increase for the National Institutes of Health of $3 billion—again, building upon the excellent work done when Senator SPECTER chaired this subcommittee, in meeting the stated goal of the Congress to double NIH funding over 5 years. So we put a record $3 billion into this bill for NIH.

We have also combined with that an additional approximately $200 million in NIH resources related to bioterrorism, which is included not in this bill but in the supplemental appropriations bill. This keeps us on track in doubling our commitment. This action holds the hope of improving the lives of millions of Americans plagued by killers such as Alzheimer's, cancer, Parkinson's, heart disease, diabetes, osteoporosis, and so many other things.

The conference agreement also makes a major improvement in access to affordable health care by providing a $175 million increase to community health centers and major increases in critical prevention activities, such as cancer and heart disease screening. These changes will save lives and improve health around the country.

As a Senator from Iowa and cochair of the Rural Health Caucus of the Senate, I am pleased to report that the agreement includes a major new effort to improve health care in rural areas and small towns.

We will bring more doctors, nurses, and other health professionals to places they are needed by expanding the National Health Service Corps and the Nurse Loan Repayment Program. Our struggling rural hospitals are given help to deal with Medicare paperwork and help to expand into other activities, such as adult daycare.

This agreement also includes substantial new resources to improve education. While I am disappointed that additional funds were not provided by beginning to fully fund special education as a part of the education reform bill, I believe we did a good job with the resources we were provided.

The agreement makes college more affordable for millions of young people by increasing the Pell grant maximum to $4,000. We increase the TRIO Program by $72.5 million, which brings total funding for the TRIO Program to $802 million.

The bill also increases funding for title I reading and math by $1.6 billion for a total of $10.35 billion to title I.

We increase afterschool programs by $154 million. We finally broke the $1 billion threshold. We provide for $1 billion in afterschool programs.

We increase the funding for teacher quality by three-quarters of a billion dollars. The total we have in this bill for teacher quality is $2.85 billion.

The Senate bill contained nearly $1 billion when we passed it to make needed repair to our schools, including security enhancements. We started this initiative last year. It has been a great success. I am very disappointed we could not reach an agreement to continue it this year. However, I have made it clear that I will bring the issue back again next year. We have schools crumbling all over America, and I think it is a legitimate role for the Federal Government to play to help our States and local communities repair, rebuild, and modernize their schools to make them adaptable for the 21st century. The average age of our schools now is well over 40 years, many 50 years old and over 75 years old. They need to be upgraded. They need to be modernized. Our property-tax payers in my State and I know in the Presiding Officer's State are overburdened as it is. Property tax is not a real reflection of one's ability to pay, and yet that is still how we fund the rebuilding of our schools across America.

We started on this last year. I am disappointed we could not continue it this year, but hopefully we will be back again next year to meet that need.

I am also pleased this agreement improves our commitment to worker training and safety. We funded our State unemployment offices to handle the increased caseloads they are facing now and probably will face for the remainder of the winter. At this time of economic downturn, these investments are crucial.

I wish to highlight a substantial initiative in this bill to improve services to our Nation's elderly. We will allow more homebound seniors to receive Meals on Wheels. We provide a major increase in services, such as adult daycare, to help the elderly stay in their own homes and to give their loved ones who are taking care of them needed respite care and support.

Finally, our subcommittee held a series of four hearings on the need to better protect Americans from the threat of bioterrorism. Based on these hearings, Senator SPECTER and I put together a comprehensive antibioterrorism funding plan.

While the agreement before us contains a modest level of funding to address this need, our comprehensive $3 billion plan is included in the homeland security package which we will work on later today on the Defense appropriations bill. Between the two, we will be substantially improving the security of Americans against a bioterrorist attack. For the record, in the bioterrorism supplemental, we have provided $865 million to expand State and local public health capacity, to expand the health alert network, and for

round-the-clock disease investigators in every State.

We provided $512 million to acquire enough smallpox vaccine for every American, and hopefully the smallpox vaccine will be available for every American sometime towards the end of next year, maybe as early as September of next year.

We included $593 million to beef up our entire vaccine stockpile in America; $135 million to help our hospitals with surge capacity. If, God forbid, we did have a terrorist attack, our hospitals in so many areas just would not be able to handle it. We have provided $135 million that will help hospitals meet that surge capacity if they require it.

We provided $155 million to improve vaccine research and lab capacities at NIH. And we included up to $10 million for a new national tracking system for deadly pathogens such as anthrax. Right now, we track every microscopic ounce of radioactive material that is in our powerplants, in our laboratories, and weapons. We keep a good inventory and tracking system of radioactive nuclear materials, but we do not have such a capacity with our deadly pathogens, as we have seen with anthrax.

It now looks as though the anthrax that was sent to Senator DASCHLE's office and Senator LEAHY and others that came through the mail originated in this country. There are all kinds of stories in the press of it coming through Fort Detrick, MD, and Dugway in Utah, but no one knows because we have never had in place an inventory and tracking system for deadly pathogens. The money we appropriated will begin the process of making sure this situation does not happen again.

We put in $71 million to improve security at our Nation's laboratories.

That is all the money we put into the bioterrorism portion of the bill which will be in the Defense appropriations bill later today.

I believe we have a good bill of which we can be proud. It is the product of a bipartisan compromise. As I said, it is not perfect. Some of us wanted different provisions. I wish we could have kept the money in for school construction, but that is the legislative process. We had good bipartisan cooperation in getting to the end result.

I close by thanking my chairman, Senator BYRD, for all of his support and for the excellent leadership he has provided to make this bill and the bioterrorism package possible. I thank our ranking member, Senator STEVENS. Again, at every step of the way he has been a strong supporter and has made sure we received the necessary allocations for our bill.

Finally, this bill, as I said earlier, would not have been possible without the tireless and outstanding staff work. Our staffs have done a terrific job. I know they have not had much sleep in the process. In fact, I understand the night before last they broke at 6 o'clock in the morning. They worked all night to get this done. That is the kind of dedication and hard work of our Appropriations Committee staff of which I am proud.

I especially note the great work of the staff director on the subcommittee, Ellen Murray, who worked tirelessly through the year to shape, form, and work on the allocations and bring this all together. Just as I have worked closely with Senator SPECTER, I know she has worked closely with another great staff person, Bettilou Taylor with Senator SPECTER, and all of our staffs. Bettilou and Ellen have just done an outstanding job of putting this together. It would not have been possible without them. I thank them both very much for their expertise and their hard work.

I thank Jim Sourwine, Erik Fatemi, Mark Laisch, Adam Gluck, Lisa Bernhardt, Adrienne Hallett, and Carole Geagley, as well as Bev Schroeder and Chani Wiggins of my personal staff for their terrific and tireless efforts.

As I said, the bill before us simply would not have been possible without them. I mentioned my staff. Let me also mention Mary Dietrich on Senator SPECTER's staff, Sudip Parikh—I do not know where Sudip is, but I thank him for all the great briefings he has given me in the past. I thank him very much.

Maybe after all my briefings on anthrax he will let me know how it all works. Emma Ashburn, also I thank Emma for all of her great work.

I say again, we have an outstanding staff, and I thank them all. I take this opportunity publicly to wish them a restful Merry Christmas. I hope they catch up on all the sleep they have lost over the last couple weeks. They have done a great job and have my undying appreciation and admiration and thanks for the great job they have done.

I know a couple of other Senators were seeking time. How much time do I have remaining?

The PRESIDING OFFICER (Ms. STABENOW). The Senator has 22 minutes.

Mr. HARKIN. How much time does the Senator desire?

Mr. DURBIN. Ten minutes.

Mr. HARKIN. I yield 10 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I thank the Chair. I thank Senator HARKIN. He and I were colleagues in the House of Representatives, and he would probably recall that Congressman Bill Natcher of Kentucky on the Appropriations Committee always chaired the subcommittee that had this appropriations, the Labor-HHS appropriations, and he would come to the floor in his courtly and dignified way and announce that this was the people's bill, Labor-HHS appropriations was the people's bill.

When Congressman Natcher took a look at the rollcalls he had in support of the bill, all the people were voting for it. And I think it reflects what Senator HARKIN said earlier about what is in this bill. I noticed Senator INOUYE was here a few moments ago. As chair of the Appropriations Subcommittee on Defense, he has a responsibility to defend and protect America. Senator HARKIN of the Labor-HHS Subcommittee of Appropriations has the responsibility to make sure that Americans' lives are worth living, whether it is education, health care or a commitment to labor. Time and again Senator HARKIN, in this appropriations bill, has answered the call of this country. I commend him, as Senator REID did earlier.

This is an important bill for America. It is a better bill because of the hard work Senator HARKIN and Senator SPECTER and the staffs have put into it. I am going to be an anxious supporter of the bill.

I have been fortunate to have served 12 years on the House Appropriations Committee and now 3 years on the Senate Appropriations Committee, but my dream to be on this appropriations subcommittee is still yet to be realized. I hope someday to make it because I think it is most important and certainly reflects your hard work has made it to the bill that will be considered on what may be the last day.

VERIFICATION OF PERSONAL IDENTITY

Madam President, I would like to address another issue very quickly, if I may.

Since September 11, 2001, all of us in Federal, State, and local governments have been looking for ways to enhance our homeland security. We have reviewed just about every government regulation or practice that affects the security of our daily lives in order to fix weaknesses, close loopholes, and beef up protection for all Americans.

Among other efforts that I have led—such as airline security, food safety, assuring a state of national readiness—I am now working on a bill to address weaknesses in our nation's personal identification system.

Specifically, I am interested in fixing the problems in the current disparate system we have where states issue driver's licenses without uniformity and without cross-checking with sister States.

In the aftermath of the most devastating attacks on America, we learned that some of the terrorists who were responsible for the September 11 tragedy carried driver's licenses issued to them by states that had extremely lax application process.

In Virginia, for example, it was reported that a terrorist paid a complete stranger $50 in the parking lot of a Department of Motor Vehicles to sign a sworn statement that vouched for the terrorist's identity and in-state residence on his driver's license application.

It was also reported that 13 of the 19 terrorists held driver's licenses from Florida, a state that—at that time—did not require any proof of permanent

residency from anyone. In fact, any foreign tourist could walk into a motor vehicles office, fill out a form on his own, and get one.

I am certainly not asserting that the September 11 attacks would have been avoided had the terrorists not had these driver's licenses. Clearly, there is little direct connection between the cards these evil men carried and the ungodly deeds that they carried out.

But what these driver's licenses—which have now become the most widely used form of personal ID in the country—gave these terrorists was the cover of legitimacy that allowed them to walk around and mingle into American society without being detected.

A driver's license is a key that opens many doors. In America, anyone who can produce a valid driver's license can access just about anything.

It can get you a motel room, membership in a gym, airline tickets, flight lessons, and even buy guns—all without anyone ever questioning you about who you are. If you can produce a driver's license, we just assume that you are legitimate, and you have a right to be here.

I realize that the investigations surrounding September 11 are still ongoing, but I think we can safely assume what some of the problems were that led to the vulnerability we left for the terrorists to exploit.

The terrorists took advantage of a combination of failures in our intelligence, law enforcement, border patrol, aviation security, and other infrastructures that, at some point, should have been able to discover and identify these individuals as threats.

As we enhance homeland security, it is critical that we improve all of these areas. But no amount of data sharing among Federal, State, local, and international law enforcement and regulatory agencies can be useful if one of the most significant pieces of the data that they transmit back and forth is unreliable.

And today, verification of personal identification is that weakest link in the process.

Whenever someone presents identification to a government official, we must be able to rely on that ID to be sure that the person is in fact who he says he is. That is the only way to ensure accurate results when a government official inputs that person's name into various databases that agencies use.

But today, with hundreds of different forms of ID cards that are in use across the Nation and with rampant identity theft problems, it is nearly impossible to know with certainty who a person is standing before you, no matter how many ID cards they can produce.

To further aggravate the problem, one form of ID often begets another, and can help someone assume a completely false identity.

For example, a person can start with a fake driver's license; and then pick up a fake Social Security number—this is really easy to get, and you don't even need a photo.

With this, he can easily obtain credit cards, library cards, video rental membership cards, etc.—all genuine forms of ID based on the fake original.

To begin the process of critically reviewing our Nation's ID system, I am drafting legislation to enhance the reliability of today's most popularly-used form of identification—the driver's license and State ID card.

But before I explain what this bill does, let me be absolutely clear what it does not do.

This is not about creating a new national ID card nor is it about developing one centralized mega-database that houses everyone's personal data. I understand the concerns that Americans have about going in that direction, and I agree that we do not need a national ID card which crosses that critical line of personal privacy.

Instead, my effort is focused on fixing a problem that we can address immediately and with significant results. My bill is about making the driver's license—which many consider as a de facto national ID card—more reliable and verifiable as a form of personal identification than it is today.

First, my bill requires all States and U.S. territories to adopt a minimum uniform standard in issuing drivers' licenses.

If someone walks into a department of motor vehicles in Virginia, he should be required to provide the same methods of verifying who he is, and should go through the same set of requirements, as someone who walks into a DMV in Illinois.

Why? Because if we don't have uniformity among States, we will remain vulnerable to those who exploit the system by forum shopping for a driver's license card in the weakest State. With that initial ID card, they can go on to obtain other ID cards and gain official recognition.

Or, under reciprocity, they can trade in that driver's license for a driver's license in another State with more strict application requirements even though they may not have qualified to get a license in the other State.

If we mandate a minimum standard that is applied uniformly across the Nation, we can ensure that anyone who presents any State-issued driver's license can be trusted that he is in fact who he claims he is, since he would not have been able to obtain the card but for having initially verified his identity in the same way across the country.

To set up the criteria and implementation of the uniform standard, I have enlisted the assistance of the American Association of Motor Vehicle Administrators AAMVA, which is a nonprofit organization whose members consist of motor vehicle and traffic law enforcement administrators of jurisdictions in the U.S., Canada, and Mexico.

AAMVA is the national expert on issues dealing with motor vehicle administration, and it develops model programs and encourages uniformity and reciprocity among the States.

My bill appoints AAMVA as the regulatory document and biometric standards-setting body, and tasks AAMVA to develop the minimum verification and identification requirements that each State must adopt for issues such as:

Uniform definition of in-State ''residency''; validation of source or ''breeder'' documents to verify ID; establishment of legal presence in the country; initial issuance procedures; and minimum security features.

With congressional oversight, AAMVA would supervise the implementation by the States so that within reasonable time, every State of our Nation will finally have uniform standards.

In implementing the uniform standards, it is also important to make sure the State DMVs have the support they need to verify the data they receive. Many DMVs across the country have complained that they receive little cooperation from Federal agencies who maintain databases containing information that could verify and confirm the information that people present at the DMV counter.

For example, the Social Security number is one of the primary unique identifiers used across the country. Yet many State DMVs have a difficult time accessing records from the Social Security Administration to match the number with the name of the applicant of the driver's license.

My bill addresses this problem by authorizing the Social Security Administration, Immigration and Naturalization Service, law enforcement agencies and any other sources of appropriate, relevant, real-time databases to provide motor vehicle agencies with limited access to their records.

My bill would also authorize and fund an initiative to ensure that all of these databases are compatible and can communicate with each other effectively.

Let me emphasize here that the access to the records is for the limited purpose of cross-checking and verifying individuals' name, date of birth, address, social security number, passport number if applicable, or legal status.

It is not a carte blanche access to records that could contain many confidential and sensitive and private information.

But we know that there may be unscrupulous employees in any organization, and some DMV employee, unfortunately, may be tempted to cut corners.

In order to discourage and prevent anyone from accessing these records without authorization, or use it in an unauthorized manner, my bill provides stiff penalties for any employee, agent, contractor, or anyone else who engages in unlawful access to such records.

Similarly, my bill provides for internal fraud within a department of motor vehicle where state employees access

DMV records to make fake IDs or to personally profit in any way.

My bill also encourages individuals to report any suspicious activities within such offices by providing whistleblower protection to those who uncover internal fraud.

But setting up the uniformity and data sharing are not enough to ensure security. I also want to make sure that the driver licenses and other forms of government identification cards issued by departments of motor vehicles are tamper proof so that there is no other source from which someone can obtain such a card.

It is time to stamp out the multi-billion dollar cottage industry of fake IDs.

My bill will make life miserable for those who manufacture, distribute, market, or sell fake driver's licenses or other forms of government identification cards, by raising the stakes for those caught in the act.

Identity theft is a national problem, and it deserves a national response. That is why I propose to make it a Federal offense to engage in the fake ID business.

I have heard from State and local officials across the country who complain that they didn't have sufficient tools to go after these crooks who hang out in parking lots and on the web luring people to buy fake IDs

In most States, such offenses are dealt with a slap on the wrist and the criminals are back on the streets eagerly trying to earn back the fines they just paid with the sale of a few more fake cards.

So I believe we need to federalize the illegal nature of this activity and go after the manufacturers, distributors, and marketers with full force of the law.

Likewise, I propose severe penalty for anyone who purchases fake IDs, obtains legitimate ID cards in a fraudulent manner, or engages in any activity that misrepresents their personal identification in anyway by using a fake or altered government-issued ID card.

Last year, I worked with Senator COLLINS to pass the Internet False Identification Prevention Act of 2000 which addressed many of these problems. My bill is designed to ensure that this and other laws dealing with fake IDs which are already in the books are working, and if they are not, that we find ways to ensure they are enforced against criminals.

Since September 11, all of us have been working around the clock with a singular goal: enhancing security of our homeland. I believe this bill will help us seal some of the cracks in our internal security systems, and I urge my colleagues to join me in this effort.

As chairman of the Governmental Affairs' Subcommittee on Oversight of Government Management, I will be holding a hearing when we return from the holidays to address this problem.

The PRESIDING OFFICER. Who yields time?

The Senator from Massachusetts.

Mr. KENNEDY. I think there is time that has been allocated to the Senator from Massachusetts. Am I correct?

The PRESIDING OFFICER. There has not at this point been time allocated to the Senator from Massachusetts.

Mr. KENNEDY. I see my friend and colleague from Minnesota. I am mindful that there is only about 12 minutes remaining to the Senator from Iowa.

The PRESIDING OFFICER. Fifteen remain.

Mr. DURBIN. Madam President, I yield any time remaining under my allocation of time until Senator HARKIN's return to the floor.

The PRESIDING OFFICER. Without objection, the Senator is recognized. The Senator from Massachusetts.

Mr. WELLSTONE. Madam President, also to facilitate the Senator from Massachusetts, I think I have 10 minutes separately allotted; is that correct?

The PRESIDING OFFICER. The Senator is correct. The Senator from Massachusetts.

Mr. KENNEDY. I thank the Chair.

Madam President, first of all, I join with others in commending our friend and colleague from Iowa for an excellent job in finding scarce resources and focusing them on the Nation's needs. I think particularly of the great efforts he made to make sure children in this country were going to have the benefits, hopefully, of an education bill that can provide educational opportunities for young people in this country. As a result of the actions of Senator HARKIN and his committee, more than 600,000 children who would not have participated in the title I program will participate in that program; 400,000 children who would not have participated in a bilingual program will participate in those programs; 200,000 children who would not have had an opportunity for after-school programs will benefit from those programs; and there will be tens of thousands of children who will benefit from the 1.2 billion that he has had in special education. So this has been an impressive achievement.

When you look at the allocations for funding of these programs in the early part of the year, none of this was foreseen. I think he would agree with me that we are going to have to do even better in the future as we are facing the challenges in education, and understanding the importance that has in the lives of families in this country.

I also commend him for his extraordinary efforts in leading this body, along with Senator HAGEL and our colleague, Senator JEFFORDS, in the funding for the IDEA program, which is related to education. There are those who say it is not, but I think we understand, as indicated in the conclusion of the debate on education, that two out of three of the children who receive IDEA funding also qualify for Title I. These, in many instances, are the same children. Shortchanging one group pits one group against the other. By adding the money even over the administration's budget, it will mean additional quality services for needy children.

We were unable to get the funding for the children who need IDEA, and that is going to be the subject of my comments this morning.

I also want to thank Senator HARKIN and Senator SPECTER for the great progress that was made in funding the health care priorities. Graduate Medical Education was increased by $50 million; the National Health Service Corps was increased by $24 million; and Community Health Centers received an increase of $175 million, which is the largest increase in its history.

Of course Senator HARKIN was there in the beginning with his subcommittee, understanding the importance of getting the funding to deal with bioterrorism. His committee worked with the Appropriations Committee and had very instructive and productive hearings developing the strong case for funding for bioterrorism as well as building a stockpile of vaccines. I feel strongly that, just as we have a petroleum reserve, we ought to have a pharmaceutical reserve so every child can be protected against any of these potential threats.

Senator HARKIN, in his committee, held very important hearings. Then Senator BYRD, with his strong leadership was able, working with Senator HARKIN, to make sure we are going to meet our Nation's responsibility. All of us are thankful for that leadership.

For more than 200 years, Americans have fought battle after battle against discrimination in all its forms. We have fought for racial equality to assure that all people are judged not by the color of their skin. We have fought for voting rights for women, and their rightful place in shaping the nation's democracy. We have acted to end discriminatory practices against the elderly and disabled.

Despite our many successes in the ongoing battle for fairer treatment for all, there is one form of dangerous discrimination that still pervades every community in this country. Few families have escaped facing this discrimination personally, or seeing the harm it has caused to loved ones, friends, or acquaintances. This discrimination is not based on skin color, gender, or age. It is based on an illness—mental illness.

For years, millions of Americans across this country with mental illness have faced stigma and misunderstanding. Even worse, they have been denied the treatment that can cure or ease their cruel afflictions. Too often, they are the victims of discrimination practiced by health insurance companies. It is unacceptable that the Nation continues to tolerate actions by insurers that deny medically necessary care for curable mental illnesses, while fully covering the cost of treatment for physical illnesses that are often more costly, less debilitating, and less curable.

It is long past time to end this unjust discrimination.

Unfortunately, we have just suffered a serious setback in the ongoing battle for the rights of the mentally ill. The House Republican leadership has blocked the Domenici-Wellstone Mental Health Equitable Treatment Act, which assures fair health insurance coverage of mental illness for the millions of Americans who must live with depression, post-traumatic stress, anorexia, and other mental illnesses.

This important bill was approved by the Senate Health, Education, Labor, and Pensions Committee last month on a unanimous vote. It passed the Senate without a word of opposition. This success was achieved by the skilful leadership and hard work of the bipartisan team of Senator PAUL WELLSTONE and Senator PETE DOMENICI.

That bill deserved to become law this year, but the House Republican leadership has refused to act. Three House committees have jurisdiction over parts of this legislation, but none has held a markup. Not one has held a single day of hearings. Now, operating behind the closed doors of the conference committee, the House Republican leadership has insisted on striking the amendment which the Senate added to the Labor, Health and Human Services Appropriations bill to achieve this essential goal.

The House leadership has bowed to the pressure of insurers and big business, at the peril of the health of millions of Americans. This legislation has the support of the American people. It has the support of a broad bipartisan majority of the Congress. It is cosponsored by 65 Members of the Senate. Over 240 Members of the House have signed a letter urging the House leadership to accept the Senate mental health parity amendment as part of the appropriations bill. The collective will of Congress has been flagrantly disregarded.

The message of the opponents on this basic issue is the same message of delay and denial that has been such a shameful blot on our national history when it was applied to African-Americans, to women, to the disabled, and to the elderly.

One of the most disappointing things about this first session of Congress has been the apparent retreat from the principles of equality and nondiscrimination.

On the education bill, the Congress failed to provide needed funding for IDEA. The Congress retreated from the commitment made a quarter of a century ago to assure that every child with disabilities would have a fair and equal chance for a quality education. Today, Congress has once again retreated on a basic question of civil rights and nondiscrimination—fair treatment for the mentally ill.

As one who has been involved in these struggles to end discrimination throughout my career, I know that the American people understand that discrimination against any American diminishes all Americans. They understand that discrimination is not only a denial of our brotherhood as human beings, it denies our country the ability to benefit from the talents and contributions of all our citizens.

Surely, this time of renewed patriotism in the struggle against the common enemy of terrorism is the wrong time to retreat from our basic American ideals.

Equal treatment for the mentally ill is not just an insurance issue, it is a civil rights issue. At its heart, mental health parity is a question of simple justice.

The House Republican leadership has now succeeded in blocking action for this session of Congress. But the battle goes on, and it will not end until true parity has been achieved once and for all. The American people understand that this battle is about justice for the mentally ill and their families. The Senate and a majority of the House understand it. It is time for the House Republican leadership to stop kowtowing to powerful special interests and listen to the voice of the American people—and to what is fair, just, and right for all those who suffer from mental illness.

I yield the remainder of my time.

The PRESIDING OFFICER. Who yields time? The Senator from Iowa?

Mr. HARKIN. Madam President, before I yield time to my good friend from Minnesota, let me again thank Senator SPECTER, who showed up here from the hearing in which he has been tied up.

Let me thank Senator KENNEDY for his great leadership on the two areas on which he spoke. Basically, I want to speak about education. I am privileged to serve on his committee and have for almost all the time I have been in the Senate. There isn't anyone I could even think of mentioning here in the Chamber who has devoted more of his or her life to the education of our kids and making sure they have a good quality education than Senator KENNEDY of Massachusetts. It has been a privilege and honor to work with him all these years.

We have had a tough fight over the last year in reauthorizing the Elementary and Secondary Education Act. I believe we came out with a good bill, one that will move us forward. But now, as I said at the time when the authorizing bill passed: We have created the authorization, now show us the money.

I think this is an appropriate time to say the President's budget will be coming down in a couple of months, the budget for next year. The President, I know, is a strong supporter of the reauthorization of the Elementary and Secondary Education Act. It has all these requirements for schools for testing and teacher quality and improvement, all the things on which we agreed. But will we have the resources? Will this President, in his budget, provide those resources to back up the authorization bills we passed? That will be the real test.

I hope this President will meet that test. I hope we get a budget from him next year that reflects those priorities.

Again, on the issue of the mental health parity, we had it on this bill.

As the Senator from Massachusetts said—I know Senator WELLSTONE will speak about it here in just a second—we had it in the bill, and it was widely supported, almost unanimously, in the Senate. It was widely supported in the House. But for some reason which I can't really divine and understand, the House Members decided they were going to vote against it. But it was the moment in time when we could have finally gotten over this, when we finally could have provided the same access to health care for mental health problems as we do for physical health problems.

Quite frankly, I believe we have failed in this endeavor. It should have been done. We held as long as we could, but when the House decided they would not agree to it, we had to abide by that and come back to the Senate without that provision in it. It is perhaps the biggest glaring loophole in our entire appropriations bill that we are now reporting back to the Senate.

My friend from Minnesota, Senator WELLSTONE, has been the leader in fighting for the people with mental health problems in this country to assure they have the same kind of health care coverage in their policies that people have for physical health problems. He has been the leader. He has led the charge on it. I know he is not going to give up. If I know anything about PAUL WELLSTONE, he is not going to give up on this fight. We will be back again next year. I will look to him next year for the same kind of leadership he provided this year, and for so many years in the past, for finally breaking down this last civil rights issue. I think Senator KENNEDY spoke about that. We have to confront it here in America.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Madam President, I begin by congratulating my distinguished colleague, Senator HARKIN, with whom I have worked closely on the subcommittee which has the responsibility for appropriations for the Departments of Labor, Health and Human Services, and Education for many years. While I liked it better when I was chairman for 6½ years, I believe the work of the subcommittee goes on seamlessly regardless of whether TOM HARKIN is chairman or ARLEN SPECTER is chairman. I think Senator HARKIN and I both recognize you can't get anything done in Washington if you are not willing to cross party lines and make accommodations.

May I just parenthetically note my very deep disappointment that there has not been an agreement on a stimulus package before Congress adjourns,

according to the most recent reports. Perhaps that will be corrected before we adjourn. If they would assign it to me and Senator HARKIN, I am sure we could get it worked out.

But this subcommittee report adopted by the full committee—and now by both the Senate and the House—is one of the most important pieces of legislation to emerge from the Congress all year.

I regret that I could not be here at the outset when the bill was called up. But I had reason to go to the hearing of the Commerce Committee which is considering the nomination of John Magaw to be the No. 3 man at that Department. I came back as soon as I could to make brief opening comments before yielding to Senator WELLSTONE who I know is waiting to speak.

This bill is one of enormous importance to America. The total figure of $123 billion represents an enormous investment in critical aspects of our way of life.

This bill contains very important funding and increases in the Department of Labor on worker safety, funding for the National Labor Relations Board, funding for the various other agencies, the Mine Health Safety Board, and OSHA.

It is my hope yet that we will resolve the critical question of ergonomics on which we await action by the Department Of Labor subcommittee. The subcommittee has held extensive hearings.

With respect to education, this bill contains more than $48 billion. There is an enormous increase for Federal participation in education. Last year's budget increased education funding by $5 billion. This year's budget increases education funding by $8 billion more.

Not only is there additional Federal funding but, as a result of action by the Congress, we are directing more of this money to the neediest students. Philadelphia, illustratively, under the new formula will get $115 million as opposed to $90 million last year.

In the conference, we adopted an amendment to provide additional targeted funding for those who were the neediest. We have provided very extensive funding on Pell grants and on guaranteed student loans in our recognition that education is a priority second to none and a major capital investment for the United States.

On a brief personal note, education was very heavily emphasized in the Specter household, perhaps because my parents had so little of it. My father was an immigrant from Russia in 1911 and had no formal education but became very extensively self-educated. My mother only went to the eighth grade but increased her educational background on her own. But my brother and my two sisters and I have been able to share the American dream because of our educational opportunity. When the President talks about leaving no child behind, it is not only for children, it is for college students, adult education, and literacy training.

There is very important funding in this bill.

The health subcommittee has taken the lead in increasing the funding for the National Institutes of Health—some $11 billion in the past several appropriations cycles. This year's increase was $2.9 billion. Frankly, I would like to have seen more, but there were other priorities.

The mark from our Senate subcommittee was $3.4 billion. The National Institutes of Health are the crown jewels of the Federal Government—maybe the only jewels of the Federal Government. They have made marvelous strides in conquering Parkinson's, perhaps with a sight 5 years down the road to cure Parkinson's, Alzheimer's, cancer, heart disease, and virtually every known malady.

Three years ago, there burst upon the scene the stem cell issue. Stem cells are extracted from embryos. Now they are working on inserting the stem cells in the human brain to cure Parkinson's or delay Alzheimer's; or into the heart, or into many other parts of the body.

A controversy has arisen because some object to stem cell research because they are extracted from embryos. Embryos can produce life. But the ones which are used for stem cell research would be discarded. Embryos are created from in vitro fertilization—customarily about a dozen. Mainly three or four are used, and the balance are being discarded.

If any of those embryos could produce life, I think they ought to produce life and ought not be used for stem cell production. If they are not going to produce life, why throw them away? Why not use them for saving lives?

We have put into this bill $1 billion for sort of a test program on embryo adoption. Let us try to find people who will adopt embryos and take the necessary steps on implanting them in a woman to produce life. If that could be done and use all of the embryos, that would be marvelous to produce life. But where those embryos are going to be discarded, I think the sensible thing to do is to use them for saving lives.

We have had in this Chamber an effort by our subcommittee and then the full committee to expand Federal funding for research on stem cells.

Right now Federal funding is permitted on stem cells once they have been extracted but not to extract them. My view is, that is something in which the Federal Government ought to participate, with the extensive funding available now in NIH.

Our efforts to expand that activity, to some extent, was complicated by amendments offered by the Senator from Kansas, Mr. BROWNBACK, who wanted to raise the cloning issue. We deferred that until next year because it would have tied up the bill for a protracted period of time. As the slow schedule of the Senate has worked, we could have been tied up, in any event, but we made the judgment, with the agreement of the majority leader, that a freestanding bill would come up in February or March.

While there is a consensus against cloning of another individual, there has been an unfortunate use of the terminology ''therapeutic cloning,'' which is really a transplant. That involves a process where there is the DNA for a person, for example, who has Parkinson's, and that is inserted into the embryo so the stem cells come out consistent with the patient, not being rejected by the patient. So that is something we will be working on further with hearings set for our subcommittee into the next year.

We have taken a very firm stand on the bioterrorism issue, with our bill containing $338 million, and our subcommittee taking the lead on having hearings which eventuated in the supplemental appropriations bill having an additional $2.5 billion for the needs of State and local health departments purchasing vaccines against bioterrorism.

When the officials from the Centers for Disease Control came in, we admonished, I guess is as good a word as any, why they had not made the subcommittee aware of their needs before.

It is no secret, you did not have to wait until anthrax came into the Hart Building or the terrorist attack on September 11 to realize the dangers of bioterrorism. Had they told us what their needs were, we would have responded as we were responding with billions for NIH.

But we worked through that. We asked them in an October 3 hearing for a list of all the bioterrorism threats and what it would cost to cure them. They produced the list, but we could not get it. CDC had to give it to HHS which did not want to disclose it because HHS had to give it to OMB, the Office of Management and Budget. By the time you finish playing alphabet soup in Washington, virtually everything is stymied.

But we had a subsequent hearing, and we got these figures, asking them what their professional judgment was as to what the funding should be. We have taken very important steps to protect America on bioterrorism.

Head Start has been a big issue for the subcommittee. There is additional funding, as we have in community health centers, and elevating women's health with additional funding. There was an initiative taken in the early 1990s by Senator HARKIN and myself to create a separate unit on women's health in the National Institutes of Health. There is additional funding for LIHEAP, the aging programs, AIDS, education, including education for disadvantaged children, school improvement programs, impact aid, bilingual education, special education, student aid, and public broadcasting.

Madam President, the conference agreement on the Labor, Health and Human Services, and Education bill before the Senate today includes $123.1

billion in discretionary spending, the full amount of the subcommittee's budget authority allocation under section 302(b) of the Budget Act. This amount represents an increase of $14 billion over the fiscal year 2001 freeze level.

At this time, I want to take this opportunity to thank the distinguished Senator from Iowa, Mr. HARKIN, the chairman of the committee, for his hard work in bringing this bill through the committee and on the floor for full consideration by all Senators.

The programs funded within the subcommittee's jurisdiction provide resources to improve the public health and strengthen biomedical research, assure a quality education for America's children, and offer opportunities for individuals seeking to improve job skills. I would like to mention several important accomplishments of this bill.

The conference agreement includes $23.3 billion for the National Institutes of Health, the crown jewel of the Federal Government. The $2.9 billion increase over the fiscal year 2001 appropriation will support medical research that is being conducted at institutions throughout the country. This increase will continue the effort to double NIH by fiscal year 2003. These funds will be critical in catalyzing scientific discoveries that will lead to new treatments and cures for a whole host of diseases.

Since September 11, 2001, Americans have become acutely aware that our enemies will use any means to murder and maim large numbers of U.S. civilians. The use of biological agents is no longer a threat—it is a reality. The committee has included $338 million to coordinate state and local readiness, stockpile appropriate pharmaceuticals, and build our public health infrastructure to respond to any act of bioterrorism. The anthrax found in Senator DASCHLE's office and in the House and Senate mail rooms, at postal facilities in New Jersey and the District of Columbia and surrounding areas, in news and other media facilities proves that we must try and prevent, detect and quickly respond to any further acts of bioterrorism. The supplemental appropriations bill which the Senate will take up shortly contains an additional $2,504,314,000 to address the needs of state and local health departments, purchase smallpox vaccine, to upgrade the capacity of laboratories and the CDC and NIH, and develop new vaccines at the National Institutes of Health.

For the first time, the conference agreement includes $1 million for a public awareness campaign to educate Americans about the existence of spare embryos and adoption options. During stem cell hearings, we were made aware that there are 100,000 spare frozen embryos stored in invitro fertilization clinics throughout the U.S. Many infertile couples could choose to adopt and implant such embryos if they were aware of that option.

To enable all children to develop and function at their highest potential, the agreement includes $6.5 billion for the Head Start Program, an increase of $338 million over the last year's appropriation. This increase will provide services to 916,000 ch8ldren in 49,420 classrooms across the nation.

To help provide primary health care services to the medically indigent and undeserved populations in rural and urban areas, the agreement contains $1.34 billion for community health centers. This amount represents an increase of $175.1 million over the fiscal year 2001 appropriation. These centers provide health care to nearly 12 million low-income patients, many of whom are uninsured.

Again this year, the conferees placed very high priority on women's health. Included in the amount is $26.8 million for the Public Health Service, Office of Women's Health, an increase of $9.5 million over last year's funding level to continue and expand programs to develop model health care services for women, provide monies for a comprehensive review of the impact of heart disease on women, and to launch an osteoporosis public educatoin campaign aimed at teenagers. Also included is $265 million for family planning programs; $124.4 million to support the programs that provide assistance to women who have been victims of abuse and to initiate and expand domestic violence prevention programs.

In fiscal year 2001, the Labor-HHS Subcommittee held several hearings to explore the factors leading to medical errors and received testimony from family members and patients detailing their experiences with medical mistakes. The Institute of Medicine also gave testimony and outlined findings from their recent report which indicated that 98,000 deaths occur each year because of medical errors and these deaths may cost up to $29 billion in excess health care expenditures and lost productivity each year. The conference report bill before the Senate contains $55 million to determine ways to reduce medical errors.

The agreement maintains $2 billion for the low Income Home Energy Assistance Program LIHEAP. The amount, when combined with the additional $300 million in emergency appropriations, will provide a total of $2.3 billion for the LIHEAP program fiscal year 2002 LIHEAP is the key energy assistance program for low income families in Pennsylvania and in other cold weather states throughout the Nation. Funding supports grants to states to deliver critical assistance to low income households to help meet higher energy costs.

For programs serving the elderly, the agreement includes: $357 million for supportive services and senior centers; $566.5 million for congregate and home-delivered nutrition services; and $206 million for the national senior volunteer corps; $445 million for the community service employment program which provides part-time employment opportunities for low-income elderly. Also, the bill provides $893.4 million for the National Institute on Aging for research into the causes and cures of Alzheimer's disease and other aging related disorders; funds to continue geriatric education centers; and the Medicare insurance counseling program.

For AIDS, the agreement includes in this amount is $1.9 billion for Ryan White programs, an increase of $103.1 million. also included is $; $781.2 million for AIDS prevention programs at the Centers for Disease Control; and $2.341 billion for research at the National Institute of Allergy and Infectious Diseases.

To enhance this Nation's investment in education, the bill before the Senate contains $48.5 billion in discretionary education funds, an increase of $8.3 billion over the fiscal year 2001 level, and $4 billion more than the President's budget request.

For programs to educate disadvantaged children, the bill recommends $12.3 billion, an increase of $2.6 billion over last year's level. The agreement also includes $250 million for the Even Start program to provide educational services to low-income children and their families.

For school improvement programs, the agreement includes $7.8 billion, an increase of $1.6 billion over the fiscal year 2001 appropriation. Within this amount, $2.850 billion will be used for a new state grant program for improving teacher quality. The agreement also includes $700.5 million for educational technology state grants.

For impact Aid programs, the agreement includes $1.143 billion, an increase of $150.1 million over the 2001 appropriation. Included in the recommendation is: $50 million for payments for children with disabilities; $982.5 million for basic support payments, $48 million for construction and $50 million for payments for Federal property.

For bilingual education, the agreement provides $665 million to assist in the education of immigrant and limited—English proficient students. This recommendation is an increase of $205 million over the 2001 appropriation.

For special education, the $8.6 billion provided in the agreement will help local educational agencies meet the requirement that all children with disabilities have access to a free, appropriate public education, and all infants and toddlers with disabilities have access to early intervention services. The $1.2 billion increase over the FY'01 appropriation will serve an estimated 6.5 million children age 3–21, at a cost of $1,133 per child. While also supporting 612,700 preschoolers at a cost of $637 per child.

For student aid programs, the agreement provides $12.3 billion, an increase of $1.6 billion over last year's amount. Pell grants, the cornerstone of student financial aid, have been increased by $250 for a maximum grant 34 million,

the work study program is held at the FY '01 level and the Perkins loans programs is increase by $7.5 million.

The agreement includes $380 million for the Corporation for Public Boardcasting. In addition to the core amount provided for CPB, the committee recommends $25 million for the conversion to digital broadcasting.

There are many other notable accomplishments in this agreement, but for the sake of time, I have mentioned just several of the kep highlights so that the nation may grasp the scope and importance of this bill.

In closing, Madam President, I again thank Senator HARKIN and his staff and the other Senators on the subcommittee for their cooperation.

I thank my distinguished colleague from Minnesota for his patience, if, in fact, he was patient.

I yield the floor. And may I note for the record that I am going to have to return to the Commerce Committee, but I will be back to carry forward on the floor consideration of the conference report.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. I, first of all, say to Senator SPECTER that was very gracious. Senator SPECTER and Senator HARKIN—Senator HARKIN and Senator SPECTER—are the ones who have led us, the ones who have been the leaders on this bill. So it was important to hear Senator SPECTER outline this legislation. I thank Senators HARKIN and SPECTER for their leadership. I am very proud of what they have done, given the resources with which we had to work.

I also thank Ellen Murray and Bettilou Taylor for their work. For a lot of us, there is a lot in this bill that is important to the people we love and believe in in our States. It is just a fact that a lot of the real tough work is done by the people who work with us. I thank them.

I also thank Ellen Gerrity because she is the one who has really driven, for me, and for lots of people, the mental health work. I am blessed to have her working with me. Senator DOMENICI and I are blessed to have her working with us.

On the vote which occurred 2 days ago in the conference committee, 10 House Members basically decided to eliminate the mental health parity legislation which would have ended the discrimination against people who struggle with this illness. This was the chance to end the discrimination, and they decided not to do so.

There were 67 Senators who were cosponsors of this legislation. It passed our committee—the HELP Committee—with the leadership of Senator KENNEDY, by a 21-to-0 vote. It was unanimously accepted on the floor of the Senate. And 244 House Members called on the conference committee: Please, don't block this legislation. This is an idea whose time has come. You can do something very good. You can end the discrimination against people struggling with this illness.

But the insurance companies won the day. The insurance companies lobbied furiously, and they got the House leadership to stop this. And the White House did not give us the support. No. The White House did not give us the support.

House leaders say next year they will hold hearings. They never have in the last 6, 7, 8, 9 years, but they say they will hold hearings. The White House says: We want to help next year. They could have helped this year. They could have helped now. It is not as if this discrimination just started yesterday. It is not as if we have not been working on this legislation for years. But they did not help now.

But I am confident, working with Senator DOMENICI—I am proud to work with him—that we will get their support next year. All of the groups and organizations representing all the people who struggle with this illness, and all the people who have loved ones who struggle with this illness, will be back.

My hope is that next year there will be a thousand people who struggle with this illness and who have friends and loved ones who struggle with this illness who will go to the House of Representatives and get 1 inch away from these Members who have blocked this bill and say: We are not going to let you do this to us any longer. We are men and women of worth and dignity and substance, and we refuse to accept this discrimination any longer.

They argue premiums would go up, but the Congressional Budget Office said premiums would go up 0.9 percent. They say it would be too expensive, but they do not talk about the $70 billion a year that we save by getting the treatment to people who now work, who can work with more productivity, with less absenteeism, or whose children now will be in school and will not be in jail, incarcerated, and needing to receive social services help.

The Washington Post editorialized last week that ''the new asylums of the 21st century'' for people struggling with mental illness are the prisons. I visited some of these juvenile ''correctional'' facilities. I have seen these children who never should have been there.

I say to Senator HARKIN, if there had been treatment for them on the front end, they would have never wound up incarcerated.

I went down to a hearing in Houston with SHEILA JACKSON-LEE. She asked me to come down there. It was packed with desperate parents who talked about the fact that their children ended up in jails because they couldn't get any coverage or help anywhere else. And the leadership of the House of Representatives, doing the bidding of the insurance companies, blocked this bill, and the White House did not help.

Now with the insurance industry we have something we have to be careful about. They are saying maybe next year we will cover only serious mental illness. They know that 90 percent of their costs are associated with severe mental illness, and they know that if they now all of a sudden say other illnesses won't be covered, the accountants working for the insurance companies will decide, not the doctors.

Do you want to know what will happen if all of a sudden we say we will only cover what they say is serious mental illness? The children will be the ones most discriminated against.

Suicide is the third leading cause of death of young people in the United States. Every year 30,000 Americans take their lives. In 90 percent of these situations it is because of depression, and the cause is inadequately treated mental illness. Every 18 minutes a child or adult takes their life because of the unmitigated, searing pain of depression and mental illness, and next year, while Americans wait for fairness in mental health care, thousands more will die and millions more will suffer because the House of Representatives, the Republican leadership, couldn't stand up to the insurance industry and couldn't do the right thing. And the White House couldn't see its way to help.

I thank the 67 Senators who helped. I thank the 244 House colleagues who helped. I thank the 154 organizations that have supported this legislation. I thank the Coalition for Fairness in Mental Illness Coverage, and I thank all of the organizations that are involved in that coalition.

I look forward to the day when people with mental illness will receive decent, humane, and timely health care. It will be a good day for our country.

A critical vote occurred in the Labor Health and Human Services conference committee earlier this week when 10 House members decided whether Congress would respond to the will of the people and establish fair treatment for people with mental illness. They decided they would not. The Mental Health Equitable Treatment Act (S. 543), supported by 67 Senators and 244 House members, was included in the Senate version of the LHHS appropriations bill, but not in the House version. Most of the 32 conferees had expressed strong support for this bill, and thus had their chance to vote their conscience and resist the enormous pressure that had been brought to bear by the business and insurance industries to kill this measure. Unfortunately, these lobbyists were joined by the House Republican Leadership and the White House to stop this bill in its tracks. They succeeded when the 10 House Republicans voted against accepting the mental health provision. Mental health parity was dropped.

House leaders are reportedly promising to hold hearings on parity for next year, and I strongly urge them to do so, and to allow no further delay to pass a full mental health parity bill. I look forward to continuing my long partnership with Senator DOMENICI and

working with the House to ensure that such hearings are fair and represent all those with mental illness. Mental health parity supporters on the House side have waited nine years for the authorizing committees to do just that and move the mental health parity legislation in the House. The White House too has expressed support for working on mental health parity legislation next year, though they had no explanation for their opposition to moving the bill now. They were very pleased with the bill as it was voted out of the Senate HELP committee with a vote of 21–0 on August 1, 2001. Yet, when Americans with mental illness needed the support of their President, now more than ever, he was not there for them.

Sometimes opponents claim that ending unfair limits for mental health care will cost too much, yet the Congressional Budget Office reported that the bill would increase total premium costs by only 0.9 percent. Moreover, this estimate does not even take into account the cost savings that have resulted in overall health care costs when mental health care is properly covered. Nor does it consider the cost savings in the workplace when absenteeism is reduced, and productivity is increased. Something else is lurking behind the claim of cost problems. What is lurking there is the continuing and widespread discrimination against people with mental illness in our health care system.

The stigma against people with mental disorders has persisted throughout history. As a result, people with mental illness are often afraid to seek treatment for fear that they will not be able to receive help, a fear all too often realized when they encounter outright discrimination in health coverage. Why is it that because the illness is located in the brain, and not the heart or liver or stomach, that such stigma persists?

One of the most serious manifestations of stigma is reflected in the discriminatory ways in which mental health care is paid for in our health care system. Health plans routinely set aside ''mental'' illnesses as distinct from ''physical'' illnesses in health care coverage. Inexplicably, they set an arbitrary number of hospital days or visits, or a higher level of copayments or deductible, as a way to handle mental health care. There is no clinical or scientific evidence that mental illness, or any illness for that matter, can always be treated successfully within a fixed number of days. Nor is there any economic or moral justification for charging people with mental illness more money for their care. One can only conclude that health plans try to save money at the expense of people with mental illness, and they bank on the stigma that accompanies this illness to discourage individuals from demanding better care. What a sad commentary on our health care system, and on our country.

The opponents, business and insurance lobbyists and their Congressional friends, who cite cost issues fail to recognize that proper treatment of mental illness actually saves money. They ignore the $70 billion per year cost of untreated mental illness. They also fail to recognize that our society picks up the cost of untreated mental illness in any case, for untreated illnesses don't just go away. Children with mental illness may end up in public institutions, foster care, or jail because their parents cannot afford their care. Adults who have private insurance are often forced into public health care systems financed through State governments, Medicare, and Medicaid. These systems are then forced to take scarce resources from those who have no insurance. Families are forced into bankruptcy; lives are broken; and lives are lost.

We also know that the number of people with serious mental illnesses in America's jails and prisons today is five times greater than the number in state mental hospitals. That is what happens when people, including those with jobs and private health insurance, do not get adequate care. How can our country tolerate this kind of abuse of basic human rights? Prisons, as the Washington Post editorial noted last Monday, are ''the new asylums of the 21st century.'' This criminalization of the mentally ill is inhumane. It is also emotionally and financially costly, and a testament to government failure at all levels. We cannot afford to lose any more lives and we must not let those with mental illness go on being treated as criminals or as unworthy of medical care.

Opponents also often try to defeat mental health parity legislation by claiming they want to cover mental illness, but only ''serious'' mental illness, and thus they would limit coverage to a selected list that is also designed to discriminate, most of all against children. The bill that was developed this year was carefully crafted to address the health needs of all those with mental illness as well as the concerns of employers, and it did so without discriminating against particular diagnoses. The insurance industry is very aware that 90 percent of their costs associated with mental illness are associated with the most severe, as is true for other kinds of health issues as well. And yet, they want to oppose coverage for life-threatening illnesses that accountants, and not doctors, have listed as not ''serious''. Any effort on the part of the lobbyists, the House Republicans, or the White House to limit coverage by particular diagnoses should be stopped immediately. It is just another way to try to stop the effort to provide fairness in treatment for people with mental illness.

We know that mental illness is a real, painful, and sometimes fatal disease. It is also a treatable disease. The gap between what we know from scientific research and clinical expertise and what we do on behalf of patients is lethal. Suicide is the third leading cause of death of young people in the U.S. Each year, 30,000 Americans take their lives, and in 90 percent of these situations, the cause is inadequate treated mental illness. This is one of the true costs of delaying this bill that I hope those who voted against this understand: Every 18 minutes, a child or adult takes their lives because of the unmitigated, searing pain of depression or other mental illness. Next year, while Americans wait for fairness in mental health care, thousands will die and millions will suffer.

Parity will do so much to end the unfair cost requirements, access limits, and personal indignities that people seeking mental health care have been forced to endure. Parity in private insurance has been shown to save other health care costs and would revolutionize our country and our health care system in extraordinarily humane ways. Congress was stopped from doing this right now because of a few members and their lobbyist friends. We must not let these powerful lobbyists subvert the will of the Congress and the will of the 154 supporting organizations of the 2001 Mental Health Equitable Treatment Act and the millions of Americans they represent whose lives are touched by the pain, suffering, and sorrow of mental illness.

I thank the 67 Senate and the 244 House colleagues who worked hard to do the right thing for people with mental illness, and I urge them to not take this defeat lightly. I especially want to thank the 154 organizations who supported this legislation and fought for its passage, particularly the Coalition for Fairness in Mental Illness Coverage and its member organizations: American Managed Behavioral Healthcare Association, American Medical Association, American Psychiatric Association, American Psychological Association, Federation of American Hospitals, National Alliance for the Mentally Ill, National Association of Psychiatric Health Systems, and National Mental Health Association.

We must return quickly to this bill early in 2002 and accept no excuses from the Administration or the House for any further delay. I look forward to the day when people with mental illness receive decent, humane, and timely health care. It will be a good day for our country.

Mr. SARBANES. Madam President, today I would like to bring to your attention title VI of the Labor, Health and Human Services Appropriations bill (H.R. 3061), which is the ''Mark to Market Extension Act of 2001''. This legislation was passed unanimously out of the Committee on Banking, Housing and Urban Affairs on August 1, 2001. We worked closely with both the House and the Administration to craft the final product that is now part of this conference report.

The legislation will ensure that HUD continues to have the authority to restructure the rents and the mortgages of its FHA-insured section 8 project-

based portfolio. These properties have been operating for the past 20 years on long term rental subsidy contracts, many of which are currently paying above-market rents. The program we seek to reauthorize provides HUD with the tools to reduce those rents to market levels and to restructure the underlying mortgages so that the new, lower rents will be sufficient to cover the debt. At the same time, the program provides for the rehabilitation of these projects, and requires another long term commitment to keep the properties affordable.

The appropriators asked that this reauthorization be incorporated into this appropriations bill in order to make use of the $300 million in savings that this legislation will generate. We were happy to accommodate this request.

I would like to thank Senator REED, the Chairman of the Subcommittee on Housing and Transportation, Senator GRAMM and Senator ALLARD for their hard work, support and cooperation throughout this process.

Below is a detailed description of title VI, which I would like to submit for the record on behalf of myself and Senators REED, GRAMM and ALLARD.

I ask unanimous consent that the two statements be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF SENATOR SARBANES, SENATOR GRAMM, SENATOR REED, AND SENATOR ALLARD ON EXTENSION OF MARK-TO-MARKET PROGRAM FOR MULTIFAMILY ASSISTED HOUSING IN FY-20 LABOR-HHS APPROPRIATIONS LEGISLATION

The following represents the views of the Chairman and Ranking Members of the Senate Committee on Banking, Housing, and Urban Affairs and its Subcommittee on Housing and Transportation regarding the ''Mark-to-Market Extension Act of 2001,'' which is part of the Labor-HHS Appropriations Conference Report.

SUBTITLE A—MULTIFAMILY HOUSING MORTGAGE AND ASSISTANCE RESTRUCTING AND SECTION 8 CONTRACT RENEWAL

Section 602: Purposes

The bill includes a number of new purposes that reflect some of the concerns of the Committee and a number of stakeholders regarding the administration of the mark-to-market (MTM) program. For example, concerns were raised that the private participating administrative entities (PAEs) might not be providing the amount of rehabilitation and reserves necessary for the properties to meet the 30 years affordability commitment required by the law. Likewise, it is important for the PAEs, both public and private, to correctly calculate project expenses. Underestimation of expenses, as with inadequate investment in rehabilitation, will undermine the physical and financial condition of the properties. Failure to account realistically and accurately for the expenses of running a project could result in the project underwriting being too ''tight'' with too little debt restructured, and too little cash flow. In such cases, unexpected events, such as spikes in energy prices, could force the property into default. Such an outcome would undercut the purpose of this program, which is intended to reposition these properties both physically and financially to continue to serve low-income residents for the long haul.

The Committee expects the Department to continue to keep track of the properties after they have been restructured. This is particularly important for a number of properties that have had rents reduced to market levels without the debt being restructured. These properties have been put on a ''watch list'' to make sure the owners continue to maintain the properties, despite the reduction in cash flow. The Committee expects HUD to act expeditiously if these properties show any signs of deterioration.

Section 611: Mark-to-Market Amendments

Subsection (a)—Authorizes $10 million per year for tenant groups, non-profit organizations, and public entities for technical assistance and capacity building to meet the purposes of the Act. This provision allows the funding to be carried over. Entities that qualify for debt forgiveness under section 517(a)(5) automatically qualify for grants under this subsection.

(b) Exception rents are allowed for up to 5 percent of the total number of projects subject to a portfolio restructuring agreement.

(c) Provides for notice to residents of the Secretary's rejection of an assistance plan.

(d) Allows certain properties to go through the program upon transfer of ownership, at the request of the new owner.

(e) Provides the Secretary the authority to reduce the amount of funds contributed by owners for rehabilitation in cases where additional features such as an elevator or air conditioning are added to the project and were not previously in that project. This flexibility extends to these additional features only; the Committee expects the Secretary to continue to apply the full matching funds requirement for all standard rehabilitation.

(f) Allows owners of previously eligible projects to opt back into the program. HUD believes that the section 8 contracts on some properties that should have gone through the mark-to-market program were renewed without going through the program. This subsection allows such properties, at the owner's consent, to get back into the program, if the property would have been otherwise eligible.

(g) Redefines second mortgages to allow inclusion of miscellaneous costs, subject to likelihood of repayment. This subsection also allows the Secretary to assign the second mortgage to an entity that meets the conditions for debt modification or forgiveness. The Congress intends this additional tool to be used in the same framework as modification or forgiveness. For example, if HUD would otherwise have forgiven a second mortgage, we would expect the Secretary to assign the mortgage to the eligible owner without any additional requirements, if that is the preference of the non-profit owner.

(h) Retains program exemption for elderly projects financed through section 202 that have been refinanced.

Section 613: Consistency of Rent Levels Under Enhanced Voucher Assistance and Rent Restructurings

The Mark-to-market program is designed to lower section 8 rental payments that are above market and, where necessary, restructure the underlying debt in eligible properties. To determine if the contract rent is above, below, or at market levels requires that a rent comparability study be done. The Department raised a concern that some rent comparability studies may be inaccurate, resulting in a number of contracts being renewed at above market rents. Alternatively, the Committee has heard reports that OMHAR is setting rents too low, or that the value of vouchers being provided to residents in the case of opt outs are being set too high, thereby encouraging owners to avoid the mark-to-market program.

The Committee believes that none of these results is desirable: properties with rents that are above market should go through the program in order to get a thorough financial and physical review. Moreover, whatever organization is establishing the comparable market rent, whether it is the PAE or the PHA, the results should be consistent so that the owner's decision to stay in the program or opt out is not determined by who is doing the rent study. In this section, the Committee directs the Secretary to establish procedures for ensuring rents as determined through this program, the contract renewal process, or for enhanced vouchers for the same units are reasonably consistent.

Section 614: Eligible Inclusions for Renewal Rents of Partially Assisted Buildings

Allows certain projects that are partially assisted with section 8 to get budget-based rents up to comparable market rents, sufficient to cover the costs of maintenance of the project.

Section 615: Eligibility of Restructuring Projects for Miscellaneous Housing Insurance

Amends Section 223(a)(7) of the National Housing Act to allow HUD-held mortgages on properties in the program to be treated as FHA-insured loans to expedite the refinancing process. In addition, it extends the maximum term of FHA-insured and HUD-held mortgages refinanced under this subsection to 30 years.

SUBTITLE B—OFFICE OF MULTIFAMILY HOUSING ASSISTANCE RESTRUCTURING

Section 621: Reauthorization of Office and Extension of Program

Extends the program to October 1, 2006. Extends the Office until October 1, 2004.

Sections 622 and 623: Appointment of Director and Vacancy in Position of Director

Establishes the procedure for appointing the Director of OMHAR and for filling vacancies. The Director would be appointed by the President, but would no longer be a Senate-confirmed position.

Section 624: Oversight by Federal Housing Commissioner

Places OMHAR under the jurisdiction of the FHA Commissioner/Assistant Secretary of Housing, as requested by the Administration. This is being done to enable better coordination between the Office of Housing and OMHAR. The Committee does this with the understanding, as expressed by Assistant Secretary Weicher at the Subcommittee's June 19, 2001 hearing, that HUD has ''every expectation that [OMHAR] will continue to be fully dedicated to [the mark-to-mark] work.''

The Committee also expects the FHA Commissioner to work conscientiously to maintain the highly qualified staff that exists at OMHAR. At the hearing, the GAO witness noted several times of the need to retain OMHAR's ''contract staff that have unique expertise in this program. . . .''

Section 625: Limitation on Subsequent Employment

Prohibits certain OMHAR employees from subsequent compensation from parties with financial interests in the program for a period of 1 year.

SUBTITLE C—MISCELLANEOUS HOUSING PROGRAM AMENDMENTS

Section 631: Extension of CDBG Public Services Cap Exception

Extends the expanded public services cap for Los Angeles for an additional 2 years. It is expected that this will be the last in a number of extensions.

Section 632: Use of Section 8 Enhanced Vouchers for Prepayments

Extends eligibility for enhanced vouchers to projects that prepaid in 1996.

Section 633: Prepayment and Refinancing of Loans for Section 202 Supportive Housing

Makes the refinancing provisions for elderly (section 202) projects in the American Homeownership and Economic Opportunity Act of 2000 self-enacting. The Committee believes that the provisions enacted last year should have already been implemented by HUD. This Section makes it clear that the provisions from the 2000 Act are self-enacting, and do not need implementing regulations from the Department.

CHANGES TO THE 2001 AND 2002 APPROPRIATIONS COMMITTEE ALLOCATIONS AND THE BUDGETARY AGGREGATES

Mr. CONRAD. Madam President, section 314 of the Congressional Budget Act, as amended, requires the chairman of the Senate Budget Committee to adjust the budgetary aggregates and the allocation for the Appropriations Committee by the amount of appropriations designated as emergency spending pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended. The conference report to H.R. 3061, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for 2002 includes $300 million in emergency-designated funding for the Low-Income Home Energy Assistant Program. That budget authority will result in $75 million in new outlays in 2002.

Pursuant to section 302 of the Congressional Budget Act, I hereby revise the 2002 allocation provided to the Senate Appropriations Committee in the concurrent budget resolution in the following amounts.

TABLE 1.—REVISED ALLOCATION FOR APPROPRIATIONS COMMITTEE, 2002

[In millions of dollars]

	Budget authority	Outlays
Current Allocation:		
General Purpose Discretionary	549,444	551,304
Highways	0	28,489
Mass Transit	0	5,275
Conservation	1,760	1,232
Mandatory	358,567	350,837
Total	909,771	937,137
Adjustments:		
General Purpose Discretionary	300	75
Highways	0	0
Mass Transit	0	0
Conservation	0	0
Mandatory	0	0
Total	300	75
Revised Allocation:		
General Purpose Discretionary	549,744	551,379
Highways	0	28,489
Mass Transit	0	0
Conservation	1,760	1,232
Mandatory	358,567	350,837
	910,071	937,212

Mr. CONRAD. Mr. President, I rise to offer for the RECORD the Budget Committee's official scoring for the conference report to H.R. 3061, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for fiscal year 2002.

The conference report provides $123.371 billion in discretionary budget authority, which will result in new outlays in 2002 of $50.089 billion. When outlays from prior-year budget authority are taken into account, discretionary outlays for H.R. 3061 total $107.791 billion in 2002. The conference report provides virtually the same amount of budget authority as did the Senate-passed bill, which provided $123.37 billion. The conference report is at the Senate subcommittee's section 302(b) allocation for both budget authority and outlays.

Included in the conference report's total is $300 million in emergency-designated funding for the low-income home energy assistance program, (LIHEAP), which will result in new outlays of $75 million in 2002. In accordance with standard budget practice, I am adjusting the appropriations committee's allocation by the amount of that emergency-designated spending.

Additionally, H.R. 3061 also provides $18.874 billion in advance appropriations for 2003 for employment and training, health resources, child care, and education programs. Those advances are specifically allowed for under the budget resolution adopted for 2002, and, combined with all other advance appropriations considered by the Senate to date, fall within the limit imposed by the resolution. Further, the report adopts the Senate provision extending the Mark-to-Market Program for multifamily assisted housing. That provision, which is included in the above totals, is estimated to save $355 million in 2002. Finally, the report includes language that extends by one year certain benefits regarding mental health parity. Because that provision includes language directing how its costs are to be counted for budgetary purposes, it violates section 306 of the Congressional Budget Act of 1974.

I ask unanimous consent that a table displaying the budget committee scoring of this report be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

H.R. 3061, CONFERENCE REPORT TO THE DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2002

[Spending comparisons—Conference Report, in millions of dollars]

	General purpose	Mandatory	Total
Conference report:			
Budget Authority	123,371	272,937	396,308
Outlays	107,791	272,968	380,759
Senate 302(b) allocaiton:[1]			
Budget Authority	123,371	272,937	396,308
Outlays	107,791	272,968	380,759
President's request:			
Budget Authority	116,382	272,937	389,265
Outlays	105,957	272,968	378,925
House-passed:			
Budget Authority	123,371	272,937	396,308
Outlays	106,828	272,968	379,796
Senate-passed:			
Budget Authority	123,370	272,937	396,307
Outlays	107,749	272,968	380,717
CONFERENCE REPORT COMPARED TO			
Senate 302(b) allocation: [1]			
Budget Authority	**0**	**0**	**0**
Outlays	**0**	**0**	**0**
President's request:			
Budget Authority	7,043	0	7,043
Outlays	1,834	0	1,834
House-passed:			
Budget Authority	0	0	0
Outlays	963	0	963
Senate-passed:			
Budget Authority	1	0	1
Outlays	42	0	42

[1] For enforcement purposes, the budget committee compares the conference report to the Senate 302(b) allocation.

Notes.—Details may not add to totals due to rounding. Totals adjusted for consistency with scorekeeping conventions. In addition, the conference report provides $18.874 billion in advance appropriations for fiscal year 2003.

Mr. DURBIN. Mr. President, during this summer's debate on the ESEA reauthorization legislation, I offered an amendment to increase the authorization for the new math and science partnerships program from $500 million in the Senate bill to $900 million in fiscal year 2002. Raising the authorization to this level brought math and science partnership participated and science partnership funding to the same level as the Reading First program also created in the education bill. My amendment passed by voice vote.

During that debate, I joined several of my colleagues in emphasizing the critical need to improve math and science education in our nation's elementary and secondary schools. U.S. students consistently score lower than their counterparts in other nations in math and science, yet more than one in four high school math teachers and nearly one in five high school science teachers lack even a minor in their main teaching field. The training and preparation of math and science teachers must be a top priority.

I am disappointed that the Labor–HHS–Education Appropriations bill funds the math and science partnerships at just $12.5 million in fiscal year 2002— a level far below the $450 million authorized by Congress for this program in the final ESEA legislation.

But I am encouraged by language included in the conference report that states,

the conferees believe math providing high-quality math and science instruction is of critical importance to our nation's future competitiveness, and agree that math and science professional development opportunities should be expanded. The conferees therefore strongly encourage the Secretary and the State to continue to fund math and science activities within the Teacher Quality Grant program at a comparable level in fiscal year 2002.

I understand that the conferees intend that at a minimum, the current commitment to the training of math and science teachers will be upheld. The conference report urges the Secretary of Education and the States to use the Teacher Quality grant program, funding available for math and science partnerships and through other federal grants to bring math and science education is a level that adequately prepares our young people for

the demands for the demands of the 21 century. I hope that States and districts continue to increase their efforts in the area. I look forward to working with my colleagues next year to further support strong math and science education in schools.

SMALLPOX VACCINATION FOR FIRST RESPONDERS

Mrs. BOXER. Mr. President, smallpox is a deadly disease that if not treated within the few first days after initial exposure, can cause death in 1 out of 3 cases. Clearly, this is not a disease to take lightly.

The problem with smallpox, unlike our recent experience with anthrax, is that it is highly contagious, and not simply infectious. Thus, one person can spread the disease to hundreds of people within a matter of days.

In this new climate of threatened bioterrorist attacks, it is essential that we prepare ourselves for the worst case scenario and not simply sit back and hope for the best.

This fact was highlighted in disturbing detail in the ''Dark Winter'' exercise conducted by the Center for Civilian Biodefense Studies at John Hopkins University.

''Dark Winter'' showed that an aerosol release of smallpox virus would spread easily, and that the dose needed to cause infection is very small. The exercise showed that 20 confirmed cases could result in as many as 300,000 additional infections and 100,000 deaths in just 3 short weeks.

In light of this, the Federal Government is working quickly to ensure that public health officials at all levels of government are able to work together should an outbreak occur.

I applaud the steps already taken by the Centers for Disease Control to vaccinate some of its first response personnel and to ensure the safety of those vaccinations.

But I believe it is not only essential to have a trained and ready team in place at the federal level to respond immediately to a possible outbreak, I believe that such a vaccination program should be expanded.

That is why I sent a letter to Health and Human Services Secretary Thompson urging him to work with Governors to identify and vaccinate key first responders in all 50 States. I specifically asked Secretary Thompson to instruct CDC officials to reach out to Governors and work with them to create lists of critical first responders in their States, and to authorize those vaccinations within the next 60 days.

We must also work quickly to make sure we have at least 290 million doses of smallpox vaccine available to treat the entire population as well as support additional research on antiviral therapies and other vaccines to help control and contain any bioterrorist attack.

In California, many companies are already making progress toward such antiviral therapies for smallpox, and I hope that we will not delay in providing funding for this type of research.

Mr. HARKIN. I commend my colleague from California on her thoughtful comment on the dangers of smallpox. I agree with her that much more research on new vaccines and therapies is needed and am proud of the many companies across the nation that are leaders in this important effort.

As my colleague indicates, the CDC has recently developed a strategy for vaccination in response to a smallpox outbreak and the funding provided in the Labor, Health and Human Services and Education Appropriations bill will help the CDC in carrying out this goal.

Additionally, I believe that the funding provided for the Office of Emergency Preparedness for bioterrorism-related activities can be especially useful in making the vaccine available to first responders.

Mrs. BOXER. I thank my distinguished colleague from Iowa for his supportive remarks, and hope that Secretary Thompson will seriously consider his suggestion.

I truly believe that a small cadre of vaccinated first responders from each of the 50 states would provide an indispensable complement to the CDC staff already inoculated.

Mr. HARKIN. I agree with my colleague from California that vaccinating first responders should be given serious consideration as the CDC and the Office of Emergency Preparedness pursue bioterrorist activities.

Mrs. BOXER. As we continue to discuss funding to prepare for potential bioterrorist attacks, we should also have confidence in this country's ability to react to a smallpox outbreak promptly. Ensuring that first responders are ''armed'' with a vaccination and in a position to respond is a responsible way to achieve this goal.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. Madam President, I thank the conferees on this bill for their hard work. This is important legislation that provides Federal funding for the Departments of Labor and Health and Human Services, and Education, and related agencies.

I am pleased to see increased funding for many programs, especially in light of our Nation's war on terrorism. This includes an increase in funding for bioterrorism activities and for strengthening our Nation's public health infrastructure. This funding is critical for all our States, localities, and our Nation as a whole to ensure that we are ready to respond to all contingencies.

There is funding to ensure our Nation's food supply remains safe and resources for helping meet the health care needs of the uninsured. In addition to funding key public health programs, this bill provides funds for helping States and local communities educate our children. Furthermore, it funds our scientists who are dedicated to finding treatments, if not cures, for many illnesses, including Parkinson's, Alzheimer's, and ALS.

The legislation also ensures our Nation's most vulnerable, our children, senior citizens and the disabled, have access to quality health care.

Funds are also provided for important programs that assist working families needing child care, adult daycare for elderly seniors, and Meals on Wheels.

For all the good in this bill, I ask: How many other worthy programs are being shortchanged because of our parochial appetites? Again, I find myself in the unpleasant position of speaking about parochial projects in yet another conference report. I have identified nearly $1 billion in earmarks. The total amount in porkbarrel spending appropriations bills considered so far is $15 billion.

I would like to start out by asking unanimous consent to print in the RECORD the Web site of the U.S. Senate Committee on Appropriations.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNITED STATES SENATE COMMITTEE ON APPROPRIATIONS

AUTHORIZATIONS AND APPROPRIATIONS: WHAT'S THE DIFFERENCE?

Authorization laws have two basic purposes. They establish, continue, or modify federal programs, and they are a prerequisite under House and Senate rules (and sometimes under statute) for the Congress to appropriate budget authority for programs.

Some authorization laws provide spending directly. In fact, well over half of federal spending now goes to programs for which the authorizing legislation itself creates budget authority. Such spending is referred to as direct, or mandatory, spending. It includes funding for most major entitlement programs. (Some entitlements are funded in annual appropriation acts, but the amounts provided are controlled by the authorization law that established the entitlement.) The authorization laws that provide direct spending are typically permanent, but some major direct spending programs, such as the Food Stamp program, require periodic renewal.

Discretionary spending, which is provided in the 13 appropriation acts, now makes up only about one-third of all federal expenditures. For discretionary spending, the role of the authorizing committees is to enact legislation that serves as the basis for operating a program and that provides guidance to the Appropriations Committees as to an appropriate level of funding for the program. That guidance typically is expressed in terms of an authorization of appropriations. Such authorizations are provided either as specific dollar amounts (definite authorizations) or ''such sums as are necessary'' (indefinite authorizations).

In addition, authorizations may be permanent and remain in effect until changed by the Congress, or they may cover only specific fiscal years. Authorizations that are limited in duration may be annual (pertaining to one fiscal year) or multiyear (pertaining to two, five, or any number of specific fiscal years). When such an authorization expires, the Congress may choose to extend the life of a program by passing legislation commonly referred to as a reauthorization. Unless the underlying law expressly prohibits it, the Congress may also extend a program simply by providing new appropriations. Appropriations made available for a program after its authorization has expired are called ''unauthorized appropriations.''

Longstanding rules of the House allow a point of order to be raised against an appropriation that is unauthorized. During initial consideration of a bill in the House (which by precedent originates appropriation bills), unauthorized appropriations are sometimes dropped from the bill. However, the House Committee on Rules typically grants waivers for unauthorized appropriations that are contained in a conference agreement. In the Senate, there is a more limited prohibition against considering unauthorized appropriations.

Both House and Senate rules require that when the Committees on Appropriations report a bill, they list in their respective committee reports any programs funded in the bill that lack an authorization. The information in the committee reports, however, differs somewhat from the information shown in this report. This report covers programs that at one time had an explicit authorization that either has expired or will expire. Unlike the lists shown in the Appropriations Committee reports, this report does not include programs for which the Congress has never provided authorizations of appropriations. For example, some Treasury Department programs have never received explicit authorizations of appropriations. They receive appropriations nonetheless because the authority to obligate and spend funds is considered ''organic''—inherent in the underlying legislation or executive action that originally empowered the Treasury to perform particular functions.

As mentioned above, many laws establish programs with authorizations of discretionary appropriations that do not expire. Both the Appropriations Committee reports and this CBO report exclude programs with that type of authorization because its effect is permanent.''

WHERE DOES THE MONEY GO?

While the size of the annual federal budget has increased in dollar terms (reflecting inflation, increased population and economy) over the years, the proportion available for common government services has shrunk dramatically. Competition among federal agencies for funding is heating up.

Over the last three decades, discretionary spending has been cut significantly to accommodate rapid growths in other expenses. Discretionary spending covers everything from road building to police protection to medical research to our national defense—most of the government services with which Americans are familiar. All other spending is mandatory—required by law regardless of what is left over for discretionary spending. Mandatory spending includes entitlements such as Social Security and Medicare, and the enormous interest the U.S. must pay every year to finance the national debt.

Three decades ago, nearly two-thirds of the federal budget was available for discretionary programs: 1966—$9 billion, interest; $43 billion, entitlement; $90 billion (63%), discretionary.

In the 1970s, entitlement spending jumped, placing a crimp on discretionary spending: 1976—$27 billion, interest; $189 billion, entitlement; $475 billion, (45%), discretionary.

By the mid-1980's, interest payments on the national debt began to rise: 1986—$136 billion, interest; $462 billion, entitlement; $438 billion (42%), discretionary.

By 1996, entitlement spending took half of the budget pie. In just 30 years, the amount left over for roads, police, defense, and most other government services shrunk to a third of the budget: 1966—$241 billion, interest; $859 billion, entitlement; $535 billion (33%), discretionary.

Current budget projections show the same trend. By 2006, entitlement spending will demand the majority of the federal budget. Interest payments will continue to be a major drain on the Treasury, and the remaining amount will be divided among discretionary programs: 2006—$209 billion, interest; $1,476 billion, entitlement; $6266 billion (27%), discretionary.

Compare the forty-year difference side-by-side: 1966—$9 billion, interest; $43 billion, entitlement; $90 billion (63%), discretionary. 2006—$209 billion, interest; $1,476 billion, entitlement; $626 billion (27%), discretionary.

RULE XVI—APPROPRIATIONS AND AMENDMENTS TO GENERAL APPROPRIATIONS BILLS

1. On a point of order made by any Senator, no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act or resolution previously passed by the Senate during that session; or unless the same be moved by direction of the Committee on Appropriations or of a committee of the Senate having legislative jurisdiction of the subject matter, or proposed in pursuance of an estimate submitted in accordance with law.

2. The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation or any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law if such restriction is to take effect or cease to be effective upon the happening of a contingency, and if an appropriation bill is reported to the Senate containing amendments to such bill proposing new or general legislation or any such restriction, a point of order may be made against the bill, and if the point is sustained, the bill shall be recommitted to the Committee on Appropriations.

3. All amendments to general appropriation bills moved by direction of a committee having legislative jurisdiction of the subject matter proposing to increase an appropriation already contained in the bill, or to add new items of appropriation, shall, at least one day before they are considered, be referred to the Committee on Appropriations, and when actually proposed to the bill no amendment proposing to increase the amount stated in such amendment shall be received on a point of order made by any Senator.

4. On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill.

5. On a point of order made by any Senator, no amendment, the object of which is to provide for a private claim, shall be received to any general appropriation bill, unless it be to carry out the provisions of an existing law or a treaty stipulation, which shall be cited on the face of the amendment.

6. When a point of order is made against any restriction on the expenditure of funds appropriated in general appropriation bill on the ground that the restriction violates this rule, the rule shall be construed strictly and, in case of doubt, in favor of the point of order.

7. Every report on general appropriation bills filed by the Committee on Appropriations shall identify with particularity each recommended amendment which proposes an item of appropriation which is not made to carry out the provisions of an existing law, a treaty stipulation, or an act or resolution previously passed by the Senate during that session.

8. On a point of order made by any Senator, no general appropriation bill or amendment thereto shall be received or considered if it contains a provision reappropriating unexpended balances of appropriations; except that this provision shall not apply to appropriations in continuation of appropriations for public works on which work has commenced.

Mr. McCAIN. I will quote from it. It says:

Authorization laws have two basic purposes. They establish, continue, or modify federal programs, and they are a prerequisite——

I emphasize, ''a prerequisite''——

under House and Senate rules . . . for the Congress to appropriate budget authority for programs.

I found that entertaining and amusing because we have this list of hundreds of projects which are not authorized and are funded at whatever level the appropriators see fit.

I will go through a number of them. Some of them are entertaining; some of them make you sad. I would like to pose a question to the manager of the bill, if I could have his attention. I see that there is $1 million for the Shakespeare Rose Theater to enhance educational and cultural programs and language literacy in the arts for students and the general public.

Could the manager of the bill tell me where the Shakespeare Rose Theater is located?

I admit there are hundreds here. I can understand why the manager of the bill wouldn't know why it is a paltry $1 million, but could the manager of the bill tell me where the Shakespeare Rose Theater is located?

Mr. HARKIN. Might I inquire of the Senator, what committee does the Senator——

Mr. McCAIN. I only have 10 minutes. Can you tell me where the theater is located? That is a pretty straightforward question. It deserves a straightforward answer.

Mr. HARKIN. You know, Madam President, I would just say to the Senator, he asked me a question——

Mr. McCAIN. I withdraw the question.

Mr. HARKIN. You asked me a question. Now he won't let me answer it.

The PRESIDING OFFICER. The Senator from Arizona has the floor.

Mr. McCAIN. I asked for an answer. I didn't get an answer.

Mr. HARKIN. The answer is there are 1,600 different items in this bill. If the Senator has about 60 seconds of patience, I will find out for him.

Mr. MCCAIN. I thank you, but it is an example. The manager of the bill doesn't even know where a place that we are giving $1 million of the taxpayers' dollars is located.

Mr. HARKIN. It is in Massachusetts.

Mr. MCCAIN. That is instructive. That is instructive about the proliferation of the pork in this legislation.

Let me cite a few others: $500,000 for the Mattatuck Museum in Waterbury, CT; $800,000 for the Mind-Body Institute of Boston, MA—the Mind-Body Institute of Boston, MA?—$150,000 for the Lady B Ranch Apple Valley, CA, for the Therapeutic Horseback Riding Program.

I want to go back to what the Senator said, that there are 1,600 earmarks. So the manager of the bill doesn't even know where $1 million goes. Maybe $1 million isn't much to the manager of the bill, but it sure as heck is a great deal of money to my constituents. I won't pursue this.

Again, $150,000 for the Lady B Ranch Apple Valley, CA, for the Therapeutic Horseback Riding Program. If you asked the average citizen if a therapeutic horseback riding program was at the top of their priority list, I don't think so. But therapeutic horseback riding has to be earmarked for Apple Valley, CA.

Continuing, $500,000 for the University of Washington Center for Health Workforce Studies in Seattle, WA. By the way, there is $800,000 for the Seattle King County Workforce Development Council, Seattle, WA, for the purpose of retraining displaced Boeing employees. Now in the Defense appropriations bill, which is coming up very shortly, we will have a $26 billion bailout for Boeing. Yet we still need $800,000 to retrain their workers. That is a good deal for Boeing.

The list continues:

$750,000 for the Center for Textile Training and Apparel Technology at Central Alabama Community College;

$200,000 for the University of Arkansas Medical Services BioVentures Incubator for equipment needed for wetlabs used in training;

$800,000 for Bishops Museum. I dare not ask the manager where Bishops Museum is, but I can find out for myself.

Continuing with the list: $200,000 for the Mississippi State University, Center for Advanced Vehicular Systems, Mississippi State, MS, for automotive engineering training.

The list goes on and on and on. Here is something that is really entertaining, or saddening, depending on whether or not you are a taxpayer. For example, it earmarks $5 million, $5 million for a program never authorized—never a hearing through the Commerce Committee—$5 million for a program to promote educational, cultural apprenticeships, and exchange programs for Alaska Natives, native Hawaiians, and their historical whaling and trading partners in Massachusetts. That is remarkable, remarkable—$5 million. This is a new program authorized by the Senate-passed version of the ESEA authorization bill. It was not requested by the administration.

It is interesting to note that even though the United States does not engage or support commercial whaling—we are against commercial whaling—we are willing to provide $5 million for a program highlighting the practice.

Another issue of concern is the report's inclusion of $25 million for equipment and facilities to assist public broadcasters with the transition to digital television. I would remind my colleagues that this request was never the subject of a hearing by the Commerce Committee, which is the authorizing committee. I don't believe that Congress is exercising sound fiscal policy when it decides to appropriate millions of dollars to publicly funded television stations so that they may purchase the latest in digital technology.

Rather, the Corporation for Public Broadcasting should have come before the Commerce Committee to discuss with us the best way to achieve the goals of public broadcasters and ensure that taxpayer dollars are spent wisely.

So as the manager said, there are 1,600 earmarks in this bill, very few of them, if any, previously authorized; all of them are in violation of the Web site the Appropriations Committee has. The overwhelming majority of these earmarks are for members of the Appropriations Committee, so that those States that are not represented on the Appropriations Committee are shortchanged. There is no competition. There is no authorization. There is no hearing. We are talking about a billion dollars here. It is remarkable.

The rules of the Senate have to be changed. The rules of the Senate have to be changed so that those of us who don't support these programs will have an opportunity to have our States' priorities considered as well.

I have something that my staff put in front of me regarding the Rose. Apparently, it is in London, England. It was built in 1587 by Philip Henslowe. The Rose was the first theater on London's Bankside. Its repertory included plays by Kyd, Jonson, Shakespeare, and Marlowe. In 1989 its remains were discovered and partially excavated amidst a blaze of international press coverage.

Are we now giving a million dollars to a theater in London, England? Remarkable. Put in without any hearing, without any authorization, without anything? We are going to give a million dollars for that? Are the British so bad off that they need a million dollars from us for a theater in London?

We have homeless people wandering the cities of America and we are going to give a million dollars to the Rose Theater? Remarkable. Remarkable.

Madam President, it is outrageous, disgraceful, and it is an abrogation of the process of legislation. Again, I will continue to oppose this and try to bring this to the attention of the American people.

The PRESIDING OFFICER. The Senator from Iowa is recognized.

Mr. HARKIN. Madam President, the Senator from Arizona never mentioned the projects in Arizona in the amount of $6.7 million. Let me read a couple: University of Arizona for a border health initiative. There is one for Pima Community College in Arizona for minority students to attend college. There is the Pima County Department of Health and the University of Arizona. Here is one for Herd Museum in Phoenix to develop exhibits and educational programs about the historic Phoenix Indian School and the Native Americans who attended the school.

Does the Senator want us to knock all those out?

Mr. MCCAIN. Absolutely. I have opposed every earmarked project for my State, and I have done so for all the years I have been here. I am sorry the Senator from Iowa doesn't know that.

Mr. HARKIN. The Senator knows full well that the other Senator from Arizona supports those.

Mr. MCCAIN. The other Senator does not support those. It came from the House.

Mr. HARKIN. So does the Congressman.

Mr. MCCAIN. It came from the House. He doesn't even know where the theater is in London.

Mr. HARKIN. The Congressman also supports them. I want to mention a couple of other projects. The Senator mentioned the Bishop Museum located in Hawaii. The other one mentioned was in Massachusetts. The Senator made fun of a horseback riding project that he kind of mocked. I don't know that program intimately, but I remember when it was brought up. This is a program in California for therapy for severely mentally retarded and brain-injured kids. It is a program where they have found that by using this kind of therapy, it allows these kids to have a little bit better life. I am not a medical expert. I don't know how this works. But according to the Member of Congress who brought this up, this is something the health care professionals believe is very important to these disabled kids.

I am told that the Senator from Arizona may be slightly mistaken, that the Senator from Arizona did ask for some of these projects. The Pima County Department of Health in Arizona, a $400,000 grant was asked for by the Senator from Arizona, Mr. MCCAIN—I am sorry, Mr. KYL. It was asked for by the other Senator from Arizona. Certainly, the other Senator from Arizona —I can't speak for him—would not say just this is mine and nobody else's. So I say that there are four projects in Arizona asked for by Senator KYL from Arizona. I want the record to show that.

Mr. MCCAIN. Madam President, do I have any time remaining?

The PRESIDING OFFICER. The Senator does not have any time remaining.

The Senator from Kansas is recognized.

Mr. BROWNBACK. I believe I have 10 minutes.

The PRESIDING OFFICER. Correct.

Mr. BROWNBACK. I yield a minute to the Senator from Arizona.

Mr. MCCAIN. The Senator from Iowa knows that Senators speak for themselves. My record is clear over many years. I have never supported earmarks, not because of its virtue or vices, but because it didn't go through an authorizing procedure. The Pima County College project may be good and beneficial, and the therapeutic horseback riding project might be good and beneficial. I happen to be ranking member of the Commerce Committee. Those are under the oversight of our Committee and they should be authorized. It is disgraceful the way these are put in.

The Senator from Kansas will soon bring out an example of a problem of legislating on appropriations. There is a major issue in his State concerning Indian gaming on which there has never been a hearing, never consideration. It was stuck into an appropriations bill, and it has profound effects on the State of Kansas. He is here, and rightfully upset, to say the least, about the fact that he, as a Senator from Kansas, never had any input into it and it was stuck into an appropriations bill.

I tell the Senator from Kansas that I will do everything I can to help him in the authorizing process to see that the process is carried out in a legitimate fashion.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

INDIAN GAMING

Mr. BROWNBACK. Madam President, I want to draw attention to something that happened in my State that I think is completely wrong in the appropriations process. The Senator from Nevada is aware of this and stated yesterday his support to help me out with this problem. I hope I can get the attention, as well, of the Senator from Iowa. This is what happens in the worst situations in the appropriating committees. It is not about money or an appropriation for a particular line item. In a conference committee, a half sentence was written in the report that overturned a Tenth Circuit Court of Appeals decision about Indian gaming in Kansas. It affects the Huron Cemetery in Kansas City, KS.

You can look at this picture. This is not a casino site. This is a cemetery site, Huron Indian Cemetery. It has been there several hundred years. It is on the banks of the Kansas River. It is a beautiful site, maintained well. What took place was this. We have four recognized Indian tribes in Kansas, and all four have casinos. A fifth tribe from outside the State, the Wyandotte tribe of Oklahoma, bought adjacent land and said: We want to make it into a reservation and casino, even though our tribe is in Oklahoma. We want to do this in Kansas City because this looks lucrative to us.

So they said, first, they wanted to put it right on top of this site. Then the courts and local opinion said no. Then they wanted to build the casino on stilts on the site. They said no to that, also. So they bought an adjacent building. That was blocked. That was blocked in the courts. The State of Kansas fought it.

The four recognized tribes of Kansas fought against it. I fought against it. The other Senator from Kansas fought against that. It has been stopped. The people of Kansas City don't want this taking place there.

OK. So then the tribe from Oklahoma litigates it in court. They are defeated at the Tenth Circuit Court of Appeals. They can't do this casino in Kansas, according to the Tenth Circuit Court of Appeals. The Governor doesn't want it, we Senators don't want it, and the tribes don't want it. Then they go into a conference committee—Department of Interior—and in the conference, at the last minute, a half-sentence, handwritten note was put in that overturns the Tenth Circuit Court of Appeals. Now they are going to be able to go forward and build a casino next to this beautiful cemetery.

This is a sacred site to a number of Native Americans in the United States. But because in a conference committee they got a half sentence in, written in pencil, it will overturn all of this work by all of these people. Is that right? Is that fair to take place? Is that the way the system is supposed to work? I don't think that is what is supposed to take place.

So we came back in the Labor-HHS appropriations bill and on the floor we worked with the managers and said: Look, this isn't right. Let's correct this in this appropriations bill.

The managers in the Senate, to their great credit—and I thank the Senator from Iowa—said: You are right; we will correct it in the Labor-HHS bill. Then it got stripped out of the bill because the House would not recede. We were trying to correct what took place in the dark of night through this conference committee report on Labor-HHS, and we were not able to get it done.

Now we are left with the possibility of a casino being built next to a cemetery by an out-of-State tribe that the tribes in Kansas, the Governor of Kansas, and the Senators from Kansas do not want, and it took place in the Appropriations Committee process.

We need a rule change so it does not happen again. I am here today to tell my colleagues that I am going to be working on this next year to get this overturned, to get this clarified. There were no hearings on this issue—none—in either the House or the Senate. It was stuck in at the last minute. It should not have taken place, yet it did, and now it is the law of the land, in spite of what all the people involved in this think about it.

This is clearly not appropriate. I hope we can put a rule in place to raise a point of order, requiring a 60-vote supermajority, against situations such as this happening to the Huron Indian Cemetery in Kansas City, KS. This just is not right. I am going to raise this issue next year. I hope my colleagues, and those on the Appropriations Committee, will work with us to correct such an injustice.

Thank you, Madam President. I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. HARKIN. Madam President, how much time is remaining?

The PRESIDING OFFICER. The Senator from Iowa has no time remaining.

Mr. HARKIN. How much time does Senator SPECTER have remaining?

The PRESIDING OFFICER. Twenty-nine minutes.

If no one yields time, time is charged equally to both parties.

Mr. HARKIN. Madam President, parliamentary inquiry: If a quorum call is instituted, does that time run against both sides?

The PRESIDING OFFICER. Under a previous order, it will run against all sides.

Mr. HARKIN. In that case, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Ms. LANDRIEU. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. NELSON of Florida). Without objection, it is so ordered.

Ms. LANDRIEU. Mr. President, I ask unanimous consent for 5 minutes to speak on the underlying bill and another unrelated subject.

The PRESIDING OFFICER. Against whose time?

Ms. LANDRIEU. Whatever time is remaining.

The PRESIDING OFFICER. Without objection, it is so ordered.

Ms. LANDRIEU. I thank the Chair.

Ms. LANDRIEU. Mr. President, I realize there is time remaining and I thank the Senators for yielding. I have spoken many times on this issue, but I want to take another minute to speak about the underlying appropriations bill, particularly the educational aspects and components of this legislation. There were a few things I didn't get to say that I would like to add for the RECORD.

I thank the chair of the subcommittee, the Senator from Iowa, Mr. HARKIN, for his extraordinary work in this area for helping bring forward an appropriations bill that reflects the positive changes of the authorization bill, to have the appropriations reflect those new strategies for improving our schools and strengthening our move for reform, for strengthening the notion that every child can learn, that we can really have excellence in every school, that we are not happy with the status quo, that we recognize some schools

are terrific, some teachers are wonderful, but the system itself is not as invigorated and as strong as it should be, and it can be improved.

That is what this legislation says: No to the status quo and yes to change; no to process and yes to progress; no to ''incomes'' and yes to outcomes; and yes to results.

In this holiday season it is a wonderful gift to ourselves, to our Nation, to change the way we are appropriating funding for public schools and for all schools in this Nation.

Today marks a historic moment. For the first time in 35 years since the Federal Government says we will work in partnership with States to help educate our children, it needs to be a local responsibility, but it must be a national priority. Our Nation cannot be strong, it cannot be great, it cannot be economically as vital if we don't have good schools. In Florida and Louisiana, that does not begin in kindergarten or end with a college degree; that is prekindergarten, early childhood education, and lifelong learning.

It is clearly in our Nation's interest to help States and local communities educate and bring schools to our citizens. The best place to begin doing that is in the home. The second best place to shore that up is in schools, starting at the lower grades and working up. As a mother with young children, I know directly and very personally that those first few years, the foundation, are important.

This bill is historic because in that whole partnership, for the first time, we have actually funded something we talk about. We targeted the grants for title I. We have funded the effort to help get the money to the districts that need a helping hand, that have difficulty raising either sales tax or property tax or industrial tax and corporate tax because the tax base is not there, but the children are. The tax base might not be there, but there are smart children who live in that county. The tax base is not there, but their parents are working hard.

This bill, for the first time, sends the new money through the targeting formulas to bring that help to poor and disadvantaged children so they can take the new tests, pass them, and meet the new standards of accountability.

It is an extraordinary accomplishment. I thank the Senator from Vermont. I know he cast his vote—it was a difficult vote to cast—against the authorization bill because we failed to fully fund special education. I am disappointed in that. I will work with him and pledge to work with Democrats and Republicans to pick up more of our fair share of those special education dollars. I will work to reform special education, to make sure it works for our students, our families, our children who are greatly challenged, mentally and physically, as well as our teachers.

Without Senator JEFFORDS, the Senator from Vermont, his untiring commitment and focus to education, we never would have had $3 billion added to the Education bill. It would have been left on the table and there would not be the energy to get it. I know he is disappointed, but I hope he hears my words this morning and is encouraged.

There are those in the Chamber who recognize without his complete commitment and dedication to the schoolchildren of this Nation, this bill would be short a lot of money. But because he put his political muscle behind it and did what he needed to do, we have seen a tremendous increase in these investments. He should be happy and grateful. I know he is disappointed in special education, but I commit to him I will work diligently to see if we cannot shore up that part of the bill.

I ask unanimous consent to have printed in the RECORD the list of the moneys the States will receive, additional funds. Every State and county will be helped, but we will get resources to those families and communities that need a helping hand. It is a historic moment.

The PRESIDING OFFICER. The Senator from New Mexico has 5 minutes remaining.

Mr. DOMENICI. Did I lose time?

The PRESIDING OFFICER. There was a quorum call in progress that was evenly divided.

Mr. DOMENICI. Mr. President, fellow Senators, let me take a few minutes. First, I rise with a sense of great sadness and yet a feeling of great hope. You really can have both votes in yourself at the same time. Two nights ago Mental Health Equitable Treatment of 2001 was dropped from the Labor-HHS appropriations conference report. The Senate passed a wonderful bill. We sent it to the House as part of Labor appropriations, even though it was a major, major authorizing bill. We had our hopes high because in the Senate the support was high. The time had come to make sure, 2 years from now in the United States, most insurance policies would cover the mentally ill. That meant to this Senator in 8 or 10 years we would be able to look back and see a very different America when it came to street people, people who during cold winter months we see on the grates of our cities with the blankets wrapped around them.

In our jails and prisons, we know that now and for the ensuing months those who have mental illnesses such as distress that comes from depression, manic depression, schizophrenia, and a whole host of serious mental diseases, are more apt to be found in the county jail or the State jail than they are in treatment centers, be they treatment centers to which you take your sick person, and they are run privately or publicly. More mentally ill people, men and women, are in jails and facilities not intended for them than there are in facilities intended for them.

We in the Senate, with the leadership and help of my friend, Senator WELLSTONE, have a bill. We call it the Domenici-Wellstone bill. It is moving right along. It cleared the Senate, sending a powerful signal to those in America by the millions who are sick with these diseases, their relatives, and their friends. They had an extremely high hope that ran through their bodies and in many cases gave them a superb ray of hope that maybe, in the future in the greatest land on Earth, we would have insurance—subject to some limitations and some exclusions, but across this land the large businesses would be offering insurance coverage for those who were mentally ill who worked for them; that we would begin to see the same thing happen there that has happened to people with heart conditions. We would have doctors taking care of them. We would have research taking place. We would have centers and facilities for research and for care growing up across this land, public or private. We know that would be happening. Sure enough, we could cast our eyes, cast our vision not too far ahead of us, and say we are doing the right thing, serious mental illness is going to receive treatment.

I ask consent I have 5 additional minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOMENICI. Insurance companies will be putting forth the kind of coverage necessary. What a day this will be. What a time that will be. What joy will come to those of us who have worked so hard. But more importantly, what joy will come to the millions of parents who will now see their children, when they probably have the first signs of these dread diseases, and these parents are going to be able to say we are not going to go broke trying to take care of an uninsured child with one of these dread diseases. What a marvelous, wonderful thing America will have done.

What do we hear? Over on the side, a dull but powerful beat of the insurance companies that are saying: This hasn't been covered before. Let's not cover it now. We hear a large undercurrent saying: We have never done this before. We should not start now. It is going to cost too much.

To them let me say: We hope you will join us when this bill clears both Houses, and when at that point you have to start writing insurance for people who are sick with schizophrenia, manic depression, those kinds of diseases—and there are many other diseases that will be covered. Research will start to take place because these kinds of sick people are carrying on their backs a package of assets, assets that are the payments that will be forthcoming from the sick person running to the doctor, to the clinic, to the research facilities. What a change and how America will have grown up when that occurs.

There are a lot of workers in this vineyard. There are thousands upon thousands of Americans who are busy in this field, in their home cities, in

their States. Many came to town this past week to show up at the conference meeting where the House and Senate met on this Labor, Health and Human Services appropriations bill. Why did they show up? They showed up because the Senate had attached to that bill a thorough covering of these diseases.

We knew it was a chance because the House would rather have this considered by another committee, not an appropriations committee. We got our chance to speak a few words. What words were spoken. Clearly, the message did not stay in this little cubicle, Senator WELLSTONE. The message went out from that room. The message went out that it is the time, it is the place, and it is ready.

As a matter of fact, I believe the members there present would have, by overwhelming numbers, voted to take this bill and put it on this appropriations bill and send it to the President for his signature. We made some good things happen. The President of the United States has issued a letter saying next year will be the time. We will hold him to it. He is saying he would like to do that. We know he had a distinguished friend who had depression and committed suicide, and he doesn't have any trouble with the idea of this being a disease, severe depression. It must be treated. Severe depression must have coverage just as the other dread diseases.

I have here lately been comparing these dread diseases of the mind with the diseases of the heart. Clearly, we covered heart even though it is part spiritual, part physical. We do not say ''we don't cover that because it is very difficult to diagnose and do research on.'' Thank God we got it together and worked on it.

So I understand my time is about to run out. I thank the Chair.

I just want to say I am happy again. The tenor and the tone—those who were saying we are going do it were really a different group of people. They are going to have hearings. Where they have not had a single hearing in the House of Representatives on the issue of parity of coverage for American people, we have had numerous hearings here. They have had none. They pledge it. Once they have it, once their Members hear, once their Members are importuned by these citizens to do this, it will move.

So I say thanks to Senator WELLSTONE for all the support and help, and to all those in the Senate—there are many, over 65 on the bill. The pressure from that, the ambience from that, was strong. We will, indeed, next year, be moving ahead with a big strong wave, and it will happen.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. HARKIN. Parliamentary inquiry, Mr. President: How much time remains on the conference report?

The PRESIDING OFFICER. The time remaining is 20 minutes to the Senator from Pennsylvania.

Mr. HARKIN. Again, I inquire, if there is a quorum call, then the time runs on both sides?

The PRESIDING OFFICER. It will all be charged to the Senator from Pennsylvania.

Mr. HARKIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

Mr. NELSON of Florida. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. REID). Without objection, it is so ordered.

Mr. NELSON of Florida. Mr. President, I ask if the Senator from Pennsylvania would give me 2 minutes of his time.

Mr. SPECTER. Mr. President, I am delighted to yield 2 minutes to the Senator from Florida.

The PRESIDING OFFICER. The Senator from Florida is recognized for 2 minutes.

Mr. NELSON of Florida. I thank the Senator.

TERRORISM INSURANCE

Mr. NELSON of Florida. Mr. President, we are coming down to the crunch time with the conclusion of this session. One of the issues to be decided this afternoon is whether or not we are going to have any protection on terrorism insurance—not only for large and small businesses but also for homes and cars, and for personal lives.

Since there are so many agendas going on with this topic, I urge, since this is the very last gasp, the Senate to come to an agreement for a fallback and a short period of time—say 6 months—and adopt legislation that would have the Federal Government assume the terrorism risk for that short period of time with a freeze on rates so the consumer is not paying the high rates now being jacked up; and a moratorium on the cancellations so the consumers, businesses, and individual home and car owners would have protection against a terrorist risk of loss.

We can do that. That is a fallback position. The alternative is to do nothing. That is unconscionable.

Rates are being jacked as we speak, and cancellations of terrorist coverage is now occurring in the 50 States.

I thank the President for letting me bring this to the attention of the Senate. I thank the Senator from Pennsylvania for yielding the time.

Mr. SPECTER. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator from Pennsylvania has 13 minutes remaining.

Mr. SPECTER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

Mr. GRAMM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator is recognized.

Is someone yielding time?

Mr. SPECTER. I yield 2 minutes of my time.

The PRESIDING OFFICER. The Senator from Texas is recognized for 2 minutes.

Mr. GRAMM. Mr. President, I think we need to take the opportunity to do terrorism insurance. I don't think at this late date, having put together two different compromises, that we could start from scratch on a program which nobody fully understands. We are going to have a chance this afternoon to do it. We have a compromise that has been worked out by Senator DODD, Senator DASCHLE, Senator SARBANES, and members of the Banking and Commerce Committees. I think we need to take it.

THE STIMULUS PACKAGE

Mr. GRAMM. Mr. President, I hope we get an opportunity to vote on the stimulus package. I liken our situation to a situation we would face if in the cold of winter a storm came along and blew the roof off of an apartment house. It is clear unless something is not done that people would get pneumonia, frostbite, and suffer from exposure.

We have one group of Congressmen and Senators rushing in to say that we have to hire doctors. We have to buy penicillin. We need blankets.

We have another group that says: Why don't we rebuild the roof? Then it is suggested that rich people live on the upper floors and they would benefit more by putting the roof back on.

Then the President proposes the classic political compromise, which is: Why don't you rebuild some of the roof and buy some of the penicillin?

I hope we can go that route. At least we would benefit people. I hope we get a chance to vote on that package today.

I yield the floor. I thank the Senator for this and for many other things.

Mr. SPECTER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. NELSON of Florida). The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, we are about at the end of the time in this session. I just want to make a comment or two about the subject matter of the Domenici-Wellstone amendment to try to bring parity to mental health. I regret very much that the Appropriations Committee did not act on it.

That amendment passed the Senate floor. And it had support from some in the House, really divided along party lines. There are some assurances from the President and at least one of the

authorizing committees in the House that there will be action to bring parity.

Mental illness is as much an illness as is physical illness, and that ought to be corrected. In the conference, I made the point that it was my hope that if action was not taken by the authorizers that the appropriators would proceed, again, next year at this time and act in our conference.

Mr. President, how much time remains?

The PRESIDING OFFICER. There are 8 minutes remaining for the Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I ask unanimous consent that I may proceed for the remainder of that time—the 8 minutes—as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

REPORTS ON THE CASES OF DR. WEN HO LEE AND DR. PETER LEE

Mr. SPECTER. Mr. President, before the first session of the 107th Congress ends, I want to put on the RECORD reports on the cases of Dr. Wen Ho Lee and Dr. Peter Lee, which were subject to oversight by the Judiciary Committee on the Department of Justice during the 106th Congress. The Subcommittee's work was controversial, partly because it included oversight of Attorney General Reno's handling of the investigations into campaign finance matters on President Clinton and Vice President Gore.

Without going into all the details, suffice it to say that bipartisan agreement could not be reached within the Subcommittee on a report or in the full Committee on issuance of subpoenas to obtain necessary testimony.

When a subpoena was sought for FBI Director Louis Freeh, the opposition of Senator HATCH, the Chairman of the Committee, proved decisive. In April 2000, the Subcommittee obtained a memorandum from Director Freeh dated December 1996 which recited a conversation between a ranking FBI official and a ranking Department of Justice official to the effect that the investigation of the Department of Justice would effect the Attorney General's tenure at a time before President Clinton had reappointed her. The Freeh memo further referenced a conversation between Attorney General Reno and Director Freeh. The Subcommittee's inability to subpoena and question Freeh was a significant hindrance to pursuing that important matter.

That memorandum and other files have been inaccessible since October with the closing of the Hart Building due to the anthrax mail. The terrorist attack of September 11 has further hindered the finishing of the Subcommittee's work because the FBI has, understandably, been occupied with investigating terrorists, which preempted other pending matters.

The Subcommittee's oversight was thwarted repeatedly by delays by the FBI and the intransigence of the Department of Energy. Once Wen Ho Lee was indicted, the FBI refused to provide additional information, claiming it would hamper the prosecution. Even after Dr. Wen Ho Lee entered a guilty plea and the prosecution was concluded, the FBI continued to refuse to provide information on the ground that it would impede their debriefing of Dr. Lee in obtaining the tapes which he took.

Congressional oversight is traditionally a difficult matter because the House and the Senate are so busy with legislative matters and it is like pulling teeth, at best, to get cooperation from the Executive branch. The Subcommittee's oversight efforts on Dr. Wen Ho Lee have been even tougher. In addition to the general difficulties, the Subcommittee's oversight efforts have been further complicated by the change in party control in May 2001, the terrorist attack on September 11 of this year, and the departure of the Subcommittee's key investigator Mr. Dobie McArthur. Mr. McArthur did an extraordinary job, virtually singlehandedly conducting the oversight investigations and writing the reports.

With the new FBI Director Robert S. Mueller, III focusing on reorganization of the Bureau and the additional responsibilities of the FBI occasioned by the September 11 terrorist attack, and the shift of the Department of Justice in the focus of FBI activities, it is very difficult to pursue further the Subcommittee's inquiry on Dr. Wen Ho Lee, but it is my hope that at some date that might be done. Because of the serious dereliction of the FBI's handling of the Dr. Wen Ho Lee investigation, it will never be known beyond a reasonable doubt whether Dr. Wen Ho Lee was a spy, although there is substantial evidence to that effect in the McArthur reports. The publication of the reports on Dr. Wen Ho Lee and Dr. Peter Lee will enable readers to evaluate the seriousness of espionage in damaging our national security interests, the failure of the Executive branch in dealing with those investigations, the need for changes in procedures by the Department of Justice, including the FBI, and the Department of Energy. Some legislation, as noted in the McArthur reports, has already been enacted as a result of the Subcommittee's oversight and further legislative reforms are needed. Publication of these reports will promote those objectives.

Mr. President, I ask unanimous consent that the text of the two-page Freeh memorandum of December 1996 be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DECEMBER 9, 1996.

To: MR. ESPOSITO,
From: DIRECTOR,
Subject: DEMOCRATIC NATIONAL CAMPAIGN MATTER

As I related to you this morning, I met with the Attorney General on Friday, 12/6/96, to discuss the above-captioned matter.

I stated that DOJ had not yet referred the matter to the FBI to conduct a full, criminal investigation. It was my recommendation that this referral take place as soon as possible.

I also told the Attorney General that since she had declined to refer the matter to an Independent Counsel it was my recommendation that she select a first rate DOJ legal team from outside Main Justice to conduct that inquiry. In fact, I said that these prosecutors should be ''junk-yard dogs'' and that in my view, PIS was not capable of conducting the thorough, aggressive kind of investigation which was required.

I also advised the Attorney General of Lee Radek's comment to you that there was a lot of ''pressure'' on him and PIS regarding this case because the ''Attorney General's job might hang in the balance'' (or words to that effect). I stated that those comments would be enough for me to take him and the Criminal Division off the case completely.

I also stated that it didn't make sense for PIS to call the FBI the ''lead agency'' in this matter while operating a ''task force'' with DOC IGs who were conducting interviews of key witnesses without the knowledge or participation of the FBI.

I strongly recommended that the FBI and hand-picked DOJ attorneys from outside Main Justice run this case as we would any matter of such importance and complexity.

We left the conversation on Friday with arrangements to discuss the matter again on Monday. The Attorney General and I spoke today and she asked for a meeting to discuss the ''investigative team'' and hear our recommendations. The meeting is now scheduled for Wednesday, 12/11/96, which you and Bob Litt will also attend.

I intend to repeat my recommendations from Friday's meeting. We should present all of our recommendations for setting up the investigation—both AUSAs and other resources. You and I should also discuss and consider whether on the basis of all the facts and circumstances—including Huang's recently released letters to the President as well as Radek's comments—whether I should recommend that the Attorney General reconsider referral to an Independent Counsel.

It was unfortunate that DOJ declined to allow the FBI to play any role in the Independent Counsel referral deliberations. I agree with you that based on the DOJ's experience with the Cisneros matter—which was only referred to an Independent Counsel because the FBI and I intervened directly with the Attorny General—it was decided to exclude us from this decision-making process.

Nevertheless, based on information recently reviewed from PIS/DOC, we should determine whether or not an Independent Counsel referral should be made at this time. If so, I will make the recommendation to the Attorney General.

Mr. SPECTER. Mr. President, I am now going to commence with the reading of the report on Dr. Wen Ho Lee: My understanding, after consulting with the authorities, is that once I begin the reading of the report, the remainder may be incorporated in the RECORD as if read in full.

The PRESIDING OFFICER. And the Senator is advised he has 2½ minutes left.

Mr. SPECTER. I thank the Chair. I shall not use the full 2½ minutes.

This report augments and completes the interim report released on March 8, 2000, regarding the Government's investigation of espionage allegations against Dr. Wen Ho Lee who pleaded guilty on September 13, 2000 to one felony count of unlawful retention of national defense information.[1] The special Judiciary subcommittee on Department of

Justice Oversight, which I chaired in the last Congress, began oversight on the Wen Ho Lee case and several other matters in September 1999, but suspended its review of this case at the request of FBI Director Louis Freeh after Dr. Lee was indicted and jailed on December 10, 1999.

I issued the interim report in March 2000 to demonstrate the need for reforms contained in the Counterintelligence Reform Act of 2000, which became law as Title VI of Public Law 106–567 on December 27, 2000. That bipartisan bill, which passed the Senate Judiciary and Select Intelligence committees without a single vote in opposition despite sometimes strong disagreements about certain aspects of the Wen Ho Lee case, corrected many of the flaws in the government's procedures for handling espionage investigations and prosecutions. This report, consisting of an executive summary accompanied by a detailed review of the case, completes the oversight record on the Wen Ho Lee matter.

HIGHLIGHTS OF THE REPORT

The government's investigation of Los Alamos National Laboratory (LANL) nuclear weapons scientist Dr. Wen Ho Lee was so inept that despite scrutiny spanning nearly two decades, both the FBI and the Department of Energy missed repeated opportunities to discover and stop his illegal computer activities. As a consequence of these numerous failures, magnetic computer tapes containing some of the nation's most sensitive nuclear secrets are now missing when they could have been recovered as late as December 1998 and possibly even later.

One great tragedy of the Wen Ho Lee case is that the entire truth will likely never be known. As a consequence of an inept investigation, the government has lost the credibility to claim that its version of events is the absolute truth. Dr. Lee also lacks the credibility to tell the definitive tale of this case: he repeatedly lied to investigators, created his own personal nuclear weapons design library without proper authority, copied nuclear secrets to an unclassified computer system accessible from the Internet, and passed up several opportunities to turn his tape collection over to the government. If the information Dr. Lee put at risk did not fall into the wrong hands, it is a matter of mere luck. When the nation's most sensitive nuclear secrets are at issue, it is unacceptable that we should have to rely on luck to keep them safe.

Among the many concerns arising from the investigation and prosecution of Dr. Lee, the following are most significant:

The government obtained highly credible information in 1994 that Dr. Lee had helped the Chinese with computer codes and software, but took no steps to examine his computer. Had Dr. Lee's computer been examined, his illegal downloads of some of the nation's most sensitive nuclear weapons data to an unclassified computer system accessible from the Internet could have been detected and stopped.

The manner in which the FBI relied almost completely on the Department of Energy's Administrative Inquiry (AI) throughout the investigation which began in 1996, rather than developing an independent investigative plan, caused an inappropriate focus on the alleged loss of W–88 warhead design information to the exclusion of all else. The FBI never questioned how the suspected loss of the W–88 information related to the codes and software help that Dr. Lee was suspected of having provided to the PRC. The ongoing debate over whether the AI's underlying assumptions—namely that rapid advances in the PRC weapons program in the early 1990s resulted from their acquisition of U.S. weapons design information, and that the loss most likely occurred from Los Alamos—is of secondary importance. The mere fact that the PRC had obtained classified nuclear weapons information should have been sufficient to trigger a thorough investigation, but the FBI's investigation was anything but thorough.

The Department of Justice was wrong to reject the 1997 request by the FBI for electronic surveillance under the Foreign Intelligence Surveillance Act. Had the request been permitted to go forward to the court, Dr. Lee's illegal downloading could have been detected and halted in 1997. The Department of Justice's own internal review, conducted by Assistant U.S. Attorney Randy Bellows, concluded that the request should have been approved.

The Department of Energy was wrong to allow Wackenhut contract polygraph examiners to administer a polygraph to Dr. Lee on December 23, 1998. The Wackenhut contractors incorrectly reported that Dr. Lee passed the polygraph, prompting the FBI to nearly shut down its investigation at a time when scrutiny of Dr. Lee should have been intensified. Dr. Lee has told investigators the computer tapes that are now missing were in his office on December 23. Had the FBI conducted its investigation consistent with the fact that Dr. Lee did not pass the polygraph, the tapes could have been recovered.

The nuclear secrets that Dr. Lee mishandled were correctly described by the government as extremely sensitive. Dr. Lee's actions in downloading these files onto an unclassified computer system accessible from the Internet, and later onto portable magnetic tapes, constituted a serious threat to the national security.

Allegations that Dr. Lee was targeted for investigation and prosecution as a result of ''ethnic profiling'' are unfounded. The repeated investigations of Dr. Lee resulted from reasonable suspicions raised by Dr. Lee's own conduct. Moreover, there is absolutely no evidence that Dr. Lee's ethnicity was a factor in the decision to prosecute Dr. Lee or to hold him in unusually strict pretrial confinement.

The government's harsh treatment of Dr. Lee after his arrest on December 10, 1999, including putting him in solitary confinement and requiring him to be manacled does, however, raise troubling questions. The government's claim that Dr. Lee was such a threat he had to be held in pretrial confinement under very strict conditions is inconsistent with the long delay from March to December 1999—when the government first learned of the downloaded secrets until he was arrested—and the acceptance of a plea agreement in September 2000 by which Dr. Lee was released with no monitoring whatsoever, and which is only marginally better than it could have had in December 1999, at least in terms of finding out what happened to the tapes. Taken together with the many missed opportunities to detect Dr. Lee's illegal computer activity and recover the tapes, the government's handling of the plea agreement raises questions as to whether the harsh tactics were intended to coerce a confession.

The government's claim that Dr. Lee presented such a danger that he had to be prohibited from communicating is severely undercut by its failure to even seek any type of electronic surveillance on him even after the existence of the tapes was known. If the government was truly concerned that Dr. Lee could potentially alter the global strategic balance through phrases as innocuous as ''Uncle Wen says hello,'' or might send a signal to a foreign intelligence service to extract him, it should have sought to monitor his communications, but it did not.

Some of the most controversial and misguided steps in the case appear to have been motivated more by a desire to protect the affected agency's image than the national security. This is particularly true of the Department of Energy's decision to administer a polygraph to Dr. Lee in December 1998 when it seemed likely that the House's Cox Committee report[3] was going to expose the many missteps that had occurred up to that point.

The full report which follows addresses each of these matters in detail, as well as several other important aspects of the case.

REPORT ON THE GOVERNMENT'S HANDLING OF THE INVESTIGATION AND PROSECUTION OF DR. WEN HO LEE

The government's conduct in this case is so filled with major breakdowns by every agency involved that it almost defies analysis and makes determining responsibility for the failures a very complicated matter. This report attempts to sort out what went wrong and why, and to determine how such mistakes can be avoided in future cases. It includes some new information which has not been publicly disclosed before, and provides a thorough review of the facts that are known. For ease of reading, it is organized in roughly chronological order, with the exception being a section in the beginning which describes the key elements of the government's case against Dr. Lee.

The case against Dr. Wen Ho Lee

Most Americans had never heard of Dr. Wen Ho Lee before he was fired from Los Alamos National Laboratory in New Mexico on March 8, 1999. The first vague hints of the story that would explode on the national scene in March 1999 had come in a January 7, 1999, Wall Street Journal article by Carla Anne Robbins, which alleged that ''China received secret design information for the most modern U.S. nuclear warhead'' and quoted unnamed U.S. officials as saying that the ''top suspect is an American working at a U.S. Department of Energy laboratory.''[4] The WSJ article went on say that the loss of information related to the W–88 warhead was the ''most significant in a 20–year espionage effort by Beijing that targeted the U.S. nuclear weapons laboratories,'' and that ''China was given general, but still highly secret, information about the warhead's weight, size and explosive power, and its state-of-the-art internal configuration, which allowed designers to minimize size and weight without losing power.''[5] The article further noted that the investigation of the suspected loss of W–88 information was the ''third major Chinese espionage effort uncovered at the U.S. labs over the last two decades,'' and was a key part of the work of the special House committee, known as the Cox Committee, that was reviewing American high-tech transfers to China.[6]

The story of suspected espionage at LANL remained dormant after the Robbins article until the New York Times published a March 5, 1999 piece by James Risen and Jeff Gerth, titled ''Breach at Los Alamos: A Special Report.'' The article did not name Dr. Lee, but raised the profile of the case by quoting unnamed administration officials as saying that ''working with nuclear secrets stolen from an American Government laboratory, China has made a leap in the development of nuclear weapons: the miniaturization of its bombs. . .''[7] The Risen and Gerth story put a political spin on the case, quoting ''some American officials'' as asserting that ''the White House sought to minimize the espionage issue for policy reasons.'' The senior National Security Council official who handled the case, Gary Samore, denied the allegations, telling the NYT reporters that ''The idea that we tried to cover up or downplay these allegations to limit the damage to U.S.-Chinese relations is absolutely wrong.''[8]

Risen and Gerth then explained that their own investigation had revealed that ''throughout the Government, the response to the nuclear theft was plagued by delays, inaction and skepticism—even though senior intelligence officials regarded it as one of the most damaging spy cases in recent history.''[9] In support of their charges, they cited disagreements between former DOE intelligence chief Notra Trulock, who was the main proponent of the view that Chinese weapons advances were attributable to espionage, and other senior administration officials, including former Acting Energy Secretary Elizabeth Moler, who was said to have ordered Trulock not to brief the Cox Committee ''for fear that the information would be used to attack the President's China policy.''[10]

Ms. Moler denied the allegations that she had interfered with Mr. Trulock's congressional testimony, but the die had been cast so that as the story unfolded over the following months there was always an underlying hint that the Clinton Administration had ignored or downplayed an important espionage case to avoid criticism or complications with its China policy.

On March 8, 1999, Dr. Lee was publicly named for the first time in an Associated Press story by Josef Hebert. Quoting a statement from the Department of Energy (which did not name Dr. Lee), Hebert wrote that Dr. Lee had been fired for '''failing to properly safeguard classified material' and having contact with 'people from a sensitive country'''.[11] Shortly thereafter, the New York Times ran another article by James Risen, who had interviewed Energy Secretary Bill Richardson. According to Risen, Richardson told him that Dr. Lee had been fired on March 8 ''for security breaches after the FBI questioned him in connection with China's suspected theft of American nuclear secrets. . .''[12] Secretary Richardson also acknowledged that Dr. Lee had been questioned for three days, but had ''stonewalled'' during the questioning.[13]

Through the spring and summer, details of the case dribbled out as the press continued its investigation into the matter and several congressional committees conducted oversight on the case. Among the new details to emerge were allegations totally unrelated to the W–88 matter, including charges that Dr. Lee had transferred massive amounts of classified nuclear data to the unclassified portion of the LANL computer system and later onto portable magnetic tapes, which were thought to be missing.

The Cox Committee released its unclassified report on May 25, 1999, which did not mention Dr. Lee by name but clearly referred to his case. The President's Foreign Intelligence Advisory Board released its own review of security at the national labs in June, concluding that the labs did wonderful science but were lousy on security matters.[15] In August, Senators Thompson and Lieberman of the Governmental Affairs Committee released a special statement, saying:

''This is a story of investigatory missteps, institutional and personal miscommunications, and—we believe—legal and policy misunderstandings and mistakes at all levels of government. The DOE, FBI, and DOJ must all share the blame for our government's poor performance in handling this matter.''[16]

By September 1999, the government had finally separated the W–88 matter from the issue of Dr. Lee's illegal file downloads, and had started a new investigation aimed at finding out how the PRC had obtained the W–88 information it was known to possess. It did so quietly, without publicly acknowledging that Dr. Lee was apparently no longer a suspect in the loss of the W–88 information.

Also in late September 1999, the Senate Judiciary subcommittee on Department of Justice Oversight was organized, with a mandate to examine: technology transfer to the PRC, including the Wen Ho Lee case, the Peter Lee case, and the Loral/Hughes matter; the facts surrounding the FBI's use of pyrotechnic tear gas rounds during the 1993 standoff at Waco, which had recently been confirmed in a special report of the Texas Rangers; and the Department of Justice's handling of campaign finance investigations and prosecutions from the 1996 presidential campaign.[17]

The subcommittee began an expeditious review of the Wen Ho Lee case and the other matters within its jurisdiction, and sent out letters to witnesses on December 7, 1999, for a hearing on December 14, which would examine two issues: 1) the details of a December 23, 1998 polygraph exam that had been administered to Dr. Lee, and 2) the relationship between the Lees and the government.

On December 10, 1999, Dr. Lee was arrested and charged in a 59–count indictment[18] of mishandling classified nuclear weapons data, prompting FBI Director Freeh to write to me, asking that I postpone hearings on the case. In view of the extraordinary circumstances of the case and Director Freeh's unprecedented request, which he reiterated to me and Senator Torricelli in a meeting on December 14, I agreed to postpone hearings on the case, but to continue a review of government documents unrelated to the criminal case, as well as documents that came into the public domain as a result of the government's prosecution of Dr. Lee.

The indictment of Dr. Lee referred to a series of tapes Dr. Lee made from 1993 through 1997, during which time he collected SECRET and CONFIDENTIAL Restricted Data[19] into a directory on the classified computer system at LANL, then transferred the information onto the unclassified portion of the LANL computer system and ultimately onto a series of portable magnetic computer tapes, each capable of holding 150 megabytes of information. All told, the information he collected and transferred to portable magnetic tapes was more than 800 megabytes, the equivalent of over 400,000 pages of data.[20]

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

''These codes, and their associated data bases, and the input file, combined with someone that knew how to use them, could, in my opinion, in the wrong hands, change the global strategic balance.''[21]

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

Dr. Younger further testified that:

''They enable the possessor to design the only objects that could result in the military defeat of America's conventional forces . . . . They represent the gravest possible security risk to . . . the supreme national interest.''[22]

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

At this same bail hearing, when the judge seemed to be leaning toward a restrictive form of house arrest, Mr. Kelly warned that Dr. Lee could be ''snatched and taken out of the country'' by hostile intelligence services.[23] The lead FBI Agent then on the case, Robert Messemer, told the judge to expect ''a marked increase in hostile intelligence service activities both here in New Mexico and throughout the United States in an effort to locate those tapes,'' and warned that ''our surveillance personnel do not carry firearms, and they will be placed in harm's way if you require us to maintain this impossible task of protecting Dr. Lee.''[24]

The government made these representations in a successful effort to deny Dr. Lee bail and he remained in pretrial confinement for more than nine months. By September 13, 2000, when Judge Parker approved the plea agreement under which Dr. Lee would plead guilty to one of the original fifty-nine felony counts and accept a sentence of ''time-served'' at 278 days, the government's case against Dr. Lee appeared to lie in tatters, as did its credibility.

Judge Parker's statements at the plea hearing were a stunning rebuke of the government when he said:

''. . . I believe you were terribly wronged by being held in custody pretrial . . . under demeaning, unnecessarily punitive conditions. I am truly sorry that I was led by our Executive Branch of government to order your detention last December.

''Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the Executive Branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States Attorney for the District of New Mexico. . .''[25]

After praising many of the lawyers on both sides of the case, Judge Parker made clear where he felt the responsibility for the government's mistakes should lay:

''It is only the top decision makers in the Executive Branch, especially the Department of Justice and the Department of Energy and locally, during December, who have caused embarrassment by the way this case began and was handled. They did not embarrass me alone. They have embarrassed our entire nation and each of us who is a citizen of it.''[26]

When Dr. Lee walked free, convicted of a single felony count out of 59 and sentenced to time served, the nation was stunned by the government's rapid reversal. The government had argued even as late as September 1, 2000 that Dr. Lee was so serious a threat to the national security that he had to be held in solitary confinement under extraordinarily stringent conditions, yet less than two weeks later, he was allowed to walk out of jail a free man. Even President Clinton, who strangely acted as though it was some alien entity that had done such a sharp turnabout rather than an agency within his own administration, seemed stunned by the change of position. On the day after Dr. Lee was released, President Clinton told reporters at the White House:

''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.''[27]

It may remain impossible to reconcile the two positions, but it is necessary to try, if for no other reason than to help Americans understand why the government acted as it did in the Wen Ho Lee case. Although it may not be sufficient to restore the public's confidence in the agencies involved in this case, a thorough examination of the facts such as that attempted here is a necessary step in that direction.

The Investigations of Dr. Wen Ho Lee

The purpose of counterintelligence is to identify suspicious conduct and then pursue an investigation to prevent or minimize access by foreign agents to our secrets. From a counterintelligence perspective, the government's handling of the Wen Ho Lee matter

has been an unmitigated disaster. The investigation of Dr. Lee since 1982 has been characterized by a series of errors and omissions by the Department of Energy and the Department of Justice, including the FBI, which have permitted Dr. Lee to threaten U.S. supremacy by putting at risk information that could change the ''global strategic balance.''

While Dr. Lee, of course, must bear primary responsibility for any damage that might result to national security from his mishandling of our nuclear secrets, those officials in the DOE, the FBI and, to a lesser degree, the DOJ, who participated in the investigation of Dr. Lee must accept responsibility for their own failure to detect and put a stop to Dr. Lee's illegal computer activity. It would be one thing if an individual who had never shown up on the counterintelligence radar scope was later found out, but Dr. Lee was under active investigation during the very time he was engaged in illegal computer downloads, yet his activities were not detected.

In fact, Dr. Lee was investigated on multiple occasions over seventeen years, but none of these investigations—or the security measures in place at Los Alamos—came close to discovering and preventing Dr. Lee from putting the national security at risk by placing highly classified nuclear secrets on an unsecure system where they could easily be accessed by even unsophisticated hackers.[18] It is difficult to comprehend how officials entrusted with the responsibility for protecting our national security could have failed to discover what was really happening with Dr. Lee, given all the indicators that were present.

The 1982–1984 Investigation

Dr. Wen Ho Lee was born in Nantou, Taiwan, in 1939. After graduating from Texas A&M University with a Doctorate in 1969, he became a U.S. citizen in 1974, and began working at Los Alamos National Laboratory in applied mathematics and fluid dynamics in 1978.[20] The X-Division, where Dr. Lee worked from 1982 until 1998, has the highest level of security of any division at LANL. It is responsible for the design of thermonuclear weapons, and Dr. Lee was part of a team working on five Lagrangian mathematical codes, also known as ''source codes'', used in weapons development. Dr. Lee's wife, Sylvia, also worked at LANL from November 1980 until June 1995. The last position she held was ''Computer Technician,'' and she held a Top Secret clearance from 1991 through 1995.[30]

The FBI first became concerned about Dr. Lee as a result of contacts he made with a suspected PRC intelligence agent in the early 1980s. On December 3, 1982, Dr. Lee called a former employee of Lawrence Livermore National Laboratory (LLNL) who was suspected of passing classified information to the Peoples Republic of China (PRC). This call was intercepted pursuant to a FISA court authorized wiretap in another FBI espionage investigation. After introducing himself, Dr. Lee stated that he had heard about the Lawrence Livermore scientist's ''matter'' and that Lee thought he could find out who had ''squealed'' on the employee.[31] Based on the intercepted phone call, the FBI opened an espionage investigation on Dr. Lee.

For the next several months the FBI investigated Dr. Lee, with much of the work being done under the guise of the periodic reinvestigation required for individuals with security clearances. On November 9, 1983, the FBI interviewed Dr. Lee. Before being informed that the FBI had intercepted his call to the Lawrence Livermore employee, Lee stated that he had never attempted to contact the employee, did not know the employee, and had not initiated any telephone calls to him. These representations were patently false.[32] Dr. Lee offered during the course of this interview to assist the FBI with its investigation of the other scientist.

On December 20, 1983 Dr. Lee was again interviewed by the FBI,[33] this time in California. During this interview, Lee explained that he had been in contact with Taiwanese nuclear researchers since 1977 or 1978, had done consulting work for them, and had sent some information that was not classified but that should have been cleared with DOE officials. He tried to explain that he had contacted the subject of the other investigation because he thought this other scientist was in trouble for doing the same thing that Lee had been doing for Taiwan.[34] After this interview, the FBI sent Dr. Lee to meet with the espionage suspect.

On January 24, 1984, Dr. Lee took an FBI polygraph examination which included questions about passing classified information to any foreign government, Lee's contacts with the Taiwanese Embassy, and his contacts with the LLNL scientist. Although the FBI has subsequently contended that Dr. Lee's answers on this polygraph were satisfactory, there remained important reasons to continue the investigation. His suspicious conduct in contacting the Lawrence Livermore scientist and then lying about it, the nature of the documents that he was sending to the Taiwanese Embassy, and the status of the person to whom he was sending those documents were potential danger signals. Although not classified, the documents Dr. Lee was passing to Taiwan's Coordination Council of North America were subject to Nuclear Regulatory Commission export controls. They were specifically stamped ''no foreign dissemination.'' According to testimony of FBI Special Agent Robert Messemer at a special hearing on December 29, 1999, FBI files also contain evidence of other ''misrepresentations'' that Dr. Lee made to the FBI in 1983–1984 which have raised ''grave and serious concerns'' about Dr. Lee's truthfulness.[36] Notwithstanding these reasons for continuing the investigation, the FBI closed its initial investigation of Lee on March 12, 1984.[37]

Although the FBI's 1982–1984 investigation was generally well run, three areas of concern are worth noting. First, the FBI should have coordinated more closely with the Department of Energy. When initially contacted by the FBI in 1982, the DOE's Office of Security recommended that Dr. Lee be removed from access due to the sensitivity of the area in which he worked. Had the DOE security official's instincts been followed, Dr. Lee would not have been able to put at risk, years later, the massive volume of nuclear data that he ultimately did.

The second area of concern is that the FBI closed the investigation despite several troubling indicators. As noted previously, FBI Special Agent Messemer mentioned several misrepresentations that Dr. Lee made to the FBI which were relevant to his truthfulness. Two of these misrepresentations stand out as particularly important. First, Dr. Lee learned about the LLNL scientist's situation from a mutual friend during an October 1982 visit to LLNL.[38] Second, and more importantly, upon learning of the LLNL scientist's predicament, Dr. Lee immediately attempted to call his point of contact at the Coordination Council of North America (the equivalent of the Taiwanese Embassy in Washington, DC).[39] That Dr. Lee would attempt to contact a foreign embassy seeking help for a fellow scientist should have raised serious questions about his trustworthiness.

Unfortunately, the FBI did not discover this until after they had already made a decision to use him in the investigation of the LLNL scientist. Had the FBI been more cautious in assessing Dr. Lee's trustworthiness in the first place, it would likely not have used him in the investigation of the other scientist, and would therefore have been in a better position to facilitate his termination from LANL or, at the very least, the removal of his security clearance. Director Freeh recently confirmed that the FBI had made no recommendation to the DOE regarding the removal of Dr. Lee's clearance following the 1982–1984 investigation.[40]

The second element of Dr. Lee's conduct in the 1982–1984 investigation that deserved greater attention from the FBI than it got is the status of the individual to whom Dr. Lee was sending the information at the CCNA. This individual was known to the FBI as an intelligence collector (although it remains unclear as to whether Dr. Lee had any reason to be aware of that). The FBI did take the necessary steps to learn how Dr. Lee came to know this individual, but it did not give sufficient weight to the individual's status as an intelligence collector.

The third and final area of concern about the FBI's handling of the 1982–1984 investigation relates to the FBI's reporting of Dr. Lee's assistance in the investigation of the LLNL scientist, which has been inconsistent. Some documents, apparently including information provided to Attorney General Reno in preparation for her June 8, 1999 appearance before the Judiciary Committee in closed session, indicate that the FBI did not use Dr. Lee in its investigation. The final draft of the 1997 request for FISA coverage on Dr. Lee, in recounting this episode, states flatly that while Dr. Lee offered to help the FBI in its investigation of the LLNL scientist, the FBI did not use him.[41] Contemporaneous FBI records of the 1982 investigation, however, indicate that not only did Dr. Lee assist the FBI with its investigation of the other scientist, but that the result was far better than had been anticipated.

The failure to mention the assistance provided by Dr. Lee in 1983 when requesting FISA coverage in 1997 is troubling because it has the effect of presenting an incomplete picture of the initial investigation of Dr. Lee. Judgements regarding whether an individual is acting as an agent of a foreign power should be made in consideration of the totality of the circumstances, and the FBI's decision to use Dr. Lee in the investigation of the LLNL scientist is an important element of the total circumstances. If the FBI trusted Dr. Lee enough to use him in the investigation of the LLNL scientist, that fact should have been included in the FISA request. The failure to mention that fact gives an incomplete impression, which is inappropriate in these matters.

It is likely that the FBI's incorrect characterization of Dr. Lee's 1982–1984 activities was merely an inadvertent oversight and was not an attempt to conceal the assistance he had provided. For example, the FBI did not make any effort to conceal or deny Mrs. Lee's assistance to the government.

While the FBI should have acknowledged Dr. Lee's assistance in the FISA request, the totality of Dr. Lee's conduct in 1982–1984 was suspicious and was directly relevant on a probable cause determination.

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

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

This investigation of Dr. Lee was initiated based upon the discovery that he was well

acquainted with a high-ranking Chinese nuclear scientist who visited Los Alamos as part of a delegation in 1994,[42] and that he was alleged to have helped Chinese scientists with codes and software. Dr. Lee had never reported meeting this scientist, which he was required to do by DOE regulations, so his relationship with this person aroused the FBI's concern. Unclassified sources have reported that Dr. Lee was greeted by ''a leading scientist in China's nuclear weapons program who then made it clear to others in the meeting that Lee had been helpful to China's nuclear program.'' [43] In concert with the 1982–1984 investigation, Dr. Lee's undisclosed relationship with this top Chinese nuclear scientist should have alerted the FBI and the DOE of the imperative for intensified investigation and reconsideration of his access to classified information. Instead, this FBI investigation was deferred on November 2, 1995, because Dr. Lee was by then emerging as a central figure in the Department of Energy's Administrative Inquiry,[44] which was developed by a DOE counterintelligence expert in concert with a seasoned FBI agent who had been assigned to DOE for the purposes of the inquiry. (The DOE Administrative Inquiry was given the code name Kindred Spirit.[45]) The investigation of Dr. Lee was essentially dormant from November 1995 until May 1996, when the FBI received the results of the DOE Administrative Inquiry and opened a new investigation of Dr. Lee on May 30, 1996.

It is difficult to understand why the FBI would suspend the investigation in 1995, even to wait for the Kindred Spirit Administrative Inquiry, when the issues that gave rise to 1994–1995 investigation remained valid and unrelated to the Kindred Spirit investigation. The key elements of the 1994–1995 investigation are described in the 1997 Letterhead Memorandum (LHM) which was prepared to support the request for a FISA search warrant. Specifically, the LHM describes the unreported contact with the top nuclear scientist,[46] and it makes reference to the ''PRC using certain computational codes . . . which were later identified as something that [Lee] had unique access to.'' [47] And, finally, the LHM states that ''the Director subsequently learned that Lee Wen Ho had worked on legacy codes.'' Given these allegations, it was a serious error to allow the investigation to wait for several months while the DOE AI was being completed. This deferral needlessly delayed the investigation and left important issues unresolved.

In addition to information known to the FBI which required further intensified investigation and not a deferred investigation on November 2, 1995, the Department of Energy was incredibly lax in failing to understand and pursue obvious evidence that Dr. Lee was downloading large quantities of classified information to an unclassified system. The sheer volume of Dr. Lee's downloading showed up on a DOE report in 1993.[49] Cheryl Wampler, from the Los Alamos computer office, has testified that the NADIR system, short for Network Anomaly Detection and Intrusion Recording, flagged Dr. Lee's massive downloading in 1993.[50] This system is specifically designed to create profiles of scientists' daily computer usage so it can detect unusual behaviors. A DOE official with direct knowledge of this suspicious activity failed to act on it, or to tell DOE counterintelligence personnel or the FBI. Based on its design, the NADIR system would have continued to flag Dr. Lee's computer activities in 1994 as being unusual, but no one from DOE took any action to investigate what was going on.[51] And it wasn't mentioned to the FBI or DOE's counter-intelligence personnel.

In response to written questions after a September 27, 2000 hearing on the Wen Ho Lee matter, DOE officials provided information to put the NADIR alerts in perspective. According to DOE, an average of 180 users per week exceeded the thresholds established by the system, and were flagged just like Dr. Lee.[52] While 180 is a substantial number of individuals, it would not be impossible to devise a system by which counterintelligence personnel can review these records to determine whether or not any individuals who are already under investigation have been identified by the system.

In response to another question about what happened to the NADIR records for 1994 (which, according to testimony from Ms. Wampler are missing), DOE replied simply that:

''. . . in 1993 NADIR was a new and developing technique and many other scientists in addition to Dr. Lee were transferring data due to a change in the computer environment at that time. During the 1993–1994 timeframe, Dr. Lee was not a suspect.'' [53]

Apart from the fact that the DOE's response is incorrect—Dr. Lee was a suspect beginning in 1994—the records should have been available for review when the FBI began its investigation. The fact that the DOE was able to confirm that Dr. Lee was flagged by NADIR in 1993 proves that point, but it does not explain the absence of the 1994 NADIR records. Had the FBI bothered to check with the DOE computer personnel, and there should have been no doubt that Dr. Lee had no expectation of privacy with regard to a system designed to identify abnormal system operations, Dr. Lee's illegal computer downloads could have been detected and halted.

The DOE computer and counterintelligence personnel could also have been more helpful in this situation.[54] Had DOE transmitted this information to the FBI, and had the FBI acted on it, Dr. Lee could have and should have been stopped in his tracks in 1994 on these indicators of downloading. The full extent of the importance of the information that Dr. Lee was putting at risk through his downloading was encapsulated in a document the Government filed in December 1999 as part of the criminal action against Dr. Lee:

''[I]n 1993 and 1994, Lee knowingly assembled 19 collections of files, called tape archive (TAR) files, containing Secret and Confidential Restricted Data relating to atomic weapon research, design, construction, and testing. Lee gathered and collected information from the secure, classified LANL computer system, moved it to an unsecure, ''open'' computer, and then later downloaded 17 of the 19 classified TAR files to nine portable computer tapes.'' [55]

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

The end result of these missteps and lack of communication was that, during some of the very time that the FBI had an espionage investigation open on Dr. Lee resulting from his unreported contacts with a top Chinese scientist and the realization that the Chinese were using codes to which Dr. Lee had unique access, DOE computer personnel were being warned by the NADIR system that Dr. Lee was moving suspiciously large amounts of information around, but were ignoring those warnings and were not passing them on to the FBI. At the same time, FBI personnel were taking no steps to investigate Dr. Lee's computer activities, even when one of the key allegations that prompted scrutiny of him in 1994 was that he had helped the Chinese with codes and software.

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

FBI and DOE failures in 1994–1995 represented the loss of a golden opportunity to detect and halt Dr. Lee's illegal computer activities. In the 1995–1996 period, another opportunity to find and fix the problem presented itself in the form of the DOE Administrative Inquiry (AI). Unfortunately, the opportunity represented by the AI was never fully realized.

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

As noted previously, the investigation of Dr. Lee was dormant from November 2, 1995 until May 30, 1996. The investigation had been shut down to await the arrival of DOE's Administrative Inquiry, which was presented on May 28, 1996. With the DOE AI in hand, the FBI resumed its investigation of the Lees. To understand that investigation, however, it is first necessary to review the AI.

The Kindred Spirit Administrative Inquiry

The public perception of the government's actions in the Wen Ho Lee case, particularly with regard to charges of so-called ''ethnic profiling'', has been shaped by a misunderstanding of the Department of Energy's Administrative Inquiry (AI), code named ''Kindred Spirit''. Although he was not its author, former DOE intelligence chief Notra Trulock has been closely associated with this document, in large measure because he was instrumental in commissioning the DOE's Kindred Spirit Analytical Group (KSAG) which spawned the AI, and he later forcefully advocated the position that substantial espionage had occurred and that something needed to be done about it. The KSAG was formed in 1995 when scientists studying Chinese nuclear developments became concerned about certain developments in the level of sophistication of the PRC's weapons. During the summer of 1995, these concerns were fueled when an individual provided to the U.S. government a document, subsequently known as the ''walk-in'' document, which contained highly classified details of some of our most advanced nuclear warheads.

Recent attempts to re-examine the premise of the Kindred Spirit AI and to question its role in the FBI's subsequent investigation of the same name have fostered the perception that the DOE's AI was largely to blame for the FBI's misdirected investigation, which focused almost exclusively on Dr. and Mrs. Lee, the loss of the W–88 information, and the Los Alamos lab, when a much broader investigation was required.

The perception that DOE's AI was the weakest link in the FBI's Kindred Spirit investigation is unfortunate because it obscures a far more complex set of circumstances. This perception has also unfairly undermined the government's credibility on the ethnic/racial profiling question and seriously damaged Notra Trulock's reputation and career. A more complete public record on this matter may be helpful in repairing some of the damage.

In an October 29, 1999 letter, Energy Secretary Bill Richardson reacted to the FBI's attempts to lay the blame for its problems in the Kindred Spirit investigation on the Administrative Inquiry:

''. . . I think there has been a tendency to overstate the adverse influence that DOE's technical analysis and preliminary investigative support had on the conduct of the

KINDRED SPIRIT investigation. There also has been, in my opinion, an over-emphasis on the degree to which DOE input served to limit the FBI's investigative work. . . . [T]he fact is that all of the decisions to limit the scope of the investigation were clearly, mutually agreed-upon by DOE and the FBI, based on security and other concerns.'' [57]

In this regard, Secretary Richardson is correct. The FBI's failures in the Wen Ho Lee investigation should not be blamed on the AI. The DOE is, by law, limited in the scope of what it can do. The FBI could have and should have looked at the AI as a starting point. Instead, the FBI case agents seemed to think that the DOE investigators had done their job for them, and never seriously looked at the premise of the AI and its relationship to Dr. Lee's activities.

The facts of the AI and the controversy surrounding it can be stated in an unclassified fashion as follows:

(A) The U.S. government concluded in 1995 that the PRC had made remarkable progress in its nuclear weapons program in the early 1990s.

(B) The government also learned in 1995 that the PRC had obtained certain classified nuclear weapons design information on the W–88 warhead and other weapons.

There is widespread agreement that both A and B are true: the Chinese made rapid advancements in their nuclear weapons program in the early 1990s, and they obtained classified nuclear weapons design information sometime before 1995. The controversy arises over whether there is any causal relationship between the two facts. One school of thought—embodied in the Kindred Spirit AI—holds that the Chinese advances occurred because they obtained classified U.S. nuclear weapons design information, particularly that related to the W–88. The contrary school of thought holds that while both A and B may be true, there is no evidence that the Chinese nuclear advances resulted from their acquisition of U.S. nuclear weapons design information.

Investigations predicated upon these two schools of thought would take remarkably divergent paths. If one took as a starting point, as did the authors of the AI, the belief that the PRC's nuclear weapons design advances were in large part attributable to espionage against the United States, one would be looking for the wholesale transfer of W–88 design information. The alternative view—that the PRC's nuclear weapons advances could have occurred independently of the acknowledged acquisition of classified U.S. weapons data in the ''walk-in'' document—would lead to an investigation focused on the specific bits of classified information the Chinese were known to have obtained, not only about the W–88 but about other weapons systems as well. The former theory paints a picture consistent with a single act of espionage, conducted by a single individual transferring information from a specific place. The latter theory forces a broader review, implicitly acknowledging that the information could involve multiple transfers from multiple sources, quite possibly by numerous individuals.

While the debate over whether or not the PRC's nuclear weapons advances resulted from espionage is important from both a counterintelligence and an intelligence point of view, it should not have been the determinative factor in deciding how to conduct this espionage investigation. The threshold for required action by the FBI is met on the basis of fact B, irrespective of fact A and any relationship between the two elements. Section 811 of the Intelligence Authorization Act of 1995, enacted to improve interagency coordination on espionage investigations in the wake of the Aldrich Ames spy case, requires an agency to notify the FBI when it becomes aware that espionage may have occurred. Proof that the PRC had obtained classified U.S. nuclear weapons design information became available in the summer of 1995 in the form of the ''walk-in'' document, which was really a large cache of documents delivered to the U.S. government by a Chinese national. The information in the ''walk-in'' document was sufficient to trigger the requirements of section 811 and to prompt an investigation by the FBI.

The DOE could have satisfied its statutory obligations under section 811 simply by notifying the FBI of its view that certain information in the ''walk-in'' document was not in the public domain, had not been authorized for transfer to the PRC, and was therefore likely in the possession of the PRC as a result of espionage. In retrospect, it might have been better if they had done so. The conclusions of the AI, while accompanied by many caveats that the DOE had been limited in its ability to conduct the investigation and that further review was required, were adopted almost wholesale by the FBI and formed the basis of the FBI's own Kindred Spirit espionage investigation.

The Bellows Report is highly critical of the DOE AI, concluding essentially that the DOE overstated the degree of consensus that existed on the question of espionage as a causal factor in the PRC's nuclear weapons advances, thereby establishing a faulty predicate for the entire investigation. The fact that the DOE was already concerned that the PRC had detonated what appeared to be an advanced nuclear weapon when the information in the ''walk-in'' document became available may have led some members of the DOE scientific review panel, called the Kindred Spirit Analytical Group (KSAG), to give undue weight to the possibility of a causal link between the PRC's weapons design advances and the information in the ''walk-in'' document. That is a question about which reasonable individuals may disagree—even among the members of the KSAG there was not unanimity on this point [58]—but there is no doubt that the AI which flowed from the KSAG was built upon the belief that the PRC's design advances were the result of espionage. There can also be no doubt that the AI cast strong suspicion on the Lees.

Any fair reading of the Administrative Inquiry makes clear that its authors (a DOE counterintelligence official and an FBI agent seconded to the DOE to assist with the AI) considered Wen Ho and Sylvia to be the prime suspects in the alleged loss to the PRC of certain W–88 nuclear warhead design information, and that the loss had most likely occurred at Los Alamos. The AI reaches a preliminary conclusion:

''. . . it is the opinion of the writer that Wen Ho Lee is the only individual identified during this inquiry who had, opportunity, motivation and legitimate access to both W–88 weapons system information and the information reportedly received by [the PRC].'' [59]

A fair reading of the document also shows that the authors explicitly recognized the limitations of their investigation and recommended that the Lees and Los Alamos be a starting place for an investigation into the loss of the W–88 information, an investigation that would necessarily extend well beyond the Lees and Los Alamos. For example, the report says:

''This by no means excludes any other DOE personnel as being possible suspects in this matter. However, based upon a review of all information gathered by this inquiry, Wen Ho Lee and his wife, Sylvia appear the most logical suspects. Wen Ho Lee had the direct access to the W–88 [information], motivation and opportunity to provide the PRC the W–88 weapons design [information].'' [60]

The report concluded with the following recommendation:

''The writer believes the ECI [DOE Counterintelligence] has basically, exhausted all logical 'leads' regarding this inquiry which ECI is legally permitted to accomplish. Therefore, I strongly urge the FBI take the lead in this investigation.'' [61]

Thus, while the AI strongly points toward the Lees there are also enough qualifiers to make it clear that other suspects should also be investigated.

Had the AI arrived on the doorstep of the FBI's Albuquerque office under different circumstances, it might have been handled more appropriately. The AI came when the FBI had already been investigating Dr. Lee, albeit not very competently, on the basis of credible allegations from 1994 that he had helped the Chinese with codes and software. In this context, the AI served to reinforce the FBI's existing perceptions of Dr. Lee as a likely espionage suspect.

Instead of using the AI as a starting point for a comprehensive investigation, the FBI did little or no additional analysis and began focusing almost exclusively on the W–88 issue and the Lees. The reason for the FBI's action was made clear in an interview of the special agent who helped write the AI, who said that he assumed that the investigation of Dr. Lee and the Kindred Spirit investigation would eventually merge because it looked like Dr. Lee was the most likely suspect.[62]

Even when given an opportunity to take a fresh look at the case, the FBI did not do so. When the CIA expressed concern in the summer of 1996 that the individual who provided the ''walk-in'' document might be under the control of a hostile intelligence service, the FBI actually shut down its investigation for nearly three weeks in July and August. An August 20, 1996 teletype from FBIHQ to the Albuquerque division says:

''On August 19, 1996, DOEHQ provided FBIHQ with a letter stating it had conferred with CIAHQ and that DOE judged 'that a serious compromise of U.S. weapons-specific restricted data occurred most likely in the 1984–1988 timeframe.' In effect, DOE stands by their original conclusion.'' [63]

Thus, after the details were sorted out, it was clear that the investigation should go forward because the PRC had information they should not have, even if there were disagreements over what, exactly, had been compromised. A September 16, 1996 FBI 302 from an interview of a scientist puts this in perspective. It says, ''There was no disagreement that 'Restricted Data' information had been acquired by the Chinese. The only disagreement was over how valuable the information was.'' [64]

Thus, the recent attempts to dissect the AI, outlined elsewhere in this report, miss the mark. The FBI had an opportunity when the CIA raised a red flag about the ''walk-in'' in 1996 to review the structure of their investigation. They knew, based on the review they conducted at the time, that there had been some disagreement within the KSAG, but that espionage had, in fact, occurred. Unfortunately, when the FBI restarted its investigation in August 1996, the case agents never questioned the underlying assumptions of the AI or the impact of these assumptions on the structure and course of the investigation.

By restarting the investigation where they left off, the FBI failed to take into consideration massive amounts of information in their own files indicating that the investigation should extend beyond the W–88 information, beyond Los Alamos, and beyond the Lees. More importantly, the FBI never seems to have made any effort to understand what, if any, relationship existed between the Kindred Spirit allegations and the investigation

of Dr. Lee that was already under way related to computer codes and software. The FBI's failure to ask this basic question sent the investigation on a wild goose chase for more than three years while Dr. Lee's illegal computer activities, which were highly relevant to the 1994 allegations against him, continued unchecked and unimpeded.

The ''walk-in'' document

The ''walk-in'' document is central to the Kindred Spirit investigation, so it should be described in the greatest detail consistent with classification concerns. This document, dated 1988, is said to lay out China's nuclear modernization plan for Beijing's First Ministry of Machine Building, which is responsible for making missiles and nose cones.[65] The 74–page document contains dozens of facts about U.S. warheads, mostly in a two-page chart. On one side of the chart are various US Air Force and US Navy warheads, including some older bombs as well as the W–80 warhead (cruise missiles), the W–87 (Minuteman III); and the W–88 (Trident II).[66] Among the most important items of information in the ''walk-in'' document are details about the W–88 warhead.

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

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

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

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

''Over the following months, an assessment of the information in the document was conducted by a multidisciplinary group from the U.S. government, including the Department of Energy and scientists from the U.S. national weapons laboratories.''[67]

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

''unquestionably contains some information that is still highly sensitive, including descriptions, in varying degrees of specificity, of the technical characteristics of seven U.S. thermonuclear warheads.'' [68]

The preceding analysis shows that while there can be a legitimate debate as to whether the conclusions of the AI were stated with inordinate confidence, which may have contributed to the FBI's decision to focus on the Lees and the loss of the W–88 information, there can be no doubt that: (1) the PRC obtained classified nuclear secrets through espionage, and (2) the FBI had ample reason to investigate Dr. Lee. The problem is that the FBI focused too narrowly on the Lees as suspects in the W–88 investigation without ascertaining whether their suspicions about Dr. Lee were logically related to the alleged loss of the W–88 information.

From 1996 until 1997 the DOE and FBI investigation was characterized by additional inexplicable lapses. For example, in November 1996, the FBI asked DOE counterintelligence team leader Terry Craig for access to Dr. Lee's computer. Although Mr. Craig apparently did not know it until 1999, Dr. Lee had signed a consent-to-monitor waiver[69] on April 19, 1995. The relevant portion of the waiver states:

''Warning: To protect the LAN [local area network] systems from unauthorized use and to ensure that the systems are functioning properly, activities on these systems are monitored and recorded and subject to audit. Use of these systems is expressed consent to such monitoring and recording. Any unauthorized access or use of this LAN is prohibited and could be subject to criminal and civil penalties.'' [70]

For reasons that have yet to be explained, this waiver was not in Dr. Lee's security file or his personnel file.[71]

The computer that Dr. Lee used apparently also had a banner, which had information that may have constituted sufficient notice to give the FBI access to its contents. And, finally, LANL computer use policy gave authorities the ability to search computers to prevent waste, fraud and abuse.[72] As noted in the press release accompanying the August 12, 1999, Department of Energy Inspector General's Report, Mr. Craig's ''failure to conduct a diligent search deprived the FBI of relevant and potentially vital information.'' [73] Had the FBI National Security Law Unit (NSLU) been given the opportunity to review these facts, it may well have concluded that no FISA warrant was necessary to conduct a preliminary investigation of Dr. Lee's computer. More importantly, records from the DOE monitoring systems like NADIR could almost certainly have been reviewed without a FISA warrant. Had these records been searched, Dr. Lee's unauthorized downloading would have been found nearly three years earlier. Unfortunately, through the failures of both DOE and FBI personnel, this critical information never reached FBI Headquarters, and the NSLU decided that Dr. Lee's computer could not be searched without a FISA warrant.[74] Thus, a critical opportunity was lost to find and remove from an unsecure system, information that could alter the global strategic balance.

Nonetheless, the FBI developed an adequate factual basis for the issuance of a FISA warrant. The information developed by the FBI to support its FISA application in 1997 was cogently summarized in the August 5, 1999 special statement of Senators Thompson and Lieberman of the Senate Committee on Governmental Affairs[75]:

''DOE counterintelligence and weapons experts had concluded that there was a great probability that the W–88 information had been compromised between 1984 and 1988 at the nuclear weapons division of the Los Alamos laboratory. It was standard PRC intelligence tradecraft to focus particularly upon targeting and recruitment of ethnic Chinese living in foreign countries (e.g., Chinese-Americans).

''It is common in PRC intelligence tradecraft to use academic delegations—rather than traditional intelligence officers—to collect information on science-related topics. It was, in fact, standard PRC intelligence tradecraft to use scientific delegations to identify and target scientists working at restricted United States facilities such as LANL, since they ''have better access than PRC intelligence personnel to scientists and other counterparts at the United States National Laboratories.''

''Sylvia Lee, wife of Wen Ho Lee, had extremely close contacts with visiting Chinese scientific delegations. Sylvia Lee, in fact, had volunteered to act as hostess for visiting Chinese scientific delegations at LANL when such visits first began in 1980, and had apparently had more extensive contacts and closer relationships with these delegations than anyone else at the laboratory. On one occasion, moreover, Wen-Ho Lee had himself aggressively sought involvement with a visiting Chinese scientific delegation, insisting upon acting as an interpreter for the group despite his inability to perform this function very effectively.

''Sylvia Lee was involuntarily terminated at LANL during a reduction-in-force in 1995. Her personnel file indicated incidents of security violations and threats she allegedly made against coworkers.

''In 1986, Wen-Ho Lee and his wife traveled to China on LANL business to deliver a paper on hydrodynamics[76] to a symposium in Beijing. He visited the Chinese laboratory—the Institute for Applied Physics and Computational Mathematics (IAPCM)—that designs the PRC's nuclear weapons.

''The Lees visited the PRC—and IAPCM—on LANL business again in 1988.

''It was standard PRC intelligence tradecraft, when targeting ethnic Chinese living overseas, to encourage travel to the ''homeland''—particularly where visits to ancestral villages and/or old family members could be arranged—as a way of trying to dilute loyalty to other countries and encouraging solidarity with the authorities in Beijing.

''The Lees took vacation time to travel elsewhere in China during their two trips to China in 1986 and 1988.

''The FBI also learned of the Lees' purchase of unknown goods or services from a travel agent in Hong Kong while on a trip to that colony and to Taiwan in 1992. On the basis of the record, the FBI determined that there was reason to believe that this payment might have been for tickets for an unreported side trip across the border into the PRC to Beijing.

''Though Wen-Ho Lee had visited IAPCM in both 1986 and 1988 and had filed ''contact reports'' claiming to recount all of the Chinese scientists he met there, he had failed to disclose his relationship with the PRC scientist who visited LANL in 1994.

''Wen-Ho Lee worked on specialized computer codes at Los Alamos—so-called ''legacy codes'' related to nuclear testing data—that were a particular target for Chinese intelligence.

''The FBI learned that during a visit to Los Alamos by scientists from IAPCM, Lee had discussed certain unclassified hydrodynamic computer codes with the Chinese delegation. It was reported that Lee had helped the Chinese scientists with their codes by providing software and calculations relating to hydrodynamics.

''In 1997, Lee had requested permission to hire a graduate student, a Chinese national, to help him with work on ''Lagrangian codes'' at LANL. When the FBI evaluated this request, investigators were told by laboratory officials that there was no such thing as an unclassified Lagrangian code, which describes certain hydrodynamic processes and are used to model some aspects of nuclear weapons testing. ''In 1984, the FBI questioned Wen-Ho Lee about his 1982 contact with a U.S. scientist at another DOE nuclear weapons laboratory who was under investigation. ''When questioned about this contact, Lee gave deceptive answers. After offering further explanations, Lee took a polygraph, claiming that he had been concerned only with this other scientist's alleged passing of unclassified information to a foreign government against DOE and Nuclear Regulatory Commission regulations—something that Lee himself admitted doing. (As previously noted, the FBI closed this investigation of Lee in 1984.) ''The FBI, as noted above, had begun another investigation into Lee in the early 1990s, before the W–88 design information compromise came

to light. This investigation was based upon an FBI investigative lead that Lee had provided significant assistance to the PRC. ''The FBI obtained a copy of a note on IAPCM letterhead dated 1987 listing three LANL reports by their laboratory publication number. On this note, in English, was a handwritten comment to 'Linda' saying '[t]he Deputy Director of this Institute asked [for] these paper[s]. His name is Dr. Zheng Shaotang. Please check if they are unclassified and send to them. Thanks a lot. Sylvia Lee.' ''

The FBI request was worked into a draft FISA application by Mr. David Ryan, a line attorney from the Department of Justice's Office of Intelligence Policy and Review (OIPR) with considerable experience in FISA matters. It was then reviewed by Mr. Allan Kornblum, as Deputy Counsel for Intelligence Operations, and finally, by Mr. Gerald Schroeder, Acting Counsel, OIPR.[77] As is well known by now, the OIPR did not agree to forward the FISA application, and yet another opportunity to discover what Dr. Lee was up to was lost.

The Department of Justice should have taken the FBI's request for a FISA warrant on Dr. Lee to the Court on August 12, 1997.

Attorney General Reno testified about this case before the Senate Judiciary Committee on June 8, 1999. A redacted version of her testimony was released on December 21, 1999. The transcript makes it clear that the Department of Justice should have agreed to go forward with the search warrant for surveillance of Dr. Wen Ho Lee under the Foreign Intelligence Surveillance Act when the FBI made the request in 1997.

The DOJ's internal review of the FISA request, conducted by Assistant U.S. Attorney Randy Bellows, confirms that the request should have gone forward. Mr. Bellows said:

''The final draft FISA application [deleted] on its face, established probable cause to believe that Wen Ho Lee was an agent of a foreign power, that is to say, a United States Person currently engaged in clandestine intelligence gathering activities for or on behalf of the PRC which activities might involve violations of the criminal laws of the United States and that his wife, Sylvia Lee, aided, abetted or conspired in such activities. Given what the FBI and OIPR knew at the time, it should have resulted in the submission of a FISA application and the issuance of a FISA order.'' [78]

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

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

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

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

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

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

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

FBI Director Freeh correctly concluded that probable cause existed for the issuance of the FISA warrant. At the June 8 hearing, Attorney General Reno stated her belief that there had not been a sufficient showing of probable cause but conceded that FBI Director Freeh, a former Federal judge, concluded that probable cause existed as a matter of law.[79]

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

''On 8–12–97 Mr. Allan Kornblum of OIPR advised that he could not send our (the FBI) application forward for those reasons. We had not shown that subjects were the ones who passed the W–88 [design information] to the PRC, and we had little to show that they were presently engaged in clandestine intelligence activities.'' [80]

It is obviously not necessary to have a showing that the subjects were the ones who passed W–88 design information to the PRC. That would be the standard for establishing guilt at a trial, which is a far higher standard than establishing probable cause for the issuance of a search warrant. Attorney General Reno contended that the remainder of the 12 individuals identified in the AI would have to be ruled out as the ones who passed W–88 design information to the PRC before probable cause would be established for issuance of the FISA warrant on Dr. Lee. That, again, is the standard for conviction at trial instead of establishing probable cause for the issuance of a search warrant. Thus, it is apparent from the Kornblum statement that the wrong standard was applied: ''that subjects were the ones that passed the W–88 [design information] to the PRC.'' [81]

DOJ was also wrong when Mr. Kornblum concluded that: ''We had little to show that they were presently engaged in clandestine intelligence activities.'' [82] There is substantial evidence that Dr. Lee's relevant activities continued from the 1980s to 1992, 1994 and 1997 as noted above.

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

''We can't do it (a FISA wiretap) unless there was probable cause to believe that that facility, their home, is being used or about to be used by them as agents of a foreign power.'' [83]

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

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

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

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

There is no requirement in this FISA language that the facility is being used in the commission of an offense. This incorrect application of the law was a serious mistake. As noted in the Bellows report, ''This matter should not have been assigned to an attorney who did not already have a solid grounding in FISA law, FISA applications, and the FISA Court.'' [84]

Attorney General Reno demonstrated an unfamiliarity with technical requirements of Section 1802 versus Section 1804. She was questioned about the higher standard under 1802 than 1804: ''It seems the statutory scheme is a lot tougher on 1802 on its face.'' [85]

Attorney General Reno replied: ''Well I don't know. I've got to make a finding that under 1804, that it satisfies the requirement and criteria—and requirement of such application as set forth in the chapter, and it's fairly detailed.'' [86]

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

''Since I did not address this, let me ask Ms. Townsend who heads the office of policy review to address it for you in this context and then I will. . . .'' [87]

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

The lack of communication between the Attorney General and the Director of the FBI on a matter of such grave importance is troubling. As noted previously, Director Freeh sent John Lewis, Assistant FBI Director for National Security to discuss this matter with the Attorney General on August 20, 1996. However, when the request for a review of the matter did not lead to the forwarding of the FISA application to the court, Director Freeh did not further press the issue. And Attorney General Reno conceded that she did not follow up on the Wen Ho Lee matter. During the June 8 hearing, Senator Sessions asked, ''Did your staff convey to you that they had once again denied this matter?'' [88]

Attorney General Reno replied, ''No, they had not.'' [89]

As the Bellows Report concludes, ''The failure to advise the Attorney General of the resolution of this matter had an unfortunate consequence: It effectively denied the FBI the true appeal it had sought.'' [90]

The June 8, 1999 hearing also included a discussion as to whether FBI Director Freeh should have personally brought the matter again to Attorney General Reno. The Attorney General replied that she did not ''complain'' about FBI Director Freeh's not doing so and stated, ''I hold myself responsible for it.'' [91]

Attorney General Reno conceded the seriousness of the case, stating, ''I don't think the FBI had to convey to the attorneys the seriousness of it. I think anytime you are faced with facts like this it is extremely serious.'' [92]

In the context of this serious case, it would have been expected that Attorney General Reno would have agreed with FBI Director Freeh that the FISA warrant should have been issued. In her testimony, she conceded that if some 300 lives were at stake on a 747 she would take a chance, testifying: ''My chance that I take if I illegally search somebody, if I save 300 lives on a 747, I'd take it.'' [93]

In that context, with the potential for the PRC obtaining U.S. secrets on nuclear warheads, putting at risk millions of Americans, it would have been expected that the Attorney General would find a balance in favor of moving forward with the FISA warrant. As demonstrated by her testimony, Attorney General Reno sought at every turn to minimize the FBI's statement of probable cause. On the issue of Dr. Lee's opportunity to have visited Beijing when he had been in Hong Kong and incurred additional travel costs of the approximate expense of traveling to Beijing, the Attorney General said that ''an unexplained travel voucher in Hong Kong does not lead me to the conclusion that someone went to Beijing any more than they went to Taipei.'' [94]

It might well be reasonable for a fact-finder to conclude that Dr. Lee did not go to Beijing; but, certainly, his proximity to Beijing, the opportunity to visit there and his inclination for having done so in the past would at least provide some ''weight'' in assessing probable cause. But the Attorney General dismissed those factors as having no weight even on the issue of probable cause, testifying, ''I don't find any weight when I don't know where the person went.'' [95] Of course it is not known ''where the person went.'' If that fact had been established, it would have been beyond the realm of ''probable cause.'' Such summary dismissal by the Attorney General on a matter involving national security is inappropriate given the circumstances. In other legal contexts, opportunity and inclination are sufficient to cause an inference of certain conduct as a matter of law.

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

Assistant U.S. Attorney Randy Bellows concurred on the damage done by OIPR's rejection of the FISA request:

''OIPR's erroneous judgment that [deleted] did not contain probable cause could not have been more consequential to the investigation of Wen Ho Lee. From the beginning of that investigation, the FBI's objective had been to obtain FISA coverage. It now faced the prospect of no FISA coverage, an eventuality for which it had never prepared. The other consequence, of course, is that such information as might have been acquired through FISA coverage was not acquired. It is impossible to say just what the FBI would have learned through FISA surveillance. That is, after all, the point of surveillance. What is clear is that [deleted] should have been approved, not rejected. For all the problems with the FBI's counterintelligence investigation of Wen Ho Lee, and they were considerable, the FBI had somehow managed to stitch together an application that established probable cause. That OIPR would disagree with the assessment would deal this investigation a blow from which it would not recover.'' [96]

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

To put the 1997 FISA rejection in perspective, consider that the open network to which Dr. Lee had transferred the legacy codes was ''linked to the Internet and e-mail, a system that had been attacked several times by hackers.'' [97] Although we do not know the exact figures for the number of times that it was accessed, it has been reported that between October 1997 and June 1998 alone, ''there were more than 300 foreign attacks on the Energy Department's unclassified systems, where Mr. Lee had downloaded the secrets of the U.S. nuclear arsenal.'' [98]

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

''. . . in 1997 Lee downloaded directly from the classified system to a tenth portable computer tape a current nuclear weapons design code and its auxiliary libraries and utility codes.'' [99]

This direct downloading had been made possible by Los Alamos computer managers who made Lee's file transfers ''easier in the mid–1990s by putting a tape drive on Lee's classified computer.'' [100] As incomprehensible as it seems, despite the fact that Dr. Lee was the prime suspect in an ongoing espionage investigation, and despite plans to limit his access to classified information to limit any damage he might do, DOE computer personnel installed a tape drive on his computer that made it possible for him to directly download the nation's top nuclear secrets.

An important aim of surveillance under the FISA statute is to determine whether foreign intelligence services are getting access to our classified national security information. Although we do not know, and may never know, why Dr. Lee placed these classified files on an unsecure system, there should be no doubt that transferring classified information to an unclassified computer system and making unauthorized tape copies of that information created a substantial opportunity for foreign intelligence services to access that information. The breakdown of communication between the FBI and DOJ which resulted in the rejection of the FISA in 1997 resulted in yet another missed opportunity to find and protect the information Dr. Lee illegally put at risk.

Certain provisions of the Counterintelligence Reform Act of 2000, which became law as Title VI of Public Law 106–567 on December 27, 2000, will prevent the kinds of problems that plagued this FISA request. The law now requires that, upon written notification from the Director of the FBI (or of one of the few other officials who are authorized to make FISA requests), the Attorney General must explain in writing why the Department does not believe that probable cause has been established, and to make recommendations for improving the request. When given such recommendations in writing, the requesting official must personally supervise the implementation of any such recommendations. These procedures will ensure that disagreements over matters of probable cause are resolved rather than allowed to linger, as happened in the Wen Ho Lee case.

Investigation from August 12, 1997 to December 23, 1998

Notwithstanding the serious evidence against Dr. Lee on matters of great national security importance, the FBI investigation languished for 16 months, from August 1997 until December 1998, with the Department of Energy permitting Dr. Lee to continue on the job with access to classified information.

After OIPR's August 1997 decision not to forward the FISA application, FBI Director Louis Freeh met with Deputy Energy Secretary Elizabeth Moler to tell her that there was no longer any investigatory reason to keep Lee in place at LANL, and that DOE should feel free to remove him in order to protect against further disclosures of classified information. In October 1997, Director Freeh delivered the same message to Energy Secretary Federico Pena that he had given to Moler.[101] These warnings were not acted on, and Dr. Lee was left in place, as were the files he had downloaded to the unclassified system, accessible to any hacker on the Internet.

After the rejection of the FISA warrant request on August 12, it took the FBI three and one-half months to send a memo dated December 19, 1997, to the Albuquerque field office listing fifteen investigative steps that should be taken to move the investigation forward. The Albuquerque field office did not respond directly until November 10, 1998. The fifteen investigative steps were principally in response to the concerns raised by OIPR about the previous FISA request. To protect sources and methods, the specific investigative steps in the December 19, 1997 teletype cannot be disclosed, but have been summarized by the FBI as follows:

1. Conduct Additional Interviews

(a) Open preliminary inquiries on other individuals named in the DOE AI who met critical criteria;

(b) Develop information on associate's background, and interview the associate, and

(c) Interview co-workers, supervisors, and neighbors.

2. Conduct Physical Surveillance

3. Conduct Other Investigative Techniques

(a) Review information resulting from other investigative methods;

(b) Review other investigations for lead purposes; and

(c) Implement alternative investigative methods.[102]

Only two of the leads were seriously pursued. Most importantly, the FBI did not open investigations on the other individuals named in the DOE AI until much later.

The False Flag

One of the steps recommended in the December 1997 HQ investigative plan was carried out in August 1998. The results of this ''False Flag'' operation against Dr. Lee are partially described in a November 10, 1998 memorandum from Albuquerque to FBIHQ. The memorandum is identified as a request for electronic surveillance and lays out the basis for probable cause, including a description of a series of phone calls between Dr. Lee and an individual posing as an officer of

the Ministry of Foreign Affairs and Ministry of State Security. According to the memo, this undercover agent (UCA) introduced himself to Dr. Lee ''as a representative of the 'concerned Department,' from Beijing, PRC,'' and explained that the purpose of his visit to Sante Fe was to ''meet with Wen Ho Lee to assure of Lee's well-being in the aftermath of the conviction of a Chinese-American scientist, Peter Lee in California.'' [103]

The Albuquerque memo describes Dr. Lee as being ''skeptical of the entire situation and apprehensive about meeting face-to-face with [the UCA]'' and relates how Dr. Lee mentioned that ''departmental policy at LANL requires him to report to his superior if he meets with a representative of a foreign government, however, it does not mean that he is forbidden to meet such a person.'' [104] Dr. Lee stated a preference for discussing any matters with the representative of the PRC over the phone, but when told that there were other sensitive issues besides the Peter Lee case which must be discussed in person, Dr. Lee agreed to meet the UCA at the Hilton Hotel.[105]

About ten minutes after agreeing to travel to meet the UCA, Dr. Lee called back and said he had changed his mind, reiterating his concerns about registering with his superior when meeting with foreign government officials. Given that Dr. Lee would not agree to a face-to-face meeting, the UCA said that ''although he was an official from the PRC government, he was traveling under civilian status on this trip so that he could avoid scrutiny by the United States government.'' [106] The UCA then asked Dr. Lee if he had been interviewed by any U.S. authorities, including the FBI, and whether Dr. Lee had noticed anything unusual or was being treated differently by his employer or had any restrictions on his travel arrangements in the wake of the Peter Lee case. Dr. Lee responded negatively.[107]

The UCA then told Dr. Lee that one of the reasons he wanted to meet was to see if there was any material to take back to the PRC. After Dr. Lee said there was not any such material, the UCA said that ''since the material he brought back to China and the speech he gave were so helpful, did Lee have any plans in going to the PRC in the near future.'' [108] Dr. Lee said that he would probably not be going to the PRC until after his retirement from LANL in one or two years. He did not, as one would expect, deny that he had previously sent material.

The next day (August 19), the UCA called Dr. Lee again, saying that he would be leaving Santa Fe in a few days and asking if Dr. Lee would like to have a number where he could contact the UCA in the future. Dr. Lee said he would like to have a number, and was provided a pager number and was told that it belonged to an American friend who had helped the UCA and his associates in the past, and who could be trusted.[109]

Dr. Lee did not immediately report this contact, but he told his wife who told a friend, who told DOE security. When Dr. Lee was questioned by DOE counterintelligence personnel about the phone call, he was vague, and failed to mention the beeper number or the hotel.

The FBI did not properly handle the information learned from the False Flag operation. First, it took more than three months for the transcript of the exchange between Dr. Lee and the UCA to get to FBI Headquarters where it could be fully analyzed. Unfortunately, the transcript (and the FISA request based on the results of the False Flag) arrived at FBI HQ just when the DOE was asserting control over the case. Had the transcript been analyzed in the full detail that it deserved, the FBI would have been able to tell the Office of Intelligence Policy and Review that prior concerns about whether Dr. Lee was ''currently engaged'' as an agent of a foreign power had been addressed by his dealings with the undercover agent. Among the key points that should have been worked into the renewed FISA application are the following:

That Dr. Lee agreed to meet with an individual purporting to be an agent of a foreign government, traveling in the U.S. in civilian clothes to avoid detection by U.S. authorities. Although Dr. Lee called back and canceled the face-to-face meeting, he never reported to lab security personnel that he had agreed to meet in the first place.

That Dr. Lee accepted the contact number of an individual claiming to be an agent of a foreign power, yet failed to disclose that fact to lab security officials about the incident when asked about this contact. Dr. Lee apparently admitted more of the details of the August phone conversations when he was interviewed by FBI agents in January 1999, but his failure to acknowledge this fact when he spoke to Los Alamos officials in August 1998 continued a pattern of incomplete disclosure from Dr. Lee.

That Dr. Lee asked questions during the conversation which indicated a knowledge of PRC intelligence and scientific organizations and the operational methods used by these agencies.

None of these new items of information was sufficient, on its own, to tip the balance of probable cause against Dr. Lee. However, in the context of the other evidence that had already been gathered by the FBI, these elements were certainly relevant to a probable cause determination and should have been relayed to OIPR for consideration. While the FBI informally told OIPR of Dr. Lee's failure to fully report the August contact, that conversation did not take place until three months after the incident occurred. A proper and timely interpretation of the False Flag operation would have set the investigation on a very different course in late 1998. The Bellows Report supports the judgement that the FBI's handling of the False Flag was inappropriate, and that the information gained through the False Flag would have added to a showing of probable cause necessary for a FISA warrant.

Surreptitious Communications

The December 19, 1997 directive from FBI Headquarters also revived an investigative issue that had come to the FBI's attention in 1995, prior to the start of the Kindred Spirit investigation. Among the 15 actions that FBI Headquarters directed the Albuquerque office to take was a reinvestigation of the possibility that Dr. Lee was engaging in clandestine communications, using either a satellite system or Short Range Agent Communications (SRAC).

As part of the 1994–1996 investigation of Dr. Lee, the FBI had learned that Dr. Lee was reported to have installed a satellite antenna near his home and was suspected of using it to communicate surreptitiously. The case agents requested assistance in investigating the possibility that Dr. Lee was engaged in some sort of satellite communications, but the request was summarily dismissed by the case manager at FBI Headquarters, Supervisory Special Agent Craig Schmidt, and the matter was not further pursued for nearly three years.

After the FISA request was rejected in 1997, in part because the FBI had not been able to convince OIPR that Dr. Lee was currently engaged in any clandestine activity, the case manager's interest in the communications issue picked up. In the December 19, 1997 communication to Albuquerque, he directed the agents in the field to renew their investigation of this matter, which they did with substantial vigor. For several months during the summer of 1998, the Albuquerque office collected information to determine whether or not Dr. Lee was, in fact, engaged in some sort of clandestine communication from his home.

The Albuquerque case agents, with the help of a technical adviser who was brought in specifically for the purpose of helping on this issue, formed a hypothesis that Dr. Lee was communicating by satellite. They included this information, and much of the supporting data, in the November 10, 1998 request for a FISA warrant. The agents did not assert conclusively that Dr. Lee was using SRAC or satellite communications, but they explained their reasons for believing that he might be doing so and requested help in making a final determination about the significance of the possible communications.

The FBI has subsequently concluded that the observed phenomenon which originally led the Albuquerque case agents to believe that Dr. Lee might be using SRAC was not linked to any communication from Dr. Lee's house. The FBI's technical analysis of this issue is thorough and convincing. On the current state of the record, the phenomenon which led the FBI to suspect that Dr. Lee was engaged in surreptitious communications, while still unexplained, cannot be conclusively linked to anything that was going on inside Dr. Lee's house or on his property.

What is disturbing, however, is that the FBI did not even begin this analysis until November 1999, shortly after the November 3, 1999 closed hearing which focused heavily on this issue. The case manager at FBI Headquarters who received the November 10, 1998 FISA request from Albuquerque rejected the new request, despite the fact that it contained new information beyond what the FBI had felt was sufficient, in 1997, to get a FISA warrant. Outside the Albuquerque field office, no one in the FBI made any real effort to understand the data in the November 10, 1998 FISA request.

Even when the dynamics of the case changed after the FBI concluded that Dr. Lee had not passed the December 23, 1998 polygraph, and changed again when Dr. Lee failed an FBI polygraph on February 10, 1999, no one in the FBI expressed any interest in examining the possibility that there might be something more to the SRAC issue than initially suspected. The FBI still did not revisit the clandestine communications issue after learning that Dr. Lee had been downloading computer files and putting them on portable tapes. The notion that there might be a link between the clandestine communications and the portable tapes apparently never occurred to the FBI, and no effort was made to investigate the meaning of the strange electromagnetic phenomenon that had led the FBI case agents to suspect that Dr. Lee was using SRAC.

Instead of taking action on the new information, the case manager sent back a cable on December 10, telling the case agents that FBIHQ had reviewed the new FISA request and determined that it did ''not yet contain the justification necessary to successfully support a FISA Court application for electronic surveillance,'' and recommended that Albuquerque send copies of written reports from LANL's Counterintelligence officer, Terry Craig, regarding Dr. Lee's deception about the False Flag.[110]

On the merits, the failure to forward the FISA request to OIPR is inexplicable. The FBI had felt since 1997 that they had sufficient probable cause to get a FISA warrant. The 1998 investigative steps yielded new information that directly addressed the concerns OIPR had raised about the Lees being currently engaged in clandestine activity,

yet the FBI case manager summarily dismissed the new request, failing to even forward it to OIPR for consideration. The failure to take action when the dynamics of the case changed in early 1999 is just incomprehensible.

When such serious national interests were involved in this case, it was simply unacceptable for the FBI to tarry from August 12, 1997 to December 19, 1997, to send the Albuquerque field office a memo. It was equally unacceptable for the Albuquerque field office to take from December 19, 1997 until November 10, 1998 to respond to the guidance from Headquarters, and then for the FBI not to renew the request for a FISA warrant based on the additional evidence. The FBI's handling of this issue is impossible to justify.

The December 23, 1998 Polygraph

When Dr. Lee returned to the United States from a three-week trip to Taiwan in December 1998, he was administered a polygraph examination on instructions from Mr. Ed Curran, Director of DOE's Office of Counterintelligence (OCI). Although Dr. Lee was initially thought to have passed the polygraph with very high scores, his access to the X-Division was temporarily suspended to give the FBI time to conclude its investigation. When the polygraph results were examined by the FBI in late January or early February 1999, it became clear that Dr. Lee had not passed, and the investigation was restarted, eventually leading to the dismissal of Dr. Lee from LANL and, several months later, his indictment and jailing.

The circumstances surrounding this December 1998 polygraph are among the most important but least understood aspects of the case. The June 1999 report of the President's Foreign Intelligence Advisory Board raised questions about this issue and recommended that the Attorney General determine, ''why DOE, rather than the FBI, conducted the first polygraph in this case when the case was an open FBI investigation. . . .'' [111] The subcommittee's investigation demonstrates that the handling of the December 23, 1998 polygraph, or more accurately the mishandling of this polygraph is one of the most consequential errors of the Wen Ho Lee matter. To understand the impact of the polygraph on the case, it is necessary to review: 1) the events leading up to and the reasons for the December 23, 1998 polygraph; 2) the results of that polygraph; and 3) the effect on the investigation of the erroneous polygraph reading by Wackenhut. The short answer is that: 1) DOE jumped into the case in a heavy handed way during late 1998 in an effort to avoid criticism related to the upcoming release of the Cox Committee report, 2) the Wackenhut examiners' incorrect conclusion that Dr. Lee passed the polygraph prompted the FBI to nearly shut down its investigation of Dr. Lee, 3) with the result that during the time he supposedly was denied access to the X-Division, Dr. Lee was able to return and recover the tapes that are now missing. Given the vast number of mistakes that had already been made prior to December 1998, and the number that were made thereafter, it would be wishful thinking to believe that a correct reading of the polygraph would have led to a successful conclusion in this case, but Wackenhut's erroneous initial interpretation of the results and the long delay in getting the charts passed to FBIHQ for review put the case on a downward spiral from which it almost never recovered. Because these issues are both highly important and widely misunderstood, each is examined in some detail.

The events leading up to the December 23, 1998 Polygraph

As noted previously, the FBI's investigation of Dr. Lee had been dealt a severe blow in August 1997 when DOJ's Office of Intelligence Policy and Review rejected the FISA request. The local case agents spent most of 1998 trying to get the investigation back on track, but were not notably successful. By November 1998, the newly appointed lead case agent was ready to move forward and sent a new request for FISA coverage to FBI HQ. Unfortunately, the request fell on deaf ears for reasons that will be explored more fully below.

At approximately the same time the case agents were seeking FISA coverage, Dr. Lee asked for permission to travel to Taiwan to visit a company called Asiatek. According to an FBI document describing this request, Dr. Lee said that ''Asiatek invited him to visit Taiwan in December 1998 to give a presentation in exchange for his airfare.'' [112] When Dr. Lee submitted a request to travel under these terms, the LANL Internal Security section denied it, so Dr. Lee reportedly traveled at his own expense to visit an ailing sister.[113]

While the Internal Security section was correct to deny Dr. Lee's request to let Asiatek pay his travel expenses, the request should have set off alarm bells within both DOE and the FBI. The aforementioned FBI document says:

''Asiatek is a Taiwan-based company founded in 1985 which introduced state-of-the art information technology to both China and Taiwan. The company works with both private industry and Taiwan government research facilities such as the Chung Shan Institute of Science and Technology (administered by the Ministry of National Defense). Asiatek specializes in information technology, program planning and management, business process re-engineering, integrated logistic support, and continuous acquisition and life cycle support environmental planning and implementation. Asiatek also develops cannon and tank systems.'' [114]

The fact that the prime suspect in a major espionage investigation was asking to travel out of the country for the second time in less than nine months, with his travel to be paid for by a foreign company, should have been a call to action by someone in DOE or the FBI. The local case agent sent a message to FBIHQ asking that this information be considered ''in conjunction with Albuquerque Division's request for FISA/MISUR coverage of Wen-Ho Lee,'' [115] but the case manager did not act on it.

If the travel alone was not sufficient to compel the FBI and/or DOE to take some positive steps to regain control over the case, the nature of the work performed by Asiatek and its relationship to the Chung Shan Institute of Science and Technology should have been because these matters related directly to concerns that had been raised about Dr. Lee during the course of the investigation. When asked why Dr. Lee was allowed to travel under these circumstances, Mr. Curran replied that ''FBI personnel were running the investigation and were the ones that allowed Dr. Lee to travel to Taiwan. If it were my decision, I would not have allowed Mr. Lee to leave the country.'' [116]

Mr. Curran's statement on the travel issue reflects a larger problem that plagued the Kindred Spirit investigation from beginning to end, namely the systemic breakdown of effective communication between DOE and the FBI on matters of great importance.[117] If Mr. Curran was opposed to letting Dr. Lee go to Taiwan, he should have said something. As Director of DOE's OCI, his opinion clearly had weight. He did not act, so Dr. Lee went to Taiwan.

As another example of ineffective communication on important issues, consider Mr. Curran's statement that he first learned on December 15, 1998, that Director Freeh had recommended removing Dr. Lee from access more than a year before.[118] Mr. Curran assumed his position as Director of OCI in April 1998 and immediately conducted a 90–day review of the CI program at DOE as mandated by PDD–61. He received what he describes as a ''summary briefing on the Kindred Spirit investigation.'' He was aware of the False Flag that was run in August and wanted to ''get the case moving and to resolve the issues of the possible loss of sensitive information,'' but the fact that the FBI had recommended that Dr. Lee's access to classified information be pulled was apparently not shared with Mr. Curran until mid-December 1998, while Dr. Lee was in Taiwan.[119] It should be noted, however, that Mr. Curran told the DOE IG that he learned about Director Freeh's 1997 comments on moving Dr. Lee in October 1998, two months before he finally took action.[120] This is significant because it undermines Mr. Curran's assertion that the reason he acted in December 1998 was because he had just learned of Director Freeh's 1997 recommendations.

That the Director of DOE's Office of Counterintelligence was not informed (or did not make himself aware) of the FBI's view that Dr. Lee should be pulled from access reflects poorly on the DOE and the FBI. How could anyone brief this case to Mr. Curran in 1998 without mentioning that the Director of the FBI had twice told DOE's top leadership that Dr. Lee's access to classified information should be removed? What would one say, when briefing the new head of counterintelligence, that would not somehow convey the message that the FBI was concerned about the potential damage from keeping him in access? And how could the top counterintelligence officer in the DOE not inquire as to whether consideration had been given to reducing the risk posed by an individual who was the chief suspect in a major espionage investigation? This lack of communication defies comprehension.

The Counterintelligence Reform Act of 2000 will prevent such disasters in the future. The Act requires the Director of the FBI to notify appropriate officials, in writing, when a full field investigation is started in an espionage case, and to present to the head of the affected agency a written assessment of the potential impact of the actions of that agency or department on an FBI counterintelligence investigation. It will not be possible in future investigations for the head of counterintelligence in an agency to claim ignorance of an FBI recommendation regarding a suspect's access to classified information. And the FBI will have to ensure that its coordination with the affected agency is both close and continuous, so that when new officials come into decision-making roles, they will be fully informed as to the important aspects of pending cases. The FBI/DOE polygraph disaster in the Wen Ho Lee case should be the last such calamity.

The interim report issued in March 2000 touched briefly on the polygraph issue, prompting a letter from Mr. Curran,[121] who provided the following account of the events leading up to the polygraph:

''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 [false flag] 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.'' [122]

In subsequent correspondence with the subcommittee, Mr. Curran elaborated on his reasons for removing Dr. Lee's access in December 1998. Responding to follow-up questions from a September 27, 2000 subcommittee hearing, Mr. Curran cited four reasons for his decision to remove Dr. Lee from access in December 1998: ''(1) the fact that the FBI no longer required Lee be kept in access, (2) my discomfort at the extent of Dr. Lee's access, which was greater than I had originally thought, (3) the fact that the FBI's false flag operation had been unsuccessful, possibly alerting Lee to the investigation, and (4) the fact that Lee was then traveling in Taiwan, thus able to travel easily to Hong Kong or the People's Republic of China without our knowledge.'' [123]

While Mr. Curran's account explains what happened, it does not adequately explain why these events took place. It was simply inconsistent for DOE to allow Dr. Lee to travel to Taiwan, yet polygraph him and pull his access to classified information upon his return, even though he supposedly passed the polygraph. If Dr. Lee was such a threat that he needed to be polygraphed and removed from access, why was he allowed to go to Taiwan? And if he passed the polygraph after returning from Taiwan, including specific questions about espionage, why was there still a need to remove his access?

Mr. Curran's explanation for the series of events leading up to the December 1998 polygraph shows an investigation that was, at best, disjointed and poorly coordinated (despite Mr. Curran's assertions to the contrary). Consider, for example, that the FBI agent who took over the case on November 6, 1998, did not agree with the DOE decision to have Wackenhut [124] give Dr. Lee a polygraph examination, and has called it ''irresponsible.'' According to FBI protocol, Dr. Lee would have been questioned as part of a post-travel interview. However, as Mr. Curran noted, the case agents were inexplicably unprepared to conduct such an interview and the Special Agent in Charge (SAC) in Albuquerque agreed to go ahead with the polygraph at Mr. Curran's request. The lead case agent requested a new FISA in November 1998, but Supervisory Special Agent Craig Schmidt the same FBI case manager at headquarters who had put together an action plan in December 1997 trying to get the investigation back on track had suddenly gotten cold feet on the matter, casually rejecting the FISA request without even showing OIPR a written product. DOE was exercised enough about Dr. Lee that Ed Curran wanted to give Dr. Lee a polygraph and pull his access to classified information (something the FBI had recommended 14 months prior), but was not willing to stop him from traveling to Taiwan. The case was a mess, and then it got worse.

The disagreement between FBI and DOE over how best to proceed in late 1998 only partially explains why the investigation lurched forward with FBI seemingly in charge one moment (letting Dr. Lee travel to Taiwan, contrary to Mr. Curran's preference) and Mr. Curran prevailing the next (getting the Albuquerque SAC to overrule the lead case agent on the polygraph question). Other testimony and documents provided to the subcommittee paint a more complete and markedly different picture of the events surrounding the polygraph of Dr. Lee on December 23, 1998. Unfortunately, the picture they paint is one of DOE trying desperately to protect its image from the revelations it expected to come with the release of the Cox Committee report, with the FBI going along, and neither agency focusing on the national security implications of their actions.

To understand the context in which these decisions were being made, consider that the Cox Committee was taking testimony in mid-December, and that key portions of the testimony centered on security at the national labs. The atmosphere leading up to the Cox Committee hearings has been described as follows:

''With impeachment as a backdrop, allegations that the Clinton administration was allowing China easy access to American secrets collided with charges that China's military had funneled money into Democratic coffers. The New York Times reported that the daughter of a senior Chinese military officer was giving money to Democrats while also working to acquire sensitive American technology.

''Republicans, opening a new front against a beleaguered president, created a House select committee, headed by Representative Cox, to investigate whether the government was compromising technology secrets by letting American companies work too closely with China's rocket industry. With its deadline approaching, the committee stumbled on the W–88 case.

''Mr. Trulock became a star witness, and committee members were riveted by his testimony. C.I.A. analysts who testified before the committee agreed there was espionage, people who heard the secret proceedings said, but were more equivocal about its value to China.'' [125]

The Mr. Trulock referenced above is Notra Trulock, former DOE intelligence chief. According to a DOE chronology, the Cox Committee was briefed by DOE on November 12, 1998 and again on December 7. On December 16, Mr. Curran, Mr. Trulock and the Director of the DOE's Office of Intelligence, Mr. Lawrence Sanchez, testified again before the Cox Committee.[126] Describing the impact of his testimony to the House panel, Mr. Trulock told the subcommittee on September 27, 2000 that ''after our initial appearance and particularly our second appearance before the Cox Committee in December of 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.'' [127] Mr. Trulock further testified:

''it is certainly not a coincidence that after the FBI provided the 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 of 1997.'' [128]

Mr. Trulock's testimony is supported by documentary evidence and testimony from other witnesses. A December 18, 1998, memorandum from the FBI's Assistant Director for National Security, Neil Gallagher, says that Secretary Richardson would be calling Director Freeh about the Lee investigation on December 21, 1998. The memorandum explains that DOE counterintelligence personnel wanted to ''neutralize their employee's access to classified information prior to the issuance of a final report by the Cox Committee.'' When questioned on this point Mr. Curran acknowledged that the conversation mentioned in the memo had taken place, but denied any connection between DOE's desire to polygraph Dr. Lee and the release of the Cox Committee report.[130]

Mr. Curran's account of these events is contradicted by testimony from other individuals who were also directly involved. When Director Freeh testified before the Senate Select Committee on Intelligence on May 19, 1999, he told the committee:

''DOE was seeking to establish grounds to terminate Mr. Lee in December of 1998, and they went forward with their polygraph and interview with that objective. We, at that point, wanted more time to prepare for a confrontational interview which in these kinds of cases is the most important interview.'' [131]

Other FBI files from this period support the contention that Secretary Richardson wanted Dr. Lee fired in early 1999. A January 21 memo from FBI Supervisory Special Agent C. H. Middleton to Deputy Assistant Director Horan said that ''DOE is anxious to avoid criticism about the case. It removed the subject's access to classified information on 12/23/98. DOE wants to fire the subject, but may not have justification to do so at this time.'' [132]

None of the information the government had in its possession at that point would have justified a decision to fire Dr. Lee, but firing him would have allowed Secretary Richardson to avoid criticism that the DOE had not taken action on a major espionage case. Director Freeh's comments are further buttressed by statements that two security personnel made to the DOE Inspector General during an investigation of the decision-making process related to Dr. Lee's clearance and access. The former Director of LANL's Internal Security Division, Mr. Ken Schiffer, told the IG that he first heard Dr. Lee's name on December 21, 1998, in a conference call with two individuals from the Office of Counterintelligence, one of whom told him that ''the Secretary wanted Mr. Lee to be fired.'' [133] Mr. Richard Schlimme, the Counterintelligence Program Manager in the Albuquerque office, told the DOE IG that he had been on annual leave on December 21, 1998, when he was called to come in to work to deal with the Wen Ho Lee situation. When he arrived, Mr. Schlimme was told that ''Secretary Richardson wanted immediate action, so Mr. Curran decided to interview Mr. Lee immediately.'' [134] Further, according to Mr. Schlimme, ''Mr. Curran wanted Mr. Lee removed from the laboratory regardless of how he did on the polygraph.'' [135]

In addition to the evidence described above, the subcommittee has a sworn deposition from the case manager at FBI Headquarters, Supervisory Agent Craig Schmidt, who said he had very little control over the investigation in December 1998 because the ''Department of Energy was becoming more and more concerned about how they would appear and how they were appearing during the [Cox] committee meetings,'' [136] In the context of all the evidence to the contrary, Mr. Curran's assertion that the decision to act with regard to Dr. Lee had nothing to do with the imminent release of the Cox Committee report is not persuasive.

Incorrect reading of the December 23, 1998 polygraph

The subcommittee focused very intently on the question of whether Dr. Lee passed or failed the December 23, 1998 polygraph for

three reasons: (1) the erroneous reading changed the course of the investigation, prompting the FBI to nearly close down its investigation at a time when the scrutiny of Dr. Lee should have been increasing, (2) it took an inordinate amount of time to discover that the initial reading of the polygraph was wrong, and (3) the public perception that Dr. Lee really passed the test but the FBI somehow later reversed that finding is incorrect.

The consequences of the incorrect interpretation of the December 23, 1998 polygraph are the subject of the next section of this report. The remainder of this section will address the matter of the delay in getting the charts to the FBI and the question of whether Dr. Lee actually passed or failed this test.

The initial interpretation of the test was made by Wolfgang Vinskey, a Senior Polygraph Examiner with Wackenhut, a private firm that had a contract with DOE to conduct polygraphs. Mr. Vinskey wrote that he had administered ''a DOE Counterintelligence Scope PDD Examination'' to Dr. Lee, and concluded that ''this person was not deceptive when answering the relevant questions pertaining to involvement in espionage, unauthorized disclosure of classified information and unauthorized foreign contacts.'' [137] Mr. John Mata, Manager of DOE's AAAP Test Center, reviewed the exam and concurred with Mr. Vinskey that ''upon completion of testing, the Examinee was not deceptive when answering the relevant questions. . . .'' [138] Mr. Mata followed up the initial report with a more detailed memorandum on December 28, 1998, in which he reiterated to Mr. Curran the information that had been in the December 23 polygraph report, namely that ''data analysis of this examination disclosed sufficient physiological criteria to opine Mr. Lee was not deceptive when answering'' the relevant questions.[139]

After the exam, the two FBI agents who were on hand were briefed on the results of the test. There is a December 21, 1999 memorandum for the record written by John Mata which describes how the test results were relayed to the FBI.[140] Mr. Mata says that he told the lead case agent that the charts did not show significant reaction on three of the questions, but that ''a plus 3 on the fourth question (relating to having knowledge of anyone he knew who had committed espionage against the United States) was close.'' [141] Mr. Mata told the agent that Dr. Lee ''had disclosed information during the examination that he had not previously reported regarding an approach that was made to him on his recent or a past trip,'' and gave her a sheet of paper containing the data analyses.[142] According to Mr. Mata, the agent wrote down the questions from the exam and asked ''if further processing involved the charts being reviewed by their polygraph examiner (specific reference to Roger Black) . . .'' to which he said no.'' [143] Mr. Mata's memo also says that at no time [on that date] was he asked to provide the charts or any allied data from the test to the FBI.

During the first week of January, Mr. Mata's memo continues, the entire polygraph package (charts, questions, data analysis sheets and video tape) were sent to OCI Polygraph Program Manager David Renzleman in Richland, Washington. In mid-January, Mr. Mata got a call from Mr. Renzleman instructing him to provide the local FBI with everything generated by the polygraph, which he did.

An undated Quality Assurance record of this examination, prepared by David Renzleman contains the following comments:

''This test was initially classified and consequently DOE OCI did not get to see the collected charts or video tape recording until late January 1999.

''When the charts were subjected to the OCI QC [Quality Control] process, the initial NDI [No Deception Indicated] opinion could not be duplicated or substantiated.

''The Test Center Manager was advised of these QC concerns and was requested to send the charts to the Department of Defense Polygraph Institute (DODPI) which he did.

''DODPI advised the Test Center Manager that they could not duplicate or support the NDI opinion of this test.'' [144]

In the ''QC Opinion'' section of the report, Mr. Renzleman said, ''I am unable to render an opinion pertaining to the truthfulness of the examinee's answers to the relevant questions of this test. Additional testing is recommended.'' [145]

When the charts and videotape were subsequently analyzed by FBI polygraph experts in late January or early February, they concluded that Dr. Lee had failed relevant questions[146] or was, at best, inconclusive.[147] Based on these concerns, the FBI arranged for additional interviews and a new polygraph on February 10, 1999. In addition to learning on this date that Dr. Lee had reactivated his computer account simply by calling up the help desk and asking that it be restored,[148] the FBI concluded Dr. Lee failed the February polygraph and increased its investigative activity, but by then the chances of salvaging the investigation were slipping away.

There remains a serious question about the chain of events which led to the delayed discovery that Dr. Lee did not pass the December 1998 polygraph. A February 26, 1999 memorandum from William Lueckenhoff, Assistant Special Agent in Charge in Albuquerque, says:

''The FBI personnel present immediately requested the polygraph charts and documentation to the polygraph in order to have it reviewed by FBIHQ. DOE's initial response to this request, as per Ed Curran, DOE Counterintelligence Office, was not to allow the FBI access to the tapes and charts, only the numerical results of the polygraph.'' [149]

As is discussed elsewhere in this report, Dr. Lee did not pass the polygraph, and no one other than the initial reviewers have been able to interpret the charts to say that he did pass. Given that the charts clearly show that Dr. Lee did not pass, any effort to prevent their release to the FBI would be a serious matter. Where DOE was concerned about criticism because it was being accused before the Cox Committee of not taking action on the case, a failed polygraph would tend to prove the critic's point. However, a passed polygraph, followed by an investigation which cleared Dr. Lee of the W–88 allegations yet later resulted in his firing for unrelated security violations would show that DOE's critics were wrong about the W–88 investigation, but that DOE was serious about security anyway and ultimately removed Dr. Lee because he was a security risk. In these circumstances, any shenanigans with the polygraph charts would be extremely serious.

Mr. Curran strongly denies the allegation in Mr. Lueckenhoff's memo and DOE documents indicate that Mr. Curran was instrumental in getting the full record of the polygraph into the FBI's hands in January, 1999.[150]

When pressed for an explanation of the February 26, 1999 memo blaming Mr. Curran for the delay in getting the test results, the FBI took the position that the memo was only a blind memorandum not intended to capture official witness statements.[151] That does not explain why Assistant Special Agent in Charge William Lueckenhoff would attribute such remarks to Mr. Curran if he had no factual basis to do so.

Mr. Lueckenhoff's account is consistent with what actually happened, but the FBI is no longer willing to stand by the February 1999 memo. It is also possible that by February 26, 1999, after Dr. Lee had failed an FBI polygraph, Albuquerque realized that its failure to obtain the charts in a timely fashion (and the creation of the disastrous January 22 memo clearing Dr. Lee on the W–88 matter) would eventually be questioned. Saying that the FBI tried to get the charts but had been denied by Mr. Curran would provide an excuse for the Albuquerque division's abysmal performance in early 1999. Because the FBI will not stand by the version of events in the February 1999 memo, it is not possible to know what really happened. Instead, the FBI's position has the effect—intended or not—of making it next to impossible to assign responsibility for giving Dr. Lee more than a month to regain access to his computer and his office, enabling him to delete the incriminating evidence from his computer and destroy the now-missing tapes.

The FBI deserves substantial criticism for its handling of this investigation, but the record should be set straight on the result of the December 23, 1998 polygraph. On this matter, the FBI was correct—Dr. Lee did not pass the polygraph test.

One of the earliest and most sustained attacks on the FBI's reading of the December 1998 polygraph came from Dr. Lee's defense team. After Dr. Lee was held without bail at the end of 1999, defense attorney Mark Holscher claimed that Dr. Lee's scores on the 1998 test had been '' 'off the charts'' in indicating truthfulness.'' [152] It is a common defense tactic to take evidence that might be harmful to the defendant's position and deal with it up front, trying to put a positive spin on it. Mr. Holscher's comments that Dr. Lee's scores were off the charts in indicating truthfulness would certainly fit into that pattern—taking on an issue that might have to be dealt with if the case went to trial and getting a positive interpretation planted in the public's mind, to include the potential jury pool. As the negotiations between the defense and the government went forward, Mr. Holscher continued to press the polygraph issue, claiming that Dr. Lee had passed the only test that had been properly administered, and suggesting that the FBI was wrong to claim that Dr. Lee had failed either exam. Mr. Holscher's statements on the polygraph are exactly what one would expect a defense lawyer to do, but they have created the incorrect impression that the Wackenhut examiners were right and the FBI was wrong.

Mr. Holscher and Dr. Lee's supporters got help on this score from a story by CBS reporter Sharyl Attkisson. The February 2000 news report, titled ''Wen Ho Lee's Problematic Polygraph,'' claimed that ''three experts gave the nuclear scientist passing scores but the FBI later reversed the findings. CBS investigation fuels argument that he was a scapegoat.'' [153]

Ms. Attkisson asked precisely the right question, ''. . . how could the exact same charts be legitimately interpreted as 'passing' and also 'failing?' '' [154] To answer this question, CBS reached out to Richard Keifer, who was then the chairman of the American Polygraph Association. Mr. Keifer was also a former FBI agent who had run the FBI's polygraph program. The CBS report continues:

''Keifer says, ''There are never enough variables to cause one person to say (a polygraph subject is) deceptive, and one to say he's non-deceptive . . . there should never be that kind of discrepancy on the evaluation of the same chart.''

''As to how it happened in the Wen Ho Lee case, Keifer thinks, ''then somebody is making an error.''

''We asked Keifer to look at Lee's polygraph scores. He said the scores are ''crystal clear.'' In fact, Keifer says, in all his years as a polygrapher, he had never been able to score anyone so high on the non-deceptive scale. He was at a loss to find any explanation for how the FBI could deem the polygraph scores as ''failing.''

. . . Since Lee was never charged with espionage (only computer security violations), the content of the polygraph may be unimportant to his case. But the fact that his scores apparently morphed from passing to failing fuels the argument of those who claim the government was looking for a scapegoat—someone to blame for the alleged theft of masses of American top secret nuclear weapons information by China—and that Lee conveniently filled that role.'' [155]

The CBS report gave the clear impression that the Wackenhut examiners were correct. Rather than take on the issue, the FBI simply told CBS ''it would be 'bad' to talk about Lee's polygraph, and that the case [would] be handled in the courts.'' [156] The case never went to trial, and the FBI never got the chance to explain its interpretation of the exam. The result has been that there are lingering doubts as to whether the polygraph is a reliable tool, and whether it was misused by the FBI in the Wen Ho Lee case.

When the case of FBI Special Agent Robert Hanssen broke in February 2001, FBI Director Louis Freeh ordered, among other things, an expanded use of the polygraph within the FBI for counterintelligence purposes. The Judiciary Committee held a hearing on the utility of polygraphs in law enforcement and counterintelligence cases, and heard from a distinguished panel with witnesses offering opinions on both sides of the issue. With the matter of Wen Ho Lee's polygraph still unresolved, two of the witnesses were asked to review the results of the December 23, 1998 polygraph and answer a series of questions that would address the same concern that CBS had raised—how can the same charts be interpreted as both passing and failing?

Dr. Michael H. Capps, currently Deputy Director for Developmental Programs at the Defense Security Service and formerly head of DOD's Polygraph Institute, reviewed the polygraph data and said that he could ''render no opinion regarding whether or not deception is indicated. . . .'' [157] Mr. Capps went on to describe how he had evaluated the exam with and without the aid of the John Hopkins algorithm, which is designed to provide a statistical analysis using a mathematical model to render a probability of deception. He noted that ''there are what I believe to be substantial differences in the scores my evaluation produced and those of the Wackenhut examiner. . . . I cannot account for the differences between my results and those of the Wackenhut examiners.'' [158]

In response to a direct question about how different examiners could reach substantially different conclusions, Mr. Capps said, ''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.'' [159]

One possible explanation for the differing opinions on the polygraph is that the questions were improperly structured, making the entire test invalid because the control questions and the relevant questions were not sufficiently distinct to permit an accurate differentiation of the responses to each. When Dr. Capps was asked about the appropriateness of the questions, he faulted two of the comparison questions used in the exam and said ''these comparison questions were not sufficiently distinct from the relevant questions so as to generate a useful basis of comparison.'' [160]

Mr. Richard Keifer was also asked to evaluate the December 23, 1998 exam in light of his comments to CBS. He provided a detailed analysis and critique of the test and reported:

''My review of the polygraph examination of Wen Ho Lee determined the results to be inconclusive. . . . 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.'' [161]

Mr. Keifer further noted that ''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.'' [162]

When asked to evaluate the test itself, which was not a standard set of questions but one that was created specifically for the examination of Dr. Lee, Mr. Keifer said that ''the fundamental problem with this examination was in question formulation.'' He then took issue with both the relevant questions and the control questions.[163] This finding is consistent with the concerns raised by Dr. Capps, as well as by FBI examiners who noted that Dr. Lee appeared to be reacting to all the questions, control and relevant. The structure of the questions used in the test is important because a polygraph is designed to measure differences between a subject's responses to control questions, which should generate little or no reaction, and the relevant questions where a substantial response is meaningful. Control questions that produce a reaction have the effect of minimizing the differences between the reactions to control questions and relevant questions, thereby rendering the test less useful.

Mr. Keifer also commented on his CBS appearance:

''I was quoted out of context and I felt it was deliberate. I had numerous telephonic conversations with Attkisson 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.'' [164]

The subcommittee's review of the matter shows that Dr. Lee definitely did not pass the December 23, 1998 exam. The best that anyone other than the initial examiners has been able to justify is an ''inconclusive'' or ''no opinion'' rating. It is important that no one has been able to substantiate the ''no deception indicated'' finding because any other result even a ''no opinion''—would have put the investigation on a completely different track. Instead, the government quit looking at Dr. Lee at the precise moment when it should have been looking most intently at his activities.

The Consequences of DOE's Interference in the Investigation

Ordinarily, the decision to polygraph an individual or to remove his access to the classified X-Division spaces would have only limited ramifications. In the Wen Ho Lee case, however, the incorrect handling of the polygraph issue was one of the most consequential mistakes in the entire investigation, likely costing the government an opportunity to recover the tapes that ultimately led to Dr. Lee's indictment and conviction, and creating much angst about the fate of the nuclear secrets on those tapes. In a June 28, 2001 letter, Assistant Attorney General Daniel J. Bryant confirmed 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.'' [165]

In other words, the tapes containing the ''crown jewels'' of American's nuclear secrets, that could ''change the global strategic balance,'' were sitting in Dr. Lee's X-Division office and could have been recovered by the government if the DOE had not gone into the panic mode and put political considerations ahead of national security concerns when it became concerned about what the Cox Committee report would say. The FBI, especially the Albuquerque SAC, bear equal responsibility for this turn of events for allowing it to happen.

One of the most fundamental tenets of counterintelligence work is that when you spook a suspect, you watch him. The suspect's reaction to unexpected events, whether planned (as when the FBI decides to confront a suspect in a hostile interview) or driven by unanticipated events (like DOE's decision to interview, polygraph and change Dr. Lee's classified access for no reason that he would know about), is a critical element of any counterintelligence investigation. Success often depends on observing and correctly interpreting that reaction. Even if the suspect does not show any apparent reaction in the presence of investigators, it is imperative that he be watched to see what he does when he thinks he isn't being watched. People with problems react differently than people who don't have anything to worry about. Failure to maintain proper surveillance under these circumstances can lead to the loss of the best opportunity to find out what is really going on. In the Wen Ho Lee, it cost a lot more than that.

Dr. Lee was definitely spooked by the interview and polygraph on December 23. According to an FBI chronology, the polygraph was completed at 2:18 p.m. and he was told at about 5:00 p.m. that his access to secure areas of X-Division and to both his secure and open X-Division computer accounts had been suspended. At 9:36 p.m., Dr. Lee made four attempts to enter the secure area of X-Division through a stairwell. At 9:39 p.m., he tried again through the south elevator.[166] At 3:31 a.m. on Christmas Eve, Dr. Lee again tried to gain access to the X-Division. Had the FBI maintained proper surveillance, they would have known that Dr. Lee was making these desperate attempts to get back into the X-Division. Surely that would have been a clue that further investigation was necessary. Had the case been handled properly, FBI or DOE personnel could have done what Dr. Lee eventually did—just walk into the X-Division and pick up the tapes. Instead of destroying them, as Dr. Lee says he did, government officials could have properly secured these tapes containing the crown jewels of America's nuclear secrets.

In a December 24 meeting, Dr. Lee was told ''that he was being transferred from X-Division to T-Division for thirty days to allow time for the FBI to complete their inquiry.'' [167] If there had ever been any doubt in his mind as to whether he was under an FBI investigation, this comment from DOE removed that doubt. His conduct over the next

few days shows clearly that he was worried about the government's sudden interest in him and the fact that his access to the X-Division had been removed. All told, Dr. Lee tried to get back into his X-Division office almost twenty times between the December 23 polygraph and the February 10 exam. Had the FBI and DOE been watching, they might have wondered why Dr. Lee wanted to get back into the X-Division so desperately, and they might have gone there to look.

It should be noted that not all of the blame for the FBI's lack of interest in Dr. Lee's conduct after the polygraph can be placed on the incorrect interpretation of the polygraph results. Even if one takes the position that the FBI thought that Dr. Lee had passed the polygraph, there is no excuse for completely dropping an investigation solely on the basis of a passed polygraph, especially when DOE and the case agents were told that during the pre-polygraph interview Dr. Lee had admitted foreign contact that he had not previously reported. The FBI should have continued the investigation on the basis of that revelation, regardless of the polygraph exam. A review of the transcript from the March 7, 1999 interview of Dr. Lee shows that the FBI focused very heavily on that unreported contact. If it was worth investigating in March, it should have been worth investigating the previous December.

DOE's answer as to why it failed to monitor Dr. Lee after the December 23, 1998 polygraph is both baffling and informative. DOE's Ed Curran said that ''since the FBI was conducting the investigation of Dr. Lee, it was responsible for determining the level of monitoring necessary.'' [168] All available evidence indicates that the impetus for the polygraph clearly came from within DOE, and that the FBI agreed to this at the insistence of DOE, yet DOE washed its hands of any responsibility for determining whether the polygraph provoked a response from Dr. Lee. Consider also that the catalog of Dr. Lee's attempts to get back into the X-Division was culled from information under DOE's control, information that the FBI did not have access to unless the DOE gave it to them. Under these circumstances, it is not surprising that Dr. Lee's attempts to get back into the X-Division almost immediately after his access was pulled went undetected until much later. The FBI says that it did not learn of Dr. Lee's attempts to reenter the X-Division until March 13, 2000.[169]

The almost complete breakdown in the surveillance of Dr. Lee had severe consequences. As the FBI later learned, ''within one hour of reactivation [of his computer account], he immediately deleted three files, including one which was named after the graduate student who had worked for him in 1997.'' [170] In late January, he began erasing the classified files from the unsecure area of the computer. After he was interviewed by the FBI on January 17, Dr. Lee ''began a sequence of massive file deletions . . .'' [171] He even called the help desk at the Los Alamos computer center to get instructions for deleting files. After he was interviewed and polygraphed again on February 10, within two hours of the time he was told he had failed the exam, he deleted even more files. All told, Dr. Lee deleted files on January 20th, February 9th, 10th, 11th, 12th, and 17th. When he called the help desk on January 22nd, his question indicated that he did not know that the ''delay'' function of the computer he was using would keep deleted files in the directory for some period of time. He asked why, when he deleted files, were the ones in parentheses not going away, and asked how to make them go away immediately. He also asked, on February 16, how to replace an entire file on a tape.[172]

Thus, the report that Dr. Lee had passed the December 23 polygraph gave Dr. Lee precious time to delete and secrete information. The significance of Dr. Lee's file deletions and the unreasonable delays in carrying out the investigation that should have detected and prevented them should not be underestimated. As FBI Agent Robert Messemer has testified, the FBI came very close, ''within literally days, of having lost that material.'' [173] The FBI was almost unable to prove that Dr. Lee downloaded classified files. If the material had been overwritten after it was deleted, ''that deletion by Dr. Lee [would] have kept that forever from this investigation.'' In this context, the repeated delays, the lack of coordination between the FBI and the Department of Energy, and later between the FBI and the Department of Justice, are much more serious.

February 10, 1999 to March 8, 1999

On February 10, 1999, Wen Ho Lee was again given a polygraph examination, this time by the FBI. During this second test, which Lee failed, he was asked: ''Have you ever given any of [a particular type of classified computer code related to nuclear weapons testing] to any unauthorized person?'' and ''Have you ever passed W–88 information to any unauthorized person?'' [174] It should be noted that the 1997 FISA request mentioned that the PRC was using certain computational codes, which were later identified as something Lee had unique access to.[175] Moreover, the computer code information had been developed independently of the DOE Administrative Inquiry which was subsequently questioned by FBI and DOJ officials.

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

As should have been expected, Dr. Lee used the time afforded him by the delays to delete the classified information he had placed on the unclassified system, and to retrieve and dispose of the now-missing tapes. According to press reports, Dr. Lee was allowed to return to the X-Division in January 1999 by an unwitting security office. On other occasions, he walked in behind division employees. In fact, he apparently managed to slip in though an open door just hours after he was barred from X-Division.[176] He also approached two other T-Division employees with a request to use their tape drive to delete classified data from two tapes (he no longer had access to the one that had been installed in his X-Division computer since he had been moved from that division in December 1998).

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

The long hiatus in moving the case forward seems to have been broken primarily by the impending release of a story on the W–88 case by the New York Times, after which the case was once again moved from the national security track onto the political track. Upon learning of the New York Times story, government officials asked that it be delayed for several weeks, ''saying they were preparing to confront their suspect.'' [177] It is almost incomprehensible that the FBI was still not ready, in March 1999, to interview Dr. Lee. The same argument had been made in December 1998 when the DOE wanted to polygraph Dr. Lee, so there is absolutely no reason that the necessary preparations could not have been made in the interim.

The reporters did not know Dr. Lee's identity, but the FBI said they worried that he might recognize himself from details in the article as if he was not already aware that the FBI was investigating him after having been polygraphed and having his access to classified information suspended since December, having been interviewed by the FBI in January, having been asked to take another polygraph in February.

The FBI interviewed Dr. Lee on March 5, and the New York Times published its story the next day, ''China Stole Nuclear secrets for Bombs, U.S. Aides Say.'' Prompted to move by the breaking story, the FBI interviewed Dr. Lee again on Sunday, March 7. It was during this interview that one of the case agents, at the suggestion of Albuquerque SAC Kitchen, asked Dr. Lee if he had heard of the Julius and Ethel Rosenberg, the couple who had been executed for providing nuclear secrets to the Soviet Union. The reference to the Rosenberg case, after threats that Dr. Lee would lose his job, be handcuffed and thrown in jail, was over the top, creating the inference that the FBI was trying to scare Dr. Lee into a confession. According to a transcript of the interview:

''Do you know who the Rosenbergs are?'' [the agent] asked.

''I heard of them, yeah, I heard them mention,'' Dr. Lee said.

''The Rosenbergs are the only people that never cooperated with the federal government in an espionage case,'' she said. ''You know what happened to them? They electrocuted them, Wen Ho.'' [178]

FBI Director Freeh later acknowledged that this reference to the Rosenbergs was inappropriate, but he denied that the FBI ever attempted to coerce a confession from Dr. Lee.[179]

One day after the FBI's confrontational interview, Dr. Lee was dismissed from Los Alamos. Former LANL Counterintelligence chief Robert Vrooman, has suggested that the leaking of Dr. Lee's name to the press 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,[180] but the investigation was already in deep trouble before Dr. Lee's name became public.

Reopening the W–88 Investigation

Before turning to the criminal case against Dr. Lee, it is appropriate to make a comment about the status of the investigation into the loss of the W–88 information, the matter at the heart of the DOE's AI and the FBI's investigation from 1996 to 1999. The September 1999 decision by the FBI and the DOJ to expand the investigation of suspected Chinese nuclear espionage [181] is puzzling, primarily because it should have happened long ago.

In an October 1, 1999 letter, Attorney General Reno and FBI Director Freeh explained the rationale for reopening the case:

''Our decision to take this action in regard to the investigation into the compromise of U.S. nuclear technology is the result of two separate inquiries. First, there were investigative concerns raised by the FBI Albuquerque field office that began to develop in

November, 1998, regarding deficiencies in the DOE Administrative Inquiry. Second, after questions were raised by Senate Governmental Affairs Committee staff, we started to re-examine flawed analysis in the conclusions drawn in the DOE Administrative Inquiry.''[182]

This letter is significant on several fronts. First, it represents the beginning of a top level assault within DOJ and FBI on the AI as an explanation for why the W–88 investigation had been bungled. The reference to concerns in the Albuquerque office in November 1998 is misleading all—of the documents coming out of Albuquerque in 1998 were focused on getting FISA coverage on Dr. Lee. The documents did contain acknowledgment that somewhere in the neighborhood of 250 personnel per year had access to the W–88 information, which was more than had been previously believed, but the case agent nevertheless pressed for a FISA. It is simply not accurate to portray the November 1998 documents as raising questions about the AI as a basis for investigating Dr. Lee.

Subsequent documents from Albuquerque did raise concerns about the AI. One of the worst in this regard is the January 22, 1999 memorandum which essentially clears Dr. Lee. It says:

''A review of the pertinent questions asked in the [December 23, 1998] polygraph exam showed that Lee did not pass classified information to a foreign intelligence service. The polygraph charts and other documentation relating to the examination were made available to FBI AQ by DOE on 01/22/1999 . . .''[183]

In a section titled ''SAC ANALYSIS'' David Kitchen wrote that ''based on FBI AQ's investigation it does not appear that

Lee is the individual responsible for passing the W–88 information.'' At that point, FBI–AQ had done remarkably little investigation. The lead case agent had requested a FISA in November 1998, but had been overruled. By December, the DOE jumped into the investigation in response to the Cox Committee hearings and gave Dr. Lee a polygraph. Based on nothing more than a supposedly passed polygraph—the results of which Albuquerque received on the same day it was writing the memo and could not have—analyzed and an interview on January 17 (during which, according to Director Freeh, Dr. Lee provided new information about his relationships with Chinese scientists), the SAC Kitchen was prepared to shut down the investigation. This is nothing short of outrageous.

Was it mere coincidence that in his ''Dr. Lee's not guilty memo'' Kitchen took aim at the AI, which contained the very allegations that were the subject of testimony before the Cox Committee? The January 22, 1999 memo does not even address the allegations, from 1994, that Dr. Lee had helped the Chinese with codes and software, yet Mr. Kitchen is prepared to shut down the investigation. Any comments from Mr. Kitchen regarding flaws in the Administrative Inquiry must be viewed in the context of the Albuquerque division's bungling of the Kindred Spirit investigation.

Another significant result of the decision to reopen the W–88 investigation, and to do so based on the supposedly faulty analysis in the AI, has been to put FBI Assistant Director Neil Gallagher on the spot based on his testimony to Congress. In a November 10, 1999 letter on the question of why the investigation was reopened, he acknowledged that when discussing the DOE's Administrative Inquiry (AI) during his June 9, 1999, testimony before the Governmental Affairs Committee,[185] he stated that he ''had full credibility in the report,'' had ''found nothing in DOE's AI, nor the conclusions drawn from it to be erroneous,'' and stated there is a ''compelling case made in the AI to warrant focusing on Los Alamos.'' [186]

As a result of further inquiry, however, Mr. Gallagher now has reason to question the conclusions of the AI. He cites an August 20, 1999, interview by FBI officials of one of the scientists who participated in the technical portion of the AI, in which the scientist ''stated that he had expressed a dissenting opinion with respect to the technical aspects of the AI,'' and points out that the statement of this scientist is ''in direct conflict with the AI submitted to the FBI because the AI does not reflect any dissension by the 'DOE Nuclear Weapons Experts.' '' [187]

A General Accounting Office investigation of Mr. Gallagher's comments regarding the AI later concluded that his testimony had been inaccurate and misleading because he had ample opportunity to know and should have known that documents created by the Albuquerque office of the FBI raised questions about the FBI in late 1998 and early 1999.[188]

In his November 1999 letter, Mr. Gallagher could also have mentioned the draft of the July 9, 1999 document prepared by the Albuquerque division, ''Changed: FBI–DOE National Laboratory Assessment. . . .'' Had he done so, he would have reported that:

''Albuquerque is of the firm opinion that the AI should have been used only for investigative assistance during the initial portion of the 'Kindred Spirit' inquiry, and that a more in-depth and comprehensive analysis of the relevant issues/facts should have been continued through the course of the investigation.'' [189]

A subsequent draft of the same document lists half a dozen reasons why the AI was flawed. The document says that the espionage could have been done by a network of sources, the travel analysis was incomplete, the strategic opinions were preliminary, there had been a disagreement over the extent of the W–88 information compromise, the Lees had been doing things at the behest of the Government, and finally, ''. . . the AI was extremely confusing and self contradictory in reporting its conclusions . . .'' [190]

This is a classic case of too little too late, and it raises questions as to whether the FBI's assault on the AI was intended to get an investigation back on track or to spread the blame for a bungled investigation.

The delay by DOJ and the FBI until September 1999 is perplexing since five governmental reports had concluded, with varying degrees of specificity, that the losses of classified information extended beyond W–88 design information and beyond Los Alamos:

(1) the classified version of the Cox Report (January 1999);

(2) the April 21, 1999 damage assessment by Mr. Robert Walpole, the National Intelligence Officer for Strategic and Nuclear Programs; [191]

(3) the unclassified version of the Cox Committee Report (May 25, 1999);

(4) the Special Report of the President's Foreign Intelligence Advisory Board (June 1999); and

(5) the Special Statement by Senators Thompson and Lieberman (August 5, 1999)

All of these reports gave FBI and DOJ ample evidence that further investigation was necessary. For example, the Cox Committee report states flatly that ''the PRC stole classified information on every currently deployed U.S. inter-continental ballistic missile (ICBM) and submarine-launched ballistic missile (SLBM).[192] Tellingly, the Cox Committee notes that ''a Department of Energy investigation of the loss of technical information about the other five U.S. thermonuclear warheads had not begun as of January 3, 1999 . . .'' and that ''the FBI had not yet initiated an investigation'' as of that date.[193] Thus, the failure to reopen the investigation into the loss of W–88 design information much sooner, or to even initiate an investigation of the other losses, simply continued that pattern of errors.

The Prosecution of Dr. Lee

Two weeks[194] after Dr. Lee was fired from LANL, investigators discovered a notebook in his X–Division office containing a one-page computer-generated document showing the files in the ''kfl'' directory Dr. Lee had created on the unclassified portion of common file system.[195] When it was discovered that many of these files were highly classified, the FBI began a criminal investigation of Dr. Lee which led to his indictment, arrest and pretrial incarceration beginning on December 10, 1999.

Almost from the moment Dr. Lee was taken into custody, his attorneys protested the strict conditions of confinement and worked to secure his release under some combination of home detention and electronic monitoring. Judge James Parker, who presided over much of the case, repeatedly urged the government to relax the conditions of confinement, but the government steadfastly argued against releasing Dr. Lee, even under strict monitoring, until September 13, 2000. On that date, the government entered into a plea agreement with Dr. Lee under which he would plead guilty to a single felony count of mishandling government secrets and go free immediately in exchange for a promise to explain what happened to the missing tapes.

FBI Director Louis Freeh issued a statement on September 13, 2000, explaining the government's decision to reach the plea agreement. In relevant part, the statement said:

''In this case, as has often happened in the past, national security and criminal justice needs intersect. In some cases, 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 these 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. . . .

''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.'' [196]

But the sudden reversal of the government's position flabbergasted Judge Parker. During the hearing to finalize the plea agreement, he commented from the bench:

''I would like to know why the government argued so vehemently that Dr. Lee's release earlier would have been an extreme danger to the government when at this time he, under the agreement, will be released without any restrictions.'' [197]

At a later point in the hearing, the judge continued:

''What I believe remains unanswered is the question: 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? This makes no sense to me.'' [198]

The judge was not alone in being puzzled by the government's handling of the criminal phase of the case. It is difficult to reconcile the lack of forceful action between the time the government discovered, in June 1999 at the latest, that the tapes had been created, with its December 1999 claims that the only way to safeguard the secrets on the tapes was to hold Dr. Lee virtually incommunicado. As will be discussed later in this report, the information on the tapes was extremely sensitive, but it does not necessarily follow that the pretrial confinement conditions the government demanded represent the only way to protect that information. If it was the government's judgement that protecting the information required extraordinary restrictions on Dr. Lee, then why not act as soon as the existence of the tapes was known? [199] Moreover, if the government was willing, in September 2000, to accept Dr. Lee's sworn statement as to the disposition of the tapes (to be verified by polygraph examination), why could it not have accepted a very similar offer from Mr. Holscher on December 10, 1999, the date of Dr. Lee's arrest?

The remainder of this report addresses the government's handling of: (1) the investigation of Dr. Lee from March–December 1999, (2) the pretrial confinement of Dr. Lee, and (3) the case against Dr. Lee. The subcommittee's investigation supports the following conclusions regarding these matters: (1) the information on the tapes was highly sensitive and, if anything, the government should have acted sooner than it did to find out what happened to them, (2) the government overreached in demanding such onerous conditions of confinement prior to trial, and (3) the plea agreement was an acceptable resolution to the case, one that very likely could have been had much sooner if the government had not backed itself into a corner with its aggressive tactics after December 1999.

The March–December 1999 Investigation [200]

One day after Dr. Lee was fired, the Albuquerque Division of the FBI (FBI–AQ) met with the U.S. Attorney for the District of New Mexico, Mr. John J. Kelly. The following day, Dr. Lee's lawyer, Mr. Mark Holscher, wrote to the government offering to surrender Dr. Lee's passport and asking whether Dr. Lee was a target or a subject of investigation. In this letter, Mr. Holscher also advised the government that his client intended to travel to Los Angeles for several days.[201]

On March 11, the FBI learned that another LANL employee had been asked by Dr. Lee to retrieve a box of documents from his X–Division office.[202]

After a telephone conversation between Mr. Kelly and Mr. Holscher on March 15, Mr. Holscher wrote on March 19 asking that the investigation of Dr. Lee be terminated, and requesting security clearances so that he could counsel Lee. In this letter, Mr. Holscher also noted that at least six newspapers had carried stories quoting unnamed FBI officials as saying that there was not enough information to indict, much less convict, Dr. Lee. Mr. Holscher described this information as Brady material, and said the government had no evidence that Dr. Lee had any intent to injure the United States, as would be required under the espionage statutes.[203]

On March 23, investigators discovered the ''kfl'' file listing, and reached a tentative conclusion that classified files had been maintained on the unclassified portion of the LANL computer system. That same day, Mr. Holscher wrote to Mr. Kelly protesting government leaks to the press about the case, including statements that Dr. Lee had failed to cooperate with the government and had failed a polygraph exam. Mr. Holscher pointed out that 28 CFR 50.2(b)(2) prohibits DOJ personnel from disclosing any information that ''may reasonably be expected to influence the outcome of a pending or future trial.'' [205]

Mr. Holscher also sent a letter to FBI Director Louis Freeh on March 23, demanding an investigation into case-related leaks. In a clear reference to Dr. Lee's assistance to the government in the 1980s, Mr. Holscher told Director Freeh that he had ''refrained from explaining to the press the true facts concerning the Lee's 1986 visit to China and follow-up activities that are known to the FBI,'' and requested that Director Freeh release a statement showing that Dr. Lee had cooperated with the government.[206]

On March 26, a LANL scientist assisting with the investigation told the FBI that the ''kfl'' directory had been in the open part of the common file system (CFS), that the file names in the directory suggested they were classified, and that the files had been deleted from the CFS on February 11, 1999. The scientist also told the FBI that Dr. Lee had typed up and stored in a CFS directory letters seeking employment overseas.

After a telephone conversation between the two men, Mark Holscher wrote to Robert Gorence on March 29, saying that he understood from the conversation that Dr. Lee was the subject of a grand jury investigation rather than a target.[207] The difference is significant because being the target of an investigation is more serious than merely being the subject of one.

On March 30, a draft rule 41 search warrant affidavit for Dr. Lee's home was presented to the U.S. Attorney's Office (USAO) in New Mexico. From April 1–8, personnel in Washington and the USAO worked on an affidavit for a search warrant.

During this time the FBI was pursuing a dual track, and a key meeting took place on April 7 between the FBI and representatives of the Office of Intelligence Policy and Review. Rather than moving quickly to discover the extent of the potential damage, FBI and DOJ officials continued to wrangle over whether the matter should be handled under FISA or was ''way too criminal'' for that.[208] OIPR attorneys raised their old concerns about the currency and sufficiency of the evidence against Lee, as well as new concerns about the appearance of improperly using FISA for criminal purposes and the prospect of conducting an unprecedented overt FISA search.[209] FBI officials indicated that FBI Director Freeh was ''prepared formally to supply the necessary certifications that this search met the requirements of the FISA statute—that is, that it was being sought for purposes of intelligence collection (e.g., to learn about Lee's alleged contacts with Chinese intelligence).'' [210] The draft FISA application the FBI prepared was never formally presented to OIPR, in large part because the criminal search warrant was issued.

On April 9, Attorney General Reno made the necessary certification for using FISA derived material [211] in a rule 41 search warrant, and Magistrate Judge William W. Deaton issued the warrant later that same day. The following day, April 10, Dr. Lee's home was searched, and he provided written consent to search his automobiles.

In a letter to Mark Holscher dated April 16, Mr. Kelly and Mr. Gorence made one demand and several requests. The two prosecutors demanded the return of any classified material in Dr. Lee's possession, and requested the names and addresses of the individuals with whom the Lees stayed during their March 9 to April 7 trip to Los Angeles. The prosecutors also told Mr. Holscher of their intent to issue a grand jury subpoena to Mrs. Lee regarding the 1986 and 1988 trips to the PRC, and any actions related to those trips.[212]

On April 18, LANL provided two computer reports, one which outlined the deletion of files by Dr. Lee from his open CFS directories in January and February, and another describing the earlier transfer of these files from the closed to open CFS. A week later, according to an FBI chronology, a technical expert assisting the FBI in the investigation said that the information Dr. Lee had downloaded would not be sufficient for a foreign power to build or duplicate U.S. weapons, but that ''the files would significantly enhance their program and save them years of research and testing.'' [213]

On April 30, a LANL computer security expert informed the FBI of two incidents involving Dr. Lee which showed up in a review of the Network Anomaly Detection and Intrusion Recording system, one in 1993 and another in 1997.[214] That Dr. Lee was flagged by this system in 1997, while he was under investigation, but the FBI only learned about it in April 1999 is simply inexplicable.

On May 5, the FBI was informed by a LANL scientist that a notebook recovered during the search of Dr. Lee's residence contained directions for transferring classified files to a Sun Sparc computer workstation and from there onto portable DC6150 computer tape cartridges. On May 9, a LANL computer official provided a report on how the file transfers had been accomplished.

In response to suggestions from counsel for Mrs. Lee that she might claim marital communication privilege, spousal privilege or both, Mr. Kelly and another prosecutor, Ms. Paula Burnett, wrote to Mr. Brian Sun on May 5. The prosecutors laid out the areas of proposed questioning, to include: (1) biographical information on Mrs. Lee, her husband and their children; (2) contacts the Lees have with extended family, friends or business contacts in the PRC and Taiwan; (3) cooperation with the FBI in the 1986–1988 period; and (4) her knowledge of Dr. Lee's work and any job related activity that he did at home. Focusing on the Mrs. Lee's assistance to the FBI, the prosecutors explained that:

''Not only would we ask her the details of what she was asked to do and what she did during the time of cooperation with the FBI, but also the extent to which her husband was aware of those activities and participated in them.'' [215]

The next day, Mr. Sun responded in writing, saying that he had spoken to Mr. Holscher and felt it was appropriate for Mrs. Lee to assert the marital communications privilege and the spousal privilege. He said, however, that he might be willing to make an attorney proffer.[216]

On May 11, FBI–AQ prepared a Letterhead Memorandum on the Lee case, which was followed on May 16 by a written status report from USA Kelly to Deputy Attorney General Eric Holder and Attorney General Reno.

The next day, May 17, a LANL computer official provided a report on potential movement of files on Dr. Lee's CFS directories from LANL computers to outside computers.

The U.S. Attorney presented a prosecution memorandum on May 27, and requested guidance form DOJ because ''the Atomic Energy Act violation had never been prosecuted before.'' He anticipated difficulty showing Lee intended to harm the U.S. as a necessary element of the crime.[217] The FBI, USAO, and Criminal Division met in Washington, DC, on the same day the prosecution memorandum was presented, to discuss the case, and two days later FBI–AQ provided a written prosecutive report to USAO.

Mr. Holscher wrote on June 9, complaining that the government had not yet advised him what it wanted to discuss with Lee and had not sought to schedule a meeting. Six days later, Mr. Kelly responded that the government was considering serious charges, but ruled out espionage charges under 18 USC 794 (the most serious espionage charge), and suggested a meeting for June 21. In the letter, Mr. Kelly said that he had postponed a previously scheduled meeting so the government could complete its investigation. He further explained to Mr. Holscher:

''I did so not to inconvenience your client, but rather to insure that the interview would take place toward the conclusion of the investigation at a time when I would be able to provide meaningful information about potential charges and, in turn, your client would be motivated to provide a more complete explanation for his potentially criminal conduct. As I stated in our telephone conversation last night, that time has now come.

''You should know that I will be making a charging decision in this matter before the end of June and that the offense conduct under consideration involves various actions by your client over the last decade that collectively have compromised some of our nation's most highly sensitive and closely guarded nuclear secrets.'' [218]

At the June 21 meeting, which was attended by USAO, FBI and Criminal Division representatives, Dr. Lee's counsel asserted that he had only downloaded unclassified data onto the unsecure computer and then on to tapes. (When later confronted with evidence that Dr. Lee had, in fact, downloaded classified data onto portable tapes, counsel claimed that if Dr. Lee had done so, any such tapes had been destroyed.) The meeting was followed by a written status report to the DAG and the AG the following day.

In the interim, on June 15, the FBI learned that Dr. Lee had asked a colleague to retrieve a box of materials that he had left in his X-Division office when he had been transferred to the T-Division. The FBI was told that the colleague had retrieved the box for Dr. Lee, but had taken the materials to LANL security, which had questions regarding some of the contents of the box.[219] The FBI chronology does not mention when the colleague had retrieved the box or what LANL security did about the contents. The absence of details raises the inference that the now-missing tapes could have been in the box, and LANL security may have passed them back to Dr. Lee without knowing what was on them. The FBI has not answered this question.

During the first week of July 1999, Dr. Lee's lawyers made written presentations to the Albuquerque USAO and the Criminal Division in Washington, each of which was designed to dissuade the government from taking action against Dr. Lee.

On July 15, a LANL scientist provided a report on the creation of Tape N, which was downloaded directly to tape in 1997. It was also during July that the government learned that one of the six tapes which had been recovered from Dr. Lee's T-Division office contained a classified file, and that two others contained deleted classified files. LANL computer officials advised the government that one tape had been cleansed of classified data in February 1999, on the unsecure computer workstation belonging to a T-Division colleague of Dr. Lee.

Three days after a meeting in Washington between the USAO and the Criminal Division, Mr. Holscher sent a letter to the government explaining that Dr. Lee had not violated the Atomic Energy Act of 1954. The letter was followed one day later, on July 27, by a meeting in Washington between counsel for Dr. Lee and the Criminal Division.

Mr. Holscher wrote again on August 2, offering to make additional factual submissions, which prompted a response from Mr. Kelly on August 4, saying the government would review anything Mr. Holscher submitted but wanted a complete explanation from Dr. Lee himself. At the same time, Mr. Kelly sent a letter to Eugene Habiger, Director of DOE's Office of Security and Emergency Operations, seeking to include in a proposed indictment of Dr. Lee information about Dr. Lee's downloading activity.

After an August 9 telephone conversation between counsel for Dr. Lee and Richard Rossman, Chief of Staff of the Criminal Division, Mr. Holscher wrote a letter on August 10 stating that Dr. Lee would not submit to any additional interviews and offering further arguments why Dr. Lee had not violated 18 USC 793.

On August 16, Criminal Division Chief of Staff Rossman wrote to counsel for Dr. Lee advising that the government had not yet made a decision whether to charge Dr. Lee, and asking for additional information (which had been discussed during the July meeting) by August 30.

Following a supplemental written presentation by Dr. Lee's counsel on August 30, Mr. Kelly wrote to Mr. Holscher on September 3 asking for information about the location and custody of the tapes from the time of their creation until the present.

On September 8, representatives of the Criminal Division, USAO, LANL and DOE met in Washington to discuss the handling of classified information in the prosecution of Dr. Lee. All of the DOE and LANL representatives concurred as to the significance of the data at issue. By October 4, DOE had prepared a draft classification guide governing issues related to Dr. Lee's illicit computer activity and the classified files involved.

On October 14, the Senate Judiciary Committee approved a resolution authorizing subpoenas relevant to the work of the Department of Justice Oversight subcommittee, including the Wen Ho Lee matter. (A second, broader resolution was authorized on November 17.[220])

On October 27, Assistant Attorney General James Robinson, Criminal Division, wrote a memo to USA Kelly recommending that Dr. Lee be prosecuted under the Atomic Energy Act of 1954.

On November 3, the Department of Justice Oversight subcommittee held its first hearing on the Wen Ho Lee case. Much of the testimony focused on the failure of the FBI to properly investigate, from 1995 to 1998, the information it had related to Dr. Lee potentially engaging in surreptitious electronic communications.

The Lee case was discussed at an National Security Council meeting on November 11, with DOE, DOJ and LANL representatives in attendance.

On November 15, a LANL scientist wrote a ''Draft of Input to Damage Assessment'' regarding the case, which was faxed to USA Kelly on November 15. At the request of the NSC, the CIA prepared a damage assessment regarding the material on the missing tapes on November 24.

The case was briefed at the White House on December 4. A September 24, 2000 Washington Post article by Walter Pincus and David A. Vise described the events leading up to and the discussion at the December 4 meeting as follows:

''The decision to prosecute Lee was made at a meeting in [Attorney General] Reno's conference room shortly before Thanksgiving. Despite lingering question's about Lee's motives, according to participants, there was unanimity among the federal prosecutors from New Mexico and their superiors in Washington that the government should bring a massive, 59–count indictment against Lee using the Atomic Energy Act. Indeed, officials in Washington had decided to charge Lee with intent to injure U.S. national security and (not ''or'') to aid a foreign adversary.

''Crossing a final hurdle, Reno called a meeting of senior national security officials in the White House Situation Room on Dec. 4, 1999, to explain how much classified information prosecutors were prepared to reveal in court. In addition to Reno, Kelly, Freeh, and Richardson, those present included national security adviser Samuel R. ''Sandy'' Berger, CIA Director George J. Tenet and deputy defense secretary John J. Hamre.

''Robert D. Walpole, the national intelligence officer for strategic and nuclear programs, began the meeting with a formal assessment that the loss of the data downloaded by Lee would be a serious blow to national security

''The meeting ended after Reno offered her assurance that prosecutors were prepared to drop the case immediately if the judge were to grant a motion, sure to come from the defense, that the data downloaded by Lee had to be introduced, in full, in open court.'' [221]

On December 7, the Department of Justice Oversight subcommittee sent letters requesting testimony in a closed hearing from nine FBI witnesses, including two of the case agents, FBI General Counsel Larry Parkinson, Albuquerque Special Agent in Charge David Kitchen, Assistant Director for National Security Neil Gallagher, and other case supervisors and managers. The hearing, scheduled for December 14, was to explore the circumstances of the December 23, 1998 polygraph and the relationship between the government and the Lees.

On December 8, as required by statute, the Attorney General sent letters to Energy Secretary Richardson and USA Kelly approving charges against Dr. Lee under the Atomic Energy Act of 1954. That same day, Mr. Kelly spoke to Mr. Holscher by phone, telling him that indictment was imminent and asking for information about the missing tapes. At some point in late 1999, prior to the indictment, Mr. Kelly told Mr. Holscher that the case might be resolved without an indictment and advised Mr. Holscher to look at the latter sections of 18 USC 793.

Although Mr. Holscher faxed a letter at 8:24 a.m. (Pacific Time) on December 10, offering to make Dr. Lee available for a polygraph by a mutually agreeable polygrapher to verify that Dr. Lee did not mishandle the tapes or provide them to a third party, Dr. Lee was indicted and arrested later that same day.

Also on December 10, FBI Director Freeh wrote to request that I ''delay hearings on any aspect of this investigation until the conclusion of the current criminal proceedings resulting from the indictment handed down today.'' [223] In explaining why it was necessary to delay subcommittee hearings, Director Freeh said:

''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 the prosecution but to the Government's ultimate ability to discover the full extent of the damage done.'' [224]

When Director Freeh met with Senator Torricelli and me on December 14, he made the same arguments. The subcommittee agreed to withhold hearings until the case was resolved, which occurred on September 13, 2000, with the acceptance of the plea agreement.

With the inexplicable exception of never seeking electronic surveillance on Dr. Lee, the chronology presented here shows a thorough and methodical investigation. The discovery that Dr. Lee had created his own portable nuclear weapons data library must, in large measure, be credited to the extraordinary level of effort and skill on the part of the investigators from the FBI and the DOE. In Senate testimony, Director Freeh said that the investigation had required the ''interview of over 1,000 witnesses, review of 20,000 pages of documents in English and Chinese, and the forensic examination of more than 1,000 gigabytes containing more than one million computer files . . .'' [225] Any assessment of the investigation must acknowledge the vast amount of work involved in discovering Dr. Lee's illegal computer activity after he tried so diligently to erase any traces of what he had done. In this regard, the government personnel should be commended.

There are, however, two areas for concern [226] related to the conduct of the March–December 1999 investigation. The first is the delay from the time the existence of the tapes was known, which occurred at the latest in June, and the time Dr. Lee was indicted in December. The chronology provided by the Department of Justice shows continuing activity on the part of the government, and multiple contacts with Dr. Lee's attorneys seeking information about the fate of the tapes, but nothing commensurate with its subsequent declarations in court that the only way to keep the information from falling into the wrong hands, where it could change the global strategic balance, was to hold Dr. Lee in very strict pretrial confinement. In responding to a question about this delay, Director Freeh testified, ''This was an extremely complex investigation and prosecutive process. It could not have been brought, in my view, fairly and accurately before it was.'' [227]

The second great concern is that the FBI did not seek electronic surveillance of Dr. Lee during this period.[228] In view of the government's later pleadings that Dr. Lee could, in effect, upset the global strategic balance merely by saying something as seemingly innocuous as ''Uncle Wen says hello,'' it is difficult to comprehend why the government never sought electronic surveillance in an effort to discover the whereabouts of the missing tapes. In the December 1999 detention hearings, the U.S. Attorney, John Kelly, suggested that if Dr. Lee still had the tapes, he could send a signal to a foreign intelligence service to extract him. If he wasn't in custody ''then we would be dealing with a situation in which an individual not in custody is going to be snatched and taken out of the country.'' [229] As early as April 30, 1999, the FBI had been told by a LANL scientist that if the files Dr. Lee downloaded were given to a foreign power, they would have the ''whole farm,'' the ''crown jewels'' of the U.S. program which had been obtained through decades of effort by the U.S.[230]

If the government felt his communications were such a potential threat, why was there never an effort to ascertain with whom and about what he was communicating during the March–December 1999 period? This lapse severely undercuts the government's later arguments that the harsh conditions of confinement were only to protect the downloaded information.

The Pretrial Confinement of Dr. Lee

After his arrest on December 10, 1999, and a detention hearing before U.S. Magistrate Judge Don Svet on December 13, 1999, Dr. Lee was placed in pretrial confinement in the Santa Fe County Correctional Facility. The conditions of his incarceration, including the Special Administrative Measures (SAM) taken to prevent him from possibly communicating to others about the location of the tapes or the material thereon, have received a great deal of attention from Dr. Lee's attorneys, the press, and eventually, Congress.

The government's decision to hold Dr. Lee under such strict conditions raises a number of important points. Defendants are presumptively entitled to pretrial release except in certain circumstances specified in statute. Because none of the ordinary conditions for pretrial confinement—for example, when a violent criminal is captured after a killing spree—applied to Dr. Lee, Judge Parker explained in his order that:

''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, can a judge order a defendant's pretrial detention. 18 USC 3142(e). A finding against release must be ''supported by clear and convincing evidence.'' 18 USC 3142(f).'' [231]

In reaching a decision on pretrial detention, the judge was required to take into account the available information regarding: (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the person, and (3) the history and characteristics of the person.[232]

At a series of detention hearings from December 13 through December 29, before two different magistrates, the government painted a stark picture of Dr. Lee's conduct. A December 23, 1999 filing by Mr. Gorence summarized the government's position:

''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 the 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.'' [233]

The Atomic Energy counts with which Dr. Lee had been charged required that the conduct at issue be done with intent to injure the United states. On this score, the government argued that:

''Lee's secretive and surreptitious actions to gather the classified TAR files, to downpartition 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.'' [234]

The government also argued that the only way to safeguard the information on the tapes Dr. Lee created was to hold him in detention, with special restrictions on his communications. As described in the government's motion on December 23, these measures included segregation from other prisoners; limiting his visitors to immediate family members and his attorneys, having an FBI agent monitor all family visitations, denial of access to a phone except to call his attorneys, and mail screening.[235]

After the required hearings, Judge Parker issued his order on December 30, 1999, in which he concluded 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.'' [236] He then addressed the nature of the alleged crimes, the weight of the evidence, and the characteristics of the defendant. Judge Parker noted that while the offenses charged fell short of espionage, they were ''quite serious and of grave concern to national security.'' [237] The judge also described the surreptitiousness with which the tapes had been created, citing the government's contention that Dr. Lee had misled a T-Division employee by claiming to want to download a resume to tape.[238] In addressing the weight of the evidence against Dr. Lee, Judge Parker noted that the government had presented direct evidence of the downloads, which was the relevant conduct at issue. With regard to the intent to injure, which was also an element of the charged offenses, he noted that:

''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 . . . the Government did present circumstantial evidence of Dr. Lee's intent to violate these provisions of the Atomic Energy Act and the Espionage Act.'' [239]

With regard to the characteristics of the defendant, Judge Parker made points on both sides, noting that Dr. Lee had ''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.'' [240] On the other hand, the judge noted Dr. Lee's longstanding ties to the community, and said, ''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.'' [241] And, finally, the judge concluded that the government had 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.'' [242]

In concluding, the judge stated:

''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 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 . . . 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.'' [243]

The judge's final statement before denying Dr. Lee's motion for pretrial release was an admonishment to the government ''to explore ways to loosen the severe restrictions currently imposed upon Dr. Lee while preserving the security of sensitive information.'' [244]

Having lost the initial fight for pretrial release, Dr. Lee returned to jail where the conditions of his confinement became a rallying point for his defenders. The following excerpt is taken from an Internet site established and maintained by Dr. Lee's supporters:

''He was arrested on December 10, 1999 and is now put in solitary confinement in a cell in a New Mexico jail 23 hours a day. He is allowed only one hour of visit a week from his immediate family. He is shackled any time he is out of his cell, at his waist, his ankle and his wrist except when he is meeting with his lawyers (and even then he must wear an ankle chain). A chain around his belly connecting to his handcuff prevents him from raising his hand above his head. We were told that two U.S. Marshals with machine guns accompanied him whenever he goes within the confine of the prison and a 'chase car' with armed Marshals follows Dr. Lee when he is moved from Santa Fe to Albuquerque and back. This is highly unusual and we questioned that other prisoners received the same treatment. The lawyer said Lee was kept separate from other prisoners during his hour-long exercise period. He is finally allowed to speak Mandarin with his family but with two FBI agents listening in. We were told by his families that Dr. Lee was always in shackles and chain even during their one hour weekly meeting. We were also told that the food provided by the prison system was inappropriate to Dr. Lee because he has long adopted to live on a non red meat diet after his colon cancer surgery several years ago.'' [245]

The government, however, portrayed Dr. Lee's conditions of confinement as a matter of necessity to protect the classified information he had downloaded to portable tapes. In a series of memoranda written by Lawrence Barreras, Senior Warden of the Santa Fe County Correctional Facility, on December 10 and 14, 1999, and January 4, 2000, the terms of Dr. Lee's confinement were outlined in detail. Specifically, Dr. Lee's confinement consisted of 24 hour supervision by a rotation of guards, permission to speak only with his attorneys and immediate family members (his wife, daughter and son) and in English only, non-contact visits from his immediate family members limited to one hour per week, no personal phone calls, and that he remain secured in his cell 24 hours a day.[246] Further, Dr. Lee was to remain in full restraints (leg and hand irons) anytime he was to be out of his cell being moved from one location to another.[247]

As previously noted, Dr. Lee's lawyers protested his conditions of confinement almost from the beginning. In a December 21, 1999 letter to Mr. Kelly and Mr. Gorence, lead defense attorney Mark Holscher said:

''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.'' [248]

The legal authority to which Mr. Holscher referred was at that time still being assembled. Title 28 of the Code of Federal Regulations, section 501.2, 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 . . . 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. Energy Secretary Bill Richardson sent a letter to the Attorney General on December 27, 1999, in which he said:

''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 the 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.'' [249]

By January 6, the Department of Justice had reviewed the administrative segregation procedures at the Santa Fe County Correctional Facility and determined with some additional measures, the standard segregation policy would adequately confine Dr. Lee. In a letter to Warden Lawrence Barreras, the local U.S. Marshal, John Sanchez described ten additional measures that were necessary:

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 FBI.

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 and Mr. Mark Holscher].

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. . . . 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 [U.S. Marshals Service] personnel only.

10. Mr. Lee is NOT TO BE REMOVED FROM THE FACILITY BY ANYONE UNLESS AUTHORIZED BY THE USMS.[250]

That same day, another of Dr. Lee's attorneys, Mr. John Cline, wrote to Mr. Gorence expressing the view that the conditions of confinement were unlawful. He requested three specific changes, including: (1) two hours outdoors every day, (2) permission for Dr. Lee to have a television, radio, and a CD player in his cell and to receive access to newspapers, and (3) a daily shower.[251]

A January 12, 2000 memorandum to the Attorney General from Principal Associate Deputy Attorney General Gary Grindler demonstrates that at least some of the concerns of Dr. Lee's lawyers were taken to the highest reaches of the Justice Department. The memo notes that the Attorney General had ''advised that some individuals have expressed concern about Dr. Lee's access to exercise,'' and explains that the order for Special Administrative Measures that she was being asked to sign ''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.'' [252]

On January 13, 2000, the Attorney General formally authorized the special administrative measures for a period of 120 days in a memorandum to John W. Marshall, the Director of the Marshals Service. The conditions of confinement were as previously described. It should be noted, however, that from December 10, 1999 until the date the Attorney General signed the order on January 13, 2000, any special conditions of confinement imposed on Dr. Lee would have been without proper authority. If federal regulations require certifications from agency heads and the Attorney General, it can only be presumed that restrictions such as those imposed on Dr. Lee would not be properly authorized until all the certifications were in place. It is troubling that the government was not better prepared to make the necessary certifications in a timely fashion.

As the end of the initial 120 days approached, the Attorney General received a new letter from Secretary Richardson on May 4, in which he expressed his support for continuing the SAM. However, he mentioned the conditions of Dr. Lee's pretrial confinement, saying:

''At the same time, I want to emphasize my concern, that to the extent consistent with protecting 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 specifically to protect against further compromise of classified information. Based on this information, I am satisfied that his civil rights are being adequately protected.'' [254]

At about the same time the FBI SAC in Albuquerque, David Kitchen, wrote to the new U.S. Attorney in New Mexico, Norman Bay, and expressed his unequivocal support for maintaining the SAM in place. Agent Kitchen expressed his ''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.'' [255]

In July, the new lead prosecutor on the case, George Stamboulidis, arranged to have restraints removed from Dr. Lee during his scheduled recreation times,[256] but this did not occur without some difficulty.[257]

An August 1, 2000 letter from Warden Barreras to Mr. Stamboulidis describes the final state of Dr. Lee's confinement:

''In response to your letter date 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 as opposed to the regular Friday 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.'' [258]

On September 7, 2000, U.S. Attorney Norman Bay requested that the Attorney General continue the SAM, which had last been extended on May 12. In his letter, he outlined recent developments in the case, including Judge Parker's order granting Dr. Lee's renewed motion for pretrial release on August 24. Mr. Bay informed the Attorney General of the government's motion to stay the request of that order, and noted that the Tenth Circuit had stayed Judge Parker's order pending further review. Mr. Bay concluded his request to the Attorney General by noting that ''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,'' and requested another 120 days of SAM.[259]

Before the Attorney General acted on the request, the government reached a plea agreement with Dr. Lee, which ended his confinement.

After the plea agreement, the conditions of Dr. Lee's confinement were widely discussed in a way that they had not been discussed before, with new allegations that a light had been left on his cell 24-hours a day, and that he had been kept in shackles an inordinate amount of time. During a series of three hearings in late September and early October 2000, Department of Justice witnesses were asked about the conditions of detention. Attorney General Reno made the point that Dr. Lee's lawyers had not previously complained about the leg-restraints and that no one had ever mentioned the light before.[260] Mr. Bay explained that the light in question was ''a dull blue light, kind of like a night light, in Dr. Lee's room . . . [used] 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 okay.'' [261]

The Attorney General also read into the record a memorandum from Raymond L. Cisneros, the local sheriff in Santa Fe who served as the jail monitor. The memorandum, dated March 10, 2000, was to the county manager and explained that Mr. Cisneros had met with Dr. Lee after receiving phone calls from unknown persons claiming that Dr. Lee was not being treated well. According to the memo:

''Other than being incarcerated, he had no complaints. The staff was treating him very well. He singled out Warden Barreras and Deputy Warden Romero as treating him great. . . . 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 of other issues regarding his incarceration. . . . Because of the high profile nature of this case, I felt it was necessary to either confirm or disprove 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.' '' [262]

Realizing that the hearings had not provided all the necessary information on the confinement issue, the DOJ later provided several hundred pages of relevant documents. Much of the discussion above has been drawn from these documents. The Department also sent a letter, dated January 20, 2001, which provided additional detail on the matter. Assistant Attorney General Robert Raben explained that the manner in which Dr. Lee had been treated flowed ''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.'' [263] Mr. Raben went on to explain that, because there is no federal detention facility in New Mexico, Dr. Lee had been housed at the Santa Fe County Detention Facility, under its administrative segregation policies, with the additional condition that he be allowed no unmonitored communications. According to Mr. Raben:

''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 issues 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.'' [264]

Mr. Raben further explained that Dr. Lee was transported for all court appearances and meetings with his attorneys by the U.S. Marshals, under standard procedures, which included ''full restraints'' during transport, and at all times except when Dr. Lee was in a holding area cell administered by the Marshals Service and when he was meeting with his attorneys. During such meetings, the leg irons remained on, but Mr. Raben said that Dr. Lee's attorneys had never objected to that procedure.[265]

After reviewing the documents and testimony on the conditions of Dr. Lee's pretrial confinement, it is clear that the reasonableness of the government's actions turns on the question of whether or not it was really necessary to restrict his ability to communicate. The government was convinced that the only way to protect the national security was to prevent Dr. Lee from communicating. Having taken that position, the remainder of the government's actions were simply to further the objective of limiting Dr. Lee's ability to communicate. Although some of the government's responses were not as prompt as one might like—for example, taking more than a month to get the initial SAM guidelines signed by the Attorney General—the government seems to have been generally responsive to requests from Dr. Lee's attorneys.

That is not to say that the government's actions were appropriate, however, because the government has not made a showing as to why it was necessary to hold Dr. Lee under such strict terms of confinement in the first place. If he had not communicated the whereabouts of the tapes to a third party in the period prior to his arrest, what made the government believe he would do so from jail? None of the documents, testimony or other information available to the subcommittee provides a compelling answer to this question. While the government may have believed such harsh conditions were necessary, they have not made a convincing case. Judge Parker was not convinced by the government's arguments, and granted Dr. Lee's renewed motion for pretrial release on August 24, 2001. In his remarks at the plea hearing, Judge Parker expressed his sentiments, telling Dr. Lee that ''since by the terms of the plea agreement that frees you today without conditions, it becomes clear that the Executive Branch now concedes, or should concede, that it was not necessary to confine you last December or at any time before your trial.'' [266]

The Case Against Dr. Lee

Had the government not reached a plea agreement with Dr. Lee, the case was scheduled for trial in late November 2000. When the government settled, many questioned the appropriateness of the plea agreement because it seemed to be in such stark contrast with what the government had argued all along. To ascertain whether the plea agreement was appropriate, it is first necessary to examine the government's case.

Although the government would likely have won a conviction because many elements of the charged conduct were not disputed Dr. Lee could not credibly deny that he had made the tapes containing vast quantities of classified nuclear weapons data this would not have been an easy case. The government faced a number of obstacles, including: (1) challenges to the government's claims about the importance of the material on the missing tapes, (2) threats by Dr. Lee's attorney to take the government on a ''long, slow death march under CIPA,'' (3) claims that Dr. Lee was the victim of selective prosecution based on racial profiling, and (4) the issue of Dr. and Mrs. Lee's assistance to the government during the 1980s. None of these obstacles would have been unsurmountable. Each is discussed below.

The Importance of the Missing Tapes

As previously noted, government witnesses testified at Dr. Lee's bail hearing that the information on the tapes was the ''crown jewels'' of our nuclear secrets that could, in the wrong hands, change the global strategic balance. When Dr. Lee's lawyers renewed their motion for pretrial release in July 2000, they made a direct assault on this claim. The defense offered depositions from Dr. Harold Agnew, former Director of LANL, and Dr. Walter Goad, a Fellow Emeritus at LANL, both of whom took issue with the government's characterization of the material on the tapes. Dr. Lee's lawyers also noted that the information in question was not classified at the highest level—Top Secret—and had, in fact, been placed in a special category called ''Protect as Restricted Data'' or PARD when Dr. Lee downloaded it.

When Judge Parker held three days of hearings in August 2000 to consider Dr. Lee's renewed motion for pretrial release, he got testimony from Dr. John Richter that the information on the tapes was 99% unclassified.[267] The government was also forced to acknowledge that the information in question was classified as Secret Restricted Data (SRD) rather than Top Secret Restricted Data (TSRD), and could therefore be sent through certified or registered mail, as demonstrated in the following excerpt from the hearing on August 17:

Mr. CLINE: SRD, unlike TSRD, can be, for example, double wrapped and sent by registered mail from one classified location to another, can it not?

Dr. ROBINSON: That is true today, yes.

Mr. CLINE: And TSRD can not be sent by mail?

Dr. ROBINSON: That is correct.

Mr. CLINE: . . . . the information that we are talking about here, which has been described as the crown jewels, could be double wrapped and sent by registered mail from Washington, D.C. to New Mexico, correct?

Dr. ROBINSON: Correct.[268]

The defense team also noted that the material Dr. Lee had downloaded fell into a category called Protect As Restricted Data, or PARD, when he made the tapes. The definition of PARD, taken from the U.S. Department of Energy Office of Security Glossary of Terms, is as follows: A handling method for computer-generated numerical data or related information which is not readily recognized as classified or unclassified because of the high volume of output and low density of potentially classified data.[269]

As described in the judge's order for Dr. Lee's pretrial release, the effect of the expert opinions offered by Drs. Agnew, Goad and Richter, the defense's showing that the material was SRD as opposed to TSRD, and that the material was marked as PARD when it was downloaded was to ''show that the information Dr. Lee took is less valuable than the government had led the Court to believe it was and less sensitive than previously described to the Court. . . .'' [270]

Judge Parker also raised a question as to whether the missing tapes contained ''all the information needed to build a functional thermonuclear weapon.'' [271] He went on to say, ''In sum, I am confronted with radically divergent opinions expressed by several distinguished United States nuclear weapons scientists who are on opposite sides of the issue of the importance of the information Dr. Lee took.[272] The judge's findings on the sensitivity of the material on the tapes were a principal factor in his decision to order Dr. Lee's pretrial release, which he did on August 24, 2000.

When the government settled the case with a plea agreement less than three weeks later, it gave the impression that it was backing away from its claims about the importance of the material. This had the unfortunate effect of reinforcing the public perception that the government was persecuting, rather than prosecuting Dr. Lee. Like the judge, the subcommittee can only rely on the testimony of expert witnesses, but it seems that the government's witnesses made the stronger arguments in this regard.

The most concise description of the information Dr. Lee downloaded is found in the government's public filing in response to Dr. Lee's appeal of Judge Parker's initial denial of bail, the relevant portions of which are excerpted below:

''The source codes model and simulate every aspect of the complex physics process involved in creating a thermonuclear explosion. The source codes are written to design specific portions of a nuclear weapon—either the primary or the secondary.

''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. Data files contain all of the physical and nuclear properties of materials required for a nuclear explosion. . . . Data files become classified as SRD [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. . . .

'' 'Input decks' are mathematical descriptions of the actual geometry and materials within a nuclear device itself. In essence, an input deck is an 'electronic blueprint' of either a primary or a secondary within a nuclear weapon.

''. . . [Dr.] Lee down-partitioned and downloaded all of LANL's significant nuclear weapon primary and secondary design codes in their entirety. . . . 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.

''. . . . 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. A country that had some experience with nuclear explosives could use the information to optimize its nuclear bombs. 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.'' [273]

At the August detention hearings, government scientists elaborated on the significance of the material and, specifically the increased importance that came from the way the files had been put together on the tapes. Dr. Paul Robinson, president of Sandia National Laboratories, testified that the tapes ''were very carefully designed to be loaded with the subroutines that would be needed for each design code to be placed right behind that design code. And so I believe they should not require a lot of additional instruction.[274] In other words, the collection of files was more than just a collection of files—it had been assembled so as to ensure that the data files called for in the codes were available at the right place, making it possible for the codes to actually run when executed.

The government also explained its rationale for claiming that the information on the tapes could change the global strategic balance. After a lengthy discussion of the technical aspects of ballistic missile defense and the challenges presented by Multiple Independently Targeted Reentry Vehicles (MIRVs), which are generally quite small, Dr. Robinson expressed his concern that the tapes Dr. Lee made could enable another nation to develop devices that would have reentry vehicles approximately the size of orange traffic cones.[275] Such small warheads would present an enormous challenge to U.S. ballistic missile defenses, even more difficult than that of defending against single warhead weapons which are larger (about the size of a minivan or small bus).

While it might be tempting to simply state that one group of scientist's arguments on this issue is most persuasive, it is not necessary to do so. One of the key witnesses who testified in support of Dr. Lee's position at the August 2000 hearings, Dr. John Richter, subsequently modified his position. The following exchange took place at an October 3, 2000 hearing before the Department of Justice Oversight subcommittee:

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?

Dr. 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.[276]

Dr. Richter also acknowledged that the input decks contained important information,[277] but ultimately took the position that the loss of the information on the tapes would be ''marginally harmful, at worst.'' [278]

In evaluating Dr. Richter's opinion on the value of the information on the tapes, it is helpful to consider that ''in 1995, he was the first to suggest that the Chinese might have significant information about the W–88 warhead. Even though he eventually backed off that opinion, it helped start the investigation that led to the discovery of Dr. Lee's download and his jailing.'' [279] Dr. Richter later put his dual roles at the start and at the end of the Wen Ho Lee case in perspective for a reporter when he said, ''If I had any influence in getting him out, I figured that's a payback.'' [280]

In sum, the information on the tapes was clearly important. It does not necessarily follow, however, that the government was right to hold Dr. Lee in harsh pretrial conditions on that basis. In fact, in the August hearings, the judge was only ruling on the question of whether not Dr. Lee should remain in pretrial confinement—under conditions that were considerably harsher than he would be subjected to if he had been convicted. If the case had gone to trial, the government would undoubtedly have prevailed on the matter of whether or not the material on the tapes was important. The government's error was not in claiming the material was important, but in claiming that the only way to protect it was to hold Dr. Lee under such harsh conditions.

The Classified Information Procedures Act (CIPA) issues

CIPA establishes a framework for handling trials involving classified information, with the objective of protecting both national security information and the rights of the defendant. One of the key concepts in CIPA is the provision permitting substitutions for classified information to prevent the government from having to expose that information at trial. Rather than show the actual material at trial, the government is permitted to offer a document that conveys the same information in unclassified form. The judge presiding over the case reviews the material in question and the government's proposed substitutions. If the judge finds that the substitutions are an adequate representation of the material in question, the case goes forward. If the judge finds the government's substitutions lacking, the government can make an interlocutory appeal of the judge's ruling, meaning that the appeal is decided before the case goes forward rather than after as is the usual fashion. If the government loses a CIPA ruling, it can also simply drop the case.

Although the prosecution of Dr. Lee ended before the CIPA issues were fully tested in court, the defense clearly intended to implement a classic graymail tactic of forcing the government to dismiss the case by claiming that secret information had to be revealed in open court to guarantee their client a fair trial. According to U.S. Attorney Norman Bay:

''In late May, we met with defense counsel in this case. . . . 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, quote, 'long, slow death march under CIPA.' '' [281]

Senator Specter replied, ''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.[282]

One of Dr. Lee's attorneys, Mr. John Cline, was the lead attorney on CIPA issues. He told the judge that using classified information in the trial: would be necessary for

proving four central defense arguments: that most of the downloaded material was already in the public domain; that some of the computer codes contained flaws that made them less useful; that the codes were related to Dr. Lee's work; and that they were difficult to use without user manuals, which were not on the tapes.'' [283]

The defense found a sympathetic ear with Judge Parker on these issues. In an order filed August 1, 2000, the judge gave the government two weeks to provide substitute language for specified classified information. He agreed with Dr. Lee (and opposed the government) as to the relevance of particular information to the defense. For example, Judge Parker said that:

''Although the parties dispute the existence or magnitude of any 'flaws' or imperfections in the various codes at issue, the Court nonetheless finds that evidence of those alleged flaws or imperfections is relevant to the Defendant's intent to secure an advantage to a foreign nation or to injure the United States. Evidence of these alleged flaws and imperfections is also relevant for use in the Defendant's cross-examination of witnesses and in the Defendant's rebuttal of Government witnesses' testimony on the issue of the sensitive nature of these codes.'' [284]

The Court delivered another blow to the Government when he ruled that:

''Evidence making a comparison of the input decks of Files 1 through 19 and Tape N to a nuclear weapons blueprint is relevant to the Defendant's intent. In addition, this evidentiary comparison is relevant to the cross-examination of witnesses and to the Defendant's rebuttal of Government witnesses' testimony on the Government's assertion that the input decks constitute an electronic blueprint of a nuclear weapon.'' [285]

Consonant with these determinations, the judge ordered the government to propose substitutions by August 14, with the defense to respond by August 21. Any issues that could not be agreed upon were to be resolved at a hearing on August 31.[286]

The government was perhaps most concerned that the argument about flaws in the codes could force an in-depth discussion of the codes in open court, something it was not prepared to do. There was also a very real concern about permitting Dr. Lee to make a comparison between an actual blueprint and the electronic version of a weapon contained in the input deck. These would have been challenges, but the government had not taken any of its appeals when it made the plea deal, and was a long way from having to cede the case on CIPA grounds.

Allegations of Selective Prosecution/Racial Profiling

Among the more sensational allegations of government misconduct in this case are charges that Dr. Lee was selected for investigation and prosecution based on his ethnicity. The terms ''selective prosecution'' and ''racial profiling'' have been used to describe how the government allegedly decided to focus on Dr. Lee. The subcommittee's review of these allegations shows that the evidence simply does not support charges that Dr. Lee's ethnic heritage was a decisive factor in the government's actions during any phase of this case.

In June 2000, Dr. Lee's defense team filed a motion ''for discovery of materials relevant to establishing that the government has engaged in unconstitutional selective prosecution.'' [287] As grounds for this discovery request, the defense team claimed that Dr. Lee had ''concrete proof that the government improperly targeted him for criminal prosecution because he is 'ethnic Chinese.''' [288] The defense's memorandum cited four examples as proof of such targeting:

''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 affidavit 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.'' [289]

The memorandum went on to explain that even if Dr. Lee did not have the direct evidence of bias, he had:

''satisfied the stringent requirements of *United States* v. *Armstrong*, 517 U.S. 456 (1996), which held that . . . 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.'' [290]

At the plea hearing in September 2000, Judge Parker noted from the bench that the government had made a deal with Dr. Lee only a short time before it would have been required to produce to the judge a substantial volume of material on the selective prosecution issue,[291] raising the inference that the government reached the plea agreement to avoid its discovery obligations on the selective prosecution issue. A Department of Energy review of ethnic bias within the department concluded that there was room for improvement on ethnic sensitivity,[292] but none of the survey's results supported the allegations that Dr. Lee had been targeted because of his ethnicity. An April 2001 review by DOE Inspector General Gregory Friedman was even more direct, concluding that ''information reviewed by the Office of Inspector General did not support concerns regarding unfair treatment based on national origin in the security processes reviewed.'' [293]

Because these charges have not been rebutted, the public may have been left with the impression that Dr. Lee's allegations were correct, and that the government acted out of racial or ethnic prejudice. Any such impression is injurious to the public's trust in the institutions which are charged with enforcing the nation's laws and must be properly addressed.

In pleading the case that Dr. Lee was targeted for criminal investigation because he is ethnic Chinese, Dr. Lee's lawyers alleged that ''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.'' [294] The defense memorandum further alleges that the Administrative Inquiry which was issued by Mr. Trulock in May 1996 listed Dr. Lee as the main suspect, prompting the FBI to open a criminal investigation of Dr. Lee.[295]

There is legitimate debate about the scope and conclusions of the AI, and that subject is addressed elsewhere in this report, but the defense's allegations are inaccurate in two major ways. First, the memorandum overstates Mr. Trulock's role in the development of the AI, which was written by Dan Bruno and an FBI Special Agent who was assigned to the DOE for the purpose of helping to conduct the AI. Although Mr. Trulock was an aggressive advocate in the 1995–1996 period of the argument that the Chinese nuclear weapons program had successfully targeted the U.S. labs for espionage, he had only a limited role in the investigation which resulted in the list of names upon which Dr. and Mrs. Lee appeared. Second, and more importantly, the defense memorandum fails to acknowledge that the FBI was predisposed to focus on Dr. Lee because he was already under investigation, albeit at a lower level than what happened after the AI was issued.

The cumulative effect of these errors has been to create the incorrect impression that somehow Mr. Trulock was directly or primarily responsible for the government's focus on Dr. Lee. The defense memorandum fails to even address the question of how Mr. Trulock supposedly played a role in the prosecution of Dr. Lee when Mr. Trulock left government service in August 1999, nearly four months before Dr. Lee was indicted.[296]

To bolster its case that Mr. Trulock was responsible for focusing on Dr. Lee, the defense memorandum cites Mr. Robert Vrooman, who was Chief Counterintelligence Officer at LANL from 1987 until 1998. The defense quoted Mr. Vrooman as saying that ''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,'' and that ''racial profiling was a crucial component in the FBI's identifying Dr. Lee as a suspect.'' [297]

The bevy of civil lawsuits that this case has spawned will have to sort out whether anyone has violated anyone else's rights or engaged in slander or defamation, but for the purposes of this report, several observations about Mr. Vrooman's allegations are appropriate. First, his statement that ''Caucasians with the same background and foreign contacts as Dr. Lee were ignored'' is factually incorrect. While any fair reading of the document would suggest that the authors of the AI were of the opinion that Dr. and Mrs. Lee were the prime suspects, the document also listed several other individuals, some of whom were Caucasian, and recommended that the others be investigated as well. Therefore, it is simply inaccurate to state that Mr. Trulock's office focused specifically on Dr. Lee, for any reason, let alone because he was ethnic Chinese.

Second, Mr. Vrooman raised questions in the late 1980s about Dr. Lee's contacts with Chinese officials and identified Dr. Lee to Energy Department officials as a potential suspect in the W–88 case.[298] He also formerly subscribed to the theory that the Chinese had obtained information about the W–88 through espionage, telling the FBI at one point of a ''smoking gun'' in the case.[299] Thus, although Mr. Vrooman has become critical of the conclusions of the AI and its focus on Dr. Lee, he was instrumental in relaying the DOE analysis regarding the extent of the PRC espionage to the FBI. Had Mr. Vrooman doubted the analysis of the DOE's review group, he could have raised those concerns then rather than saying that a smoking gun had been discovered. When challenged on this point during a hearing, Mr. Vrooman said that he had called Mr. Trulock's office in May 1996, but Mr. Trulock was not in. He said that he did not further pursue the matter because:

''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 the FBI for years. They had always protected people's civil rights and did the case

well and we thought they would quickly come to the same conclusion we had.'' [300]

Mr. Vrooman also said that he met weekly with FBI agents on the case and routinely expressed reservations, which came to a head in December 1998 when ''we were basically thinking that Lee was not the right man.'' [301] Given that Mr. Vrooman retired from Los Alamos on March 13, 1998,[302] it remains unclear as to how he was sufficiently informed on the case in December of that year to make judgements of this sort.

And, finally, it should be noted that Mr. Vrooman was one of the three individuals disciplined for his role in failing to remove Dr. Lee from access after the Director of the FBI recommended twice in late 1997 that Dr. Lee's clearance be removed.[303] The subsequent discovery that Dr. Lee had been engaged in massive illegal downloading reflects poorly on Mr. Vrooman's conduct as the lab's counterintelligence chief and gives him a strong motive to minimize Dr. Lee's conduct and to allege government discrimination. Any assessment of Mr. Vrooman's opinion of the government's handling of the case against Dr. Lee must be made with these facts in mind.

Furthermore, when pressed for examples of supposed bias on the part of the government, Mr. Vrooman fell short. At an October 3, 2000 hearing of the Judiciary subcommittee on Department of Justice Oversight, Senator Grassley pursued this line of questioning. Senator Grassley asked for information to substantiate Mr. Vrooman's allegation that whenever Dr. Lee's motive [for the alleged espionage against the United States] was discussed, it came down to ethnicity. The following exchange occurred:

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: Okay. Could you point to any documentation that would back up the point that was 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.[304]

In fact, there are documents which describe Dr. Lee's motives, but they run counter to what Mr. Vrooman alleges. In the November 10, 1998 request for electronic surveillance on Dr. Lee, the newly appointed FBI case agent describes several incidents from Dr. Lee's past and states their relevance to the issue of motive. One section of this November 1998 FISA request from the Albuquerque office describes how Dr. Lee sent numerous documents to Taiwan's Coordinating Council of North America (CCNA) in the late 1970s and early 1980s, and says that Dr. Lee told the FBI that:

''his motive for sending the publications was brought on out of a desire to help in scientific exchange. During the same interview, Dr. Lee stated that he helps other scientists routinely, and had no desire to receive any monetary or any other type of reward.''[305]

The memo continues, saying the Albuquerque Division of the FBI believes that Dr. Lee's actions in sending these documents to a foreign government without proper authorization ''shows that Wen Ho Lee has the propensity to commit and engage in the crime of espionage to include willingly providing documentation to foreign officials. . . .''[306] This discussion of motive makes no mention of Dr. Lee's ethnicity. If documents or information provided to a foreign government could injure the United States or aid a foreign country, the crime of espionage has still been committed even if the transfer was motivated by a desire to promote scientific exchange and in the absence of a desire for monetary reward.

The November 10, 1998 memorandum also describes a meeting at Los Alamos in early 1994 during which it became apparent that Dr. Lee had a relationship with a top PRC nuclear weapons scientist. A reliable source quoted this top PRC nuclear scientist as saying of Dr. Lee, ''We know him very well. He came to Beijing and helped us a lot.'' [307] The source further reported that Dr. Lee had helped the Chinese Academy of Engineering Physics ''with various computational codes used in fluid dynamics which is a very important aspect of thermal nuclear [sic] weapons design work.'' [308] The Albuquerque memo cited these specific acts as showing ''Wen Ho Lee's propensity to associate with foreign governments and provide information to foreign governments and therefore the propensity to aid in and commit acts of espionage.'' [309] These statements demonstrate clearly that the government's assertions about Dr. Lee's motives were based on specific acts he was known to have committed rather than on the fact that he is ethnic Chinese. These specific acts gave the government ample reason to investigate him and the allegations of Mr. Vrooman and others, that the government relied only on ethnic profiling, are simply incorrect.

In fact, all of the arguments put forward by Dr. Lee's lawyers on the racial profiling issue are a skewed interpretation of the same point—namely the U.S. government's recognition that the PRC intelligence services focus on Chinese-Americans. Consider the second and third examples cited in the discovery memorandum, where the defense claims that former FBI Deputy Director Paul Moore has confirmed that Dr. Lee was targeted by the FBI due to racial profiling, and that the affidavit in support of a search warrant for Dr. Lee's home claimed that Dr. Lee was more likely to have engaged in espionage for the PRC because he was ethnic Chinese. Neither of these claims stands up to even the most minimal level of scrutiny because both are misrepresentations of what was actually said.

The defense memorandum on selective prosecution quotes former FBI Deputy Director Paul Moore as saying in a televised interview with Jim Lehrer on December 14, 1999:

''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 the 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.'' [310]

To say that the United States government is cognizant of the fact that the PRC prefers to target individuals for elicitation based on their ethnicity is completely different from saying that an individual would be more likely to engage in espionage because he or she is a member of a particular ethnic group. The former statement about recruitment efforts of PRC intelligence services would be a logical, relevant and acceptable observation so long as it was based on fact. The latter statement, implying that an individual would be more likely to engage in espionage on the basis of his or her race, would be an outrageous, biased and unacceptable claim that would have no place in any law enforcement or counterintelligence investigation.

In the Wen Ho Lee case, the government's assertions were confined to acknowledging that the PRC focused on overseas ethnic Chinese, without making inferences that the targeted individuals would be more likely to respond positively because of their Chinese heritage. The defense memorandum cites FBI Special Agent Michael Lowe's April 9, 1999 affidavit in support of a search warrant, saying that it leaves no doubt that improper racial profiling was a substantial basis for the targeting of Dr. Lee. The defense's assertion on this point is incorrect. In relevant part, the affidavit says:

''. . . 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.'' [311]

This does not allege that Dr. Lee is likely to have engaged in espionage because he is ethnic Chinese, only that he is likely to have been targeted by the PRC intelligence services on that basis. All the defense memorandum shows is that if there is any ethnic profiling done, it is done by the PRC. Since the PRC had no role in the decision to investigate or prosecute Dr. Lee, any bias on their part would be irrelevant.

It should be noted that Dr. Lee's request for discovery related to selective prosecution contained several factual errors, including an incorrect claim that no one else had ever been prosecuted under the Atomic Energy Act, and an incorrect claim that the Department of Justice had never prosecuted anyone under the espionage statutes without evidence that classified material had been transferred to a third party. These claims were shown to be incorrect in the government's response to Dr. Lee's discovery request.[312]

The Relationship Between the Lees and the Government

Shortly after Dr. Lee was fired from LANL, he retained Mark Holscher as his counsel. On May 6, 1999, Mr Holscher released the following statement, which clearly indicated that any prosecution of Dr. Lee would have to deal with the Lees' cooperation with the government:

''Dr. Wen Ho Lee has dedicated himself to the defense of this country for the last 20 years. His work, much of which is classified, has led directly to the increased Safety and national security of all Americans, and he is responsible for helping this country safely simulate nuclear tests.

''In 1986 and 1988, Dr. Lee went to Mainland China to present papers at two technical conferences. Dr. Lee's participation in these conferences was pre-approved and encouraged by the Los Alamos Laboratory and the Department of Energy. These same entities also cleared the texts of the papers given at these conferences, which covered mathematics and physics topics.

''The press has incorrectly reported that Dr. Lee made ''several'' trips to Mainland China and also has failed to report that his two trips were approved in advance by the Los Alamos Laboratory and the Department of Energy. These two approved trips were the only times Dr. Lee has ever traveled to

Mainland China. These false press reports do a disservice both to Dr. Lee and the Los Alamos Laboratory.

''The press reports also fail to include the fact that Dr. Lee presented similar papers at conferences in several countries throughout Western Europe and other parts of the world. The false insinuations that Dr. Lee went to Mainland China in the late 1980s with an improper purpose are unfair. Not only did Dr. Lee go to Mainland China to present a technical paper, his and his wife's attendance were with the full knowledge and approval of the Federal Bureau of Investigation.

''There have been inaccurate press reports regarding the circumstances surrounding Dr. and Mrs. Lee's cooperation with the government. Mrs. Lee agreed to the FBI's request that she assists it as a volunteer without pay in the FBI's efforts to monitor Chinese scientists. She agreed to help the FBI with the full knowledge and approval of Dr. Lee and continued to do so for a number of years.

''At the request of the FBI, Dr. Lee's wife attended the 1986 conference with him, where she voluntarily provided background information on Chinese scientists. Dr. and Mrs. Lee supported and agreed with the FBI's request that Mrs. Lee assist it in obtaining background information on Chinese scientists. It simply defies logic for critics to now allege that Dr. Lee was engaged in improper activities in Mainland China while he and his wife were there.

''At no time during or after the pre-approved 1986 or 1988 trips did Dr. Lee ever provide any classified information whatsoever to any representative of Mainland China, nor has he ever given any classified information to any unauthorized persons. As was anticipated and approved by the U.S. government, Dr. Lee and his wife socialized with Chinese scientists. It was fully understood by the Department of Energy and the Los Alamos Laboratory that the conferences included social events with the participants.'' [313]

Had the case gone to trial, the government would have had to confront the issue of its relationship with Dr. and Mrs. Lee over a long period of time. As previously noted, Dr. Lee assisted the FBI in a 1983–1984 investigation of a Lawrence Livermore scientist. Notwithstanding the FBI's denial of any assistance when the FISA request went forward in 1997, Dr. Lee had, in fact, helped the FBI. Mrs. Lee's relationship with the government would have been a substantially more difficult matter to contend with.

In one discovery request, Dr. Lee's defense team asked for, among other things, all information related to ''Sylvia Lee's Cooperation with the FBI and CIA.'' Citing grand jury testimony of the FBI case agent on the Wen Ho Lee matter, the defense memorandum said that:

''Sylvia Lee served as an FBI ''Information Asset'' between 1985 and 1991 in connection with visits to LANL by PRC scientists. Her principal FBI contact was FBI Special Agent David Bibb. On at least two occasions, Dr. Lee attended meetings between Sylvia Lee and her FBI contact. Sylvia Lee also met with [name redacted] and representatives of the LANL internal security office to provide information concerning PRC scientists.'' [315]

In its response, the government claimed that it had produced all documents related to Lee's cooperation with the FBI. Further, the government argued that while Dr. Lee's purported assistance to the government might be relevant to a jury in considering his criminal intent pursuant to the Atomic Energy Act counts, Mrs. Lee's ''affiliation with the FBI and/or the CIA has no bearing on Lee's criminal intent.'' [316]

In a July 13, 2000 order, Judge Parker said that he would address this issue by reviewing, in camera: (1) documents reflecting Sylvia Lee's cooperation with the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and the Department of Energy (DOE), and (2) certain FBI memoranda regarding the propriety of prosecuting the Defendant.[317] After reviewing this information, the judge ruled that it contained information relevant to the defense in several categories of exculpatory information:

1. [redacted];
2. The Defendant's cooperation with and provision of information to Government agencies;
3. The Government agencies' assessments of cooperation by and reliability of Sylvia Lee and the Defendant;
4. The Defendant's actions that may be perceived to be inconsistent with an intent to secure an advantage for a foreign nation; and
5. The Government agencies' conclusions about the Defendant's motives.[318]

The relationship between the government and the Lees would not likely have been a major part of any trial, but it certainly had the potential to embarrass the government. The laws on intelligence oversight set out strict procedures for establishing a reporting relationship or an asset relationship with an American citizen. Press reports suggest, for example, that Mrs. Lee provided information to both the FBI and the CIA, including repeated contacts in the mid–1980s where a CIA agent was present for the meetings and paid for the hotel room where the meetings took place.[319] If the government had failed to conform to any of the laws or regulations in these matters, it could expect the defense to bring them up at trial.

The Plea Agreement

After Judge Parker ruled that Dr. Lee had to be released pending trial, the landscape shifted markedly. By September 13, the government reached the plea agreement which has been previously described. When the judge accepted the plea agreement, Dr. Lee was set free, subject only to the requirement that he undergo three weeks of intense debriefing, subject himself to a polygraph on questions related to the case, and remain available to cooperate with the FBI for a period of one year.

During the plea hearing, Judge Parker asked the government to explain why the government considered the agreement to be in the best interest of the nation. The government's lead prosecutor, Mr. Stamboulidis, answered that the plea provided the ''best chance to find out with confidence precisely what happened to the classified material and data'' on the missing tapes, which he said had been the government's ''transcending concern.'' [320] He also explained that the cooperation agreement would allow the government to verify Dr. Lee's statements, and that Dr. Lee would be at great risk if he failed to fully cooperate or to be truthful. And, finally, Mr. Stamboulidis said, ''this disposition avoids the public dissemination of certain nuclear secrets which would have necessarily occurred on the way towards proceeding towards conviction in this case at trial.'' [321]

The judge was not entirely convinced, asking ''why the government argued so vehemently that Dr. Lee's release earlier would have been an extreme danger to the government at this time he, under the agreement, will be released without any restrictions?'' [322]

Referring to two sworn statements Dr. Lee had provided on the morning of the plea hearing, Mr. Stamboulidis said that Dr. Lee had finally, ''for the first time, given us these assurances that he never intended any harm to our nation by his mishandling these materials in an unlawful way and that he never allowed them to fall into harm's way and compromise national security.'' [323]

Again, the judge was not persuaded, saying, ''Throughout this case, the government has repeatedly questioned the veracity of Dr. Lee. You're saying now, simply because he has given a statement under oath, the government no longer believes he is a threat to national security?'' [324]

The judge appeared to be not so much concerned that the plea agreement was inappropriate, but that it could have been reached much sooner. He noted that the government had rejected a written offer from Dr. Lee's attorneys to have Dr. Lee explain the missing tapes under polygraph exam, which was essentially the same deal the government got in the end (minus the felony count). Judge Parker also reminded counsel for both sides that at the December detention hearing he had asked the parties to pursue the offer made by Mr. Holscher, but nothing came of it. Mr. Stamboulidis took issue with the judge, saying that after the indictment, the offer had been withdrawn, to which Judge Parker replied:

''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.'' [325]

The net effect of Judge Parker's questions and the government's apparent reversal on the matter of the threat posed by Dr. Lee created the impression that the case had collapsed. This led to some sharp questions to the Attorney General and FBI Director Freeh at the September 2000 hearing. Director Freeh explained that serious negotiations about a plea agreement had begun during the summer at the direction of Judge Parker, and reiterated that the over-arching reason for the government's decision to make the agreement was to find out what happened to the tapes.[326]

After noting that he and the Attorney General were in total agreement with the decision on the plea deal, Director Freeh outlined five other factors which figured into the government's decision which are summarized below:

1. Judge Parker's strong suggestion that the case was appropriate for mediation rather than trial;
2. Judge Parker's rulings in favor of the defendant in initial proceedings under CIPA, which made it appear that Dr. Lee might succeed in his attempt at graymail because the judge's reasoning left little room to expect that the government would prevail;
3. Judge Parker's August ruling (although stayed by the Tenth Circuit) that created the ''very real prospect that Dr. Lee would soon be released in any event under conditions that we pointed out to the judge were inadequate to prevent Dr. Lee's communications with others.''
4. The potential that the trial would become a ''battle of the experts'' with regard to the classification level and importance of the material on the tapes; and
5. The fact that ''the FBI's lead case agent had had to correct erroneous testimony from the initial detention hearing,'' including the agent's misstatement about Dr. Lee telling another scientist he wanted to use his computer to download a resume (when Dr. Lee had actually said he wanted to download some files), and the agent's overstatement of evidence relating to whether Dr. Lee had sent letters to find outside employment.[327]

Director Freeh's statements provide a compelling rationale for the government's decision to accept the plea agreement. What has not been adequately explained, however, is the decision to keep Dr. Lee in such onerous conditions of pretrial confinement. After

careful review, it becomes apparent that the government was right to reach a plea agreement with Dr. Lee, whose actions did constitute a serious threat to the national security, but was wrong to hold him virtually incommunicado in pretrial confinement for more than nine months.

ENDNOTES

1. ''Plea and Disposition Agreement,'' United States vs. Wen Ho Lee, Criminal No. 99–1417 JP, 13 September 2000: 2.

2. Although the request that was rejected by the Department of Justice's Office of Intelligence Policy and Review did not ask for computer surveillance, both the FBI and the DoJ acknowledge that this would have become part of any approved surveillance plan.

3. House of Representatives, ''Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China,'' 105th Congress, 2d Session, Report 105–851, 25 May 1999. [Hereafter Cox Committee Report]

4. Carla Anne Robbins, ''China Got Secret Data on U.S. Warhead,'' Wall Street Journal, January 7, 1999: 1.

5. Robbins, 1.

6. Robbins, 1.

7. James Risen and Jeff Gerth, ''Breach at Los Alamos: A Special Report,'' New York Times, March 5, 1999: A1.

8. Risen and Gerth, 1.

9. Risen and Gerth, 1. It should be noted that the New York Times, generally, and Risen and Gerth specifically, came under fierce attack for their original article, which was said to have vastly overstated the case against Dr. Lee. Shortly after Dr. Lee was freed in September 2000, the NYT published a statement finding fault with its coverage of the case, and promising a thorough review of the matter, which was published in a two-article series in February 2001. See Matthew Purdy, ''The Making of a Suspect: The Case of Wen Ho Lee,'' New York Times, February 4, 2001: 1, and Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 5, 2001: 1.

10. Risen and Gerth, 1.

11. Josef Hebert, ''Government scientist involved in probe is fired,'' Associated Press, March 8, 1999: 1.

12. James Risen, ''U.S. Fires Scientist Suspected of Giving China Bomb Data,'' New York Times, March 9, 1999: A1.

13. Risen, 1.

14. See Cox Committee Report, Volume I, 90–91.

15. See ''Science at its Best, Security at its Worst: A Report on Security Problems at the U.S. Department of Energy,'' A Special Investigative Panel of the President's Foreign Intelligence Advisory Board, June 1999.

16. Senate Governmental Affairs Committee Chairman Fred Thompson (R–TN) and Ranking Minority Member Joseph Lieberman (D–CT), statement, ''Department of Energy, FBI, and Department of Justice Handling of the Espionage Investigation into the Compromise of Design Information on the W–88 Warhead,'' August 5, 1999: 1.

17. The initial plan was to commission a Task Force, which I would chair. By October, Senator Hatch had prepared a resolution transferring me from the Constitution Subcommittee to the subcommittee on Administrative Oversight and the Courts, and spelling out the areas of inquiry and special procedures applicable to the investigation. In the end, the subcommittee's investigation was conducted pursuant to two subpoena resolutions which spelled out, in general terms, the investigative mandate. The first subpoena resolution, adopted by a vote of 18–0 on October 14, 1999, authorized the charirman, in consultation with the ranking member, to issue a subpoena requiring the Attorney General to produce certain documents if they were not delivered voluntarily. The second resolution, authorizing subpoenas in 38 categories for individuals and documents, was approved (not unanimously) on November 17, after a narrower proposal by Senator Leahy was rejected.

18. The indictment alleged violations of the following sections of the U.S. Code: 42 USC 2276, 42 USC, 2275, 18 USC 793(c), and 18 USC 793(e).

19. The term ''Restricted Data'' means all data concerning: (1) the 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. 42 U.S.C. §2014(y).

20. United States Senate, ''Joint Hearing on the Wen Ho Lee Case,'' before the United States Senate Select Committee on Intelligence and Committee on the Judiciary. 106th Congress, 2nd Session, September 26, 2000: 38. Testimony of FBI Director Louis Freeh. [Hereafter ''Joint Hearing''']

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

22. Transcript of Proceedings, Detention Hearing, December 13, 1999, 38.

23. Transcript of an in camera proceeding held on December 29, 1999, United States v. Wen Ho Lee, 59.

24. Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 5, 2001, online edition.

25. Transcript of Proceedings before The Honorable James A. Parker, U.S. v. Wen Ho Lee, September 13, 2000: 55 [Hereafter Plea Hearing, September 13, 2000]

26. Plea Hearing, September 13, 2000: 58.

27. ''President Clinton calls Lee case 'troubling' '', CNN website September 14, 2000.

28. Transcript of Proceedings, Motion Hearing, December 27, 1999: 49. [Hereafter Motion Hearing].

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

30. Michael W. Lowe, ''Application and Affidavit for Search Warrant,'' April 9, 1999: 1–2.

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

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

33. Redacted Transcript, 15.

34. Redacted Transcript, 15.

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

36. Ian Hoffman, ''Agent: Lee Admitted Lying,'' Albuquerque Journal, January 18, 2000, online edition.

37. Redacted Transcript, 16.

38. The FBI could tell from the text of the intercepted call that Dr. Lee had heard of the other scientist through a mutual friend. What the FBI could not learn from that call, and what Dr. Lee did not fully explain until sometime later, was that he had learned about the other scientist when he visited LLNL in October, 1982. His actions upon learning about the other scientist's situation are of particular importance.

39. See declassified transcript of closed portion of detention hearing on December 29, 1999, during which FBI Special Agent Robert Messemer characterizes the fact that Dr. Lee called the Coordination Council of North America at the same time he was calling the LLNL scientist as more troubling then the fact that he lied to the FBI about having called the LLNL scientist.

40. United States Senate, Joint Hearing before the Senate Select Committee on Intelligence and the Senate Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2001: 72.

41. Draft #3 of the 1997 FISA request, 10.

42. Redacted Transcript, 16–17; Thompson and Lieberman Statement, 6, 16.

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

44. FBI Director Freeh testified at a joint hearing of the Senate Judiciary and Select Intelligence Committees on September 26, 2000 that ''the FBI's investigation into this 1994 matter was still ongoing when Dr. Lee emerged as a potential subject in the 1996 administrative inquiry. . . . Being aware of the potential interest in Dr. Lee, and not wanting to take any steps that would interfere with the inquiry or expose the FBI's interest in him, FBI headquarters and FBI Albuquerque agreed to hold the investigation of the 1994 investigation in abeyance.'' See hearing transcript, 46–47. At another hearing the following week, Mr. Trulock testified, however, that ''The DOE/FBI's team's first visit to the laboratory occurred in 1996. . . . DOE first learned of Dr. Wen Ho Lee when he was brought to our attention by Robert Vrooman in January of 1996. . . .'' See Judiciary Committee hearing, October 3, 2000: 43.

45. Thompson and Lieberman Statement, 6, footnote 14.

46. Redacted Transcript, 108–109.

47. Redacted Transcript, 109.

48. Redacted Transcript, 109.

49. Ian Hoffman, ''Lawyer: Lee's Intent in Question,'' Albuquerque Journal, January 5, 2000, at http://wenholee.org/ABQJournal010500.htm.

50. For a discussion of this issue, see Motion Hearing, 147–157.

51. Motion Hearing, 152–153.

52. DOE Assistant Secretary for Congressional and Intergovernmental Affairs John C. Angell, letter to Senator Charles Grassley of December 20, 2000, responding to written questions submitted by Senator Arlen Specter following a September 27, 2000, hearing of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts: 21.

53. See John Angell's December 20, 2000 letter to Senator Grassley, 20.

54. Even if DOE computer personnel and counterintelligence were unaware that Dr. Lee was under investigation by the FBI, and that would have been possible in 1994, it would not have been inappropriate for DOE to share records of systems like NADIR with the FBI. This has the benefit of allowing the FBI to find out if any individuals are being flagged by security and monitoring systems, without alerting computer personnel to the investigation.

55. United States of America, ''Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention,'' December 23, 1999.

56. The ''walk-in'' document is so named because an individual provided this information to the United States without being solicited for it, in other words, he ''walked-in'' with the information. The documents he provided contained classified nuclear weapons information.

57. Energy Secretary William Richardson, letter to FBI Director Louis J. Freeh, of October 29, 1999L 1.

58. For example, a September 16, 1996 FBI 302 from an interview of a scientist says that in September 1995 the KSAG met and ''there was no disagreement that 'Restricted Data' information had been acquired by the Chinese. The only disagreement was over how valuable the information was.''

59. DOE Administrative Inquiry, 38.

60. DOE Administrative Inquiry, 36.

61. DOE Administrative Inquiry, 38.

62. See FBI 302 dated September 2, 1999, from an interview of the FBI agent who was detailed to assist with the AI, 4.

63. FBI teletype from FBIHQ to FBI–AQ, dated August 20, 1996: 3.

64. FBI 302 dated 9/16/96 (from an interview on 9/13/96) of a LANL scientist, 2.

65. William Broad, ''Spies Versus Sweat: The Debate Over China's Nuclear Advance,'' New York Times, September 7, 1999, Online Edition.

66. Vernon Loeb and Walter Pincus. ''China Prefers the Sand to the Moles,'' Washington Post, December 12, 1999, A02.

67. United States House of Representatives, Report of the Select Committee on U.S. National Security and Military/Commercial Concerns With the People's Republic of China, May 25, 1999: Volume 1, 83–84. [Hereinafter, Cox Report] A ''walk-in'' is an individual who voluntarily offers to conduct espionage.

68. President's Foreign Intelligence Advisory Board. Science at its Best; Security at its Worst, June 1999, 30–31.

69. Thompson and Lieberman Statement, 6–7.

70. X-Division Open LAN Rules of Use, Executed by Dr. Wen Ho Lee on April 19, 1995.

71. United States Senate, Senate Select Committee on Intelligence, testimony of FBI Director Louis J. Freeh at a ''Closed Hearing,'' May 19, 1999: 34.

72. Thompson and Lieberman Statement, 9.

73. ''Richardson Announces Results of Inquiries Related to Espionage Investigation,'' Department of Energy News Release, August 12, 1999.

74. Thompson and Lieberman Statement, 9.

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

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

77. See Redacted Transcript, 35 and 88.

78. Bellows Report, 482.

79. Redacted Transcript, 118–119.

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

81. Redacted Transcript, 52.

82. Redacted Transcript, 52.

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

84. Bellows Report, 548.

85. Redacted Transcript, 49.

86. Redacted Transcript, 49.

87. Redacted Transcript, 24–25.

88. Redacted Transcript, 39.

89. Redacted Transcript, 39.

90. Bellows Report, 549.

91. Redacted Transcript, 40.

92. Redacted Transcript, 36.

93. Redacted Transcript, 56.

94. Redacted Transcript, 117.

95. Redacted Transcript, 117.

96. Bellows Report, 541.

97. Motion Hearing, 85. See also Pete Carey, ''Los Alamos Suspect May Have Been Doing His Job: Rerouting Files Common at Lab,'' Florida Times-Union, June 20, 1999, G–8.

98. ''With Intent to Injure the U.S.'' Washington Times, editorial, December 4 1999, A16.

99. United States of America, ''Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention,'' December 23, 1999, 3–4.

100. Hoffman.

101. Thompson and Lieberman Statement, 23–24.

102. Unclassified summary of the December 19, 1997, FBIHQ teletype to Albuquerque, provided by FBI Office of Public and Congressional Affairs, December 3, 1999.

103. FISA Request, November 10, 1998: 11.

104. FISA Request, November 10, 1998: 11.

105. FISA Request, November 10, 1998: 11.

106. FISA Request, November 10, 1998: 11.

107. FISA Request, November 10, 1998: 11.

108. FISA Request, November 10, 1998: 11–12.

109. FISA Request, November 10, 1998: 12.

110. FBI memorandum, [title redacted], from FBI National Security Division to FBI–AQ, dated December 10, 1998: 1–2.

111. PFIAB, 34.

112. See the undated, unsigned memorandum provided to the subcommittee by the FBI Office of Congressional Affairs in December 1999.

113. See the undated, unsigned memorandum provided to the subcommittee by the FBI Office of Congressional Affairs in December 1999.

114. See the undated, unsigned memorandum provided to the subcommittee by the FBI Office of Congressional Affairs in December 1999.

115. FBI EC from Albuquerque to FBIHQ, dated December 8, 1998: 1.

116. See the letter of DOE Assistant Secretary for Congressional and Intergovernmental Affairs John Angell to Senator Arlen Specter of December 20, 2000, which encloses answers prepared by Mr. Curran to follow-up questions from the September 27, 2000 hearings of the Judiciary Subcommittee on Administrative Oversight and the Courts.

117. It is troubling that the level of attention paid to Dr. Lee's activities in 1998 was so low, and the coordination between DOE and FBI was so poor, that counterintelligence personnel did not even learn of his previous trip to Taiwan, in March-April 1998, until after he was already out of the United States.

118. See the letter of DOE Assistant Secretary for Congressional and Intergovernmental Affairs John Angell to Senator Arlen Specter of December 20, 2000, which encloses answers prepared by Mr. Curran to follow-up questions from the September 27, 2000 hearing of the Judiciary Subcommittee on Administrative Oversight and the Courts.

119. See the letter of DOE Assistant Secretary for Congressional and Intergovernmental Affairs John Angell to Senator Arlen Specter of December 20, 2000, which encloses answers prepared by Mr. Curran to follow-up questions from the September 27, 2000 hearing of the Judiciary Subcommittee on Administrative Oversight and the Courts.

120. See 1999 Report of DOE Inspector General regarding Dr. Lee's clearance and access, 101.

121. At the December 14, 1999 meeting in which Director Freeh asked the subcommittee to suspend its oversight of the Wen Ho Lee case, Mr. Curran was asked about an FBI memo from February 1999 which claimed that Mr. Curran had instructed his personnel not to share the charts and videotape of the December 1998 polygraph with the FBI. After seeing an early draft of the interim report. Mr. Curran wrote a letter on January 31, 2000, denying the information in the FBI report. He also sent a copy of a letter he had received from FBI Assistant Director Neil Gallagher, which described the memo in question as a ''blind memo'', not intended to capture actual witness statements.

122. Ed Curran, Director, DOE Office of Counterintelligence, letter to Senator Arlen Specter, January 31, 2000: 2–3.

123. See the letter of 20 December 2000 from John C. Angell, Assistant Secretary of Congressional and Intergovernmental Affairs, Department of Energy to Senator Charles Grassley, which enclosed responses from Mr. Curran to 22 questions from Senator Specter.

Wackenhut is a private company that has a contract with DOE to perform security related polygraphs.

125. Matthew Purdy, ''The Making of a Suspect: The Case of Wen Ho Lee,'' New York Times, February 4, 2001, online edition.

126. ''Department of Energy Chronology,'' May 6, 1999: 7–8.

127. United States Senate, Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, ''Continuation of Oversight of the Wen Ho Lee Case,'' 106th Congress, 2nd Session, 27 September 2000: 62. [Hereafter, 27 September 2000 hearing]

128. 27 September 2000 hearing: 62–63.

129. FBI Assistant Director for National Security Neil Gallagher, Memorandum of 18 December 1998: 1.

130. 27 September 2000 hearing: 32.

131. United States Senate, Senate Select Committee on Intelligence, ''Closed Hearing,'' 106th Congress, 2nd Session, May 19, 1999: 7.

132. FBI Supervisory Special Agent C.H. Middleton to Ms. Horan, dated January 21, 1999: 2.

133. DOE IG Gregory H. Friedman, letter to Senator Arlen Specter of October 2, 2000, enclosing a declassified segment of a 1999 Report by the IG. This information comes from page 113 of the full report.

134. DOE IG Gregory H. Friedman, letter to Senator Arlen Specter of October 2, 2000, enclosing a declassified segment of a 1999 Report by the IG. This information comes from page 115 of the full report.

135. DOE IG Gregory H. Friedman, letter to Senator Arlen Specter of October 2, 2000, enclosing a declassified segment of a 1999 Report by the IG. This information comes from page 116 of the full report.

136. Deposition of Supervisory Special Agent Craig Schmidt by Mr. Eric George of the Senate Committee on the Judiciary staff, 29 July 1999: 91.

137. U.S. Department of Energy Psychophysiological Detection of Deception (PDD) Examination Report, File #99–2A–003, December 23, 1998, statement of Wolfgang Vinskey.

138. U.S. Department of Energy Psychophysiological Detection of Deception (PDD) Examination Report, File #99–2A–003, December 23, 1998, statement of John P. Mata.

139. John P. Mata, memorandum ''Psychophysiological Detection of Deception (PDD) Examination of Wen Ho Lee,'' for Edward Curran, December 28, 1998: 3–4.

140. This memo was undoubtedly after Mr. Mata received a call from Ed Curran who was

told on December 14, 1999 of an FBI document which said that the FBI had not initially been able to get access to the charts, per instructions from Ed Curran.

141. John P. Mata, Memorandum for the Record, ''Recollection of Events Regarding DOE Polygraph Examination of Wen Ho Lee, December 23, 1998,'' December 21, 1999: 2.

142. John P. Mata, Memorandum for the Record, ''Recollection of Events Regarding DOE Polygraph Examination of Wen Ho Lee, December 23, 1998,'' December 21, 1999: 2.

143. John P. Mata, Memorandum for the Record, ''Recollection of Events Regarding DOE Polygraph Examination of Wen Ho Lee, December 23, 1998,'' December 21, 1999: 2.

144. OCI Polygraph Program Manager David M. Renzleman, Polygraph Program Record of Quality Assurance, undated, 1.

145. OCI Polygraph Program Manager David M. Renzleman, Polygraph Program Record of Quality Assurance, undated, 2.

146. See FBI Headquarters internal memo dated February 2, 1999 and or February 6, 1999 on the same subject.

147. United States Senate, Committee on Governmental Affairs, Testimony from June 9, 1999 closed hearing: 145.

148. Undated FBI response to questions for the record submitted by Senator Arlen Specter following the Senate Judiciary Subcommittee on Department of Justice Oversight hearing, ''Continuation of Oversight on the Wen Ho Lee Case,'' on September 27, 2000: 1.

149. FBI ASAC William Lueckenhoff, memorandum to DAD Sheila Horan, February 26, 1999: 1.

150. DOE IG Gregory H. Friedman, letter to Senator Arlen Specter of October 2, 2000, enclosing a declassified segment of a 1999 Report by the IG. This information comes from page 116 of the full report.

151. FBI Assistant Director Neil J. Gallagher, letter to Mr. Edward J. Curran of January 4, 2000: 1.

152. Ian Hoffman, ''Lee Denied Bail; Court Cites Risk,'' Albuquerque Journal, December 30, 1999: A1.

153. Sharyl Attkisson, ''Wen Ho Lee's Problematic Polygraph,'' February 4, 2000, accessed at http://www.cbsnews.com/now/story/0,1597,157220-412,00.shtml. [Hereafter, ''Wen Ho Lee's Problematic Polygraph''']

154. ''Wen Ho Lee's Problematic Polygraph.''

155. ''Wen Ho Lee's Problematic Polygraph.''

156. ''Wen Ho Lee's Problematic Polygraph.''

157. Dr. Michael Capps, Deputy Director of Developmental Programs, Defense Security Service, letter to Senator Arlen Specter of June 25, 2001: 1. [Hereafter, Capps letter]

158. Capps letter, 2–3.

159. Capps letter, 3.

160. Capps letter, 4.

161. Richard W. Keifer, letter to Senator Arlen Specter of June 26, 2001, ''Your letter of May 22, 2001 regarding the Dr. Wen Ho Lee polygraph Examination on December 23, 1998,'' 1. [Hereafter, Keifer letter.]

162. Keifer letter, 3.

163. Keifer letter, 3.

164. Keifer letter, 5.

165. Assistant Attorney General Daniel J. Bryant, letter to Senator Patrick Leahy and Senator Arlen Specter of June 28, 2001.

166. FBI ''Chronology of Significant Events Between 12/23/98 and 2/10/99,'' prepared for use by FBI Director Louis Freeh at a joint hearing of the Senate Select Committee on Intelligence and the Senate Judiciary Committee on September 26, 2000: 1. [Hereafter, FBI Unclassified Chronology.]

167. DOE IG Gregory H. Friedman, letter to Senator Arlen Specter of October 2, 2000, enclosing a declassified segment of a 1999 Report by the IG. This information comes from page 116 of the full report.

168. Assistant Secretary of Energy for Congressional and Intergovernmental Affairs John Angell, letter to Senator Grassley responding to questions from Senator Arlen Specter after a hearing before the Judiciary Subcommittee on Administrative Oversight and the Courts on September 27, 2000: 17.

169. Undated FBI response to questions for the record from Senator Arlen Specter following a hearing of the Senate Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' of September 27, 2000: 1.

170. FBI Chronology of Wen Ho Lee Investigation 1999–2000: 12.

171. Transcript of Proceedings, 118.

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

173. Transcript of Proceedings, 146.

174. Thompson and Lieberman Statement, 26.

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

176. Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 5, 2001, online edition.

177. Matthew Purdy, ''The Making of a Suspect: The Case of Wen Ho Lee,'' New York Times, February 4, 2001, online edition. Unless otherwise noted, the description of the government's actions in the first week of March 1999 is taken from this article.

178. Matthew Purdy, ''The Making of a Suspect: The Case of Wen Ho Lee,'' New York Times, February 4, 2001, online edition.

179. In his written statement to the Joint Hearing of the Senate Select Committee on Intelligence and the Judiciary Committee on September 26, 2000, Director Freeh said, ''One approach that was taken during that interview was not consistent with the conduct expected of agents during an interview. Specifically, Dr. Lee was reminded of the fate of Julius and Ethel Rosenberg, who were executed for espionage. Confrontational interviews often call for tough statements by investigators, but that implication was inappropriate. Again, Dr. Lee ended the interview without providing any useful information and without giving any indication of the actions to which he has now pled guilty.'' When asked by Senator Specter at the September 26 hearing about the Rosenberg reference and the harsh conditions of confinement and the inference that these measures might be intended to coerce a confession, Director Freeh responded, ''I would disagree very strongly with the suggestion or the notion that anything was done with respect to confinement, or anything else in this case, to improperly or unfairly treat Dr. Lee.'' See hearing transcript, 81.

180. For a discussion of the issue of how Dr. Lee's name was leaked to the press, see pages 53, 54, 64 and 65 of the transcript of the Senate Judiciary Subcommittee on Department of Justice Oversight hearing on October 3, 2000, during which Mr. Trulock says that NYT reporter James Risen told him that Energy Secretary Richardson leaked Dr. Lee's name to the media. Secretary Richardson vehemently denied being the source of the leak, both in a letter to Senator Hatch on October 3, 2000, in which he said he had received a letter from Senator Specter requesting a hearing on the basis of Mr. Trulock's statement. In reply, Secretary Richardson said, ''Mr. Risen has denied that he made this statement to Mr. Trulock, and I categorically deny that I shared Mr. Lee's name with Mr. Risen.'' Secretary Richardson made the same denials to Senator Specter in a meeting on October 5, 2000, but a review of the articles in question shows that Secretary Richardson gave an on the record interview in which he named Dr. Lee and made several comments about his lack of cooperation. Although Dr. Lee's name had first appeared in the press in an AP article the day before, Secretary Richardson confirmed on the record that Dr. Lee was the individual who had been fired for security violations.

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

182. Attorney General Janet Reno and FBI Director Louis Freeh, letter to Senator Orrin Hatch, October 1, 1999: 1.

183. FBI Albuquerque EC to FBI HQ of January 22, 1999: 2.

184. FBI Albuquerque EC to FBI HQ of January 22, 1999: 3–4.

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

186. Gallagher, letter of November 10, 1.

187. Gallagher, letter of November 10, 2.

188. Robert H. Hast, Managing Director of the General Accounting Office's Office of Special Investigations, letter to Senators Arlen Specter, Charles Grassley and Robert Torricelli, ''Subject: FBI Official's Congressional Testimony Was Inaccurate Because He Failed to Present Certain Information That Had Been Made Available to Him About the Wen Ho Lee Investigation,'' of June 28, 2001: 1.

189. FBI Albuquerque, ''Changed: FBI–DOE National Laboratory Assessment. . . .'' July 9, 1999: 6.

190. FBI Albuquerque, ''Changed: FBI–DOE National Laboratory Assessment. . . .'' August 26, 1999: 6–7.

191. See ''DCI Statement on Damage Assessment,'' at *http://www.cia.gov/cia/public*__affairs/ press__release/ps042199.html, and the ''Key Findings'' at *http://www.cia.gov/cia/public*__affairs/ press__release/0421kf.html.

192. Cox Committee Report, Vol 1, 68.

193. Cox Committee Report, Vol 1, 83–84.

194. According to a chronology prepared by the Justice Department, the discovery occurred on March 23, 1999. That it took more than two weeks after Dr. Lee had been dismissed from LANL (and nearly three weeks after he gave permission to search his office) to find this document is very troubling.

195. United States Senate, Joint Hearing of the Senate Select Committee on Intelligence and the Senate Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 52.

196. FBI Director Louis J. Freeh, ''STATEMENT BY FBI DIRECTOR LOUIS J. FREEH,'' September 13, 2000: 2.

197. Transcript of Proceedings, United States v. Wen Ho Lee, September 13, 2000: 34–37.

198. Transcript of Proceedings, United States v. Wen Ho Lee, September 13, 2000: 48–50.

199. Although the subcommittee has not had access to the files from the criminal case against Dr. Lee, it should be noted that none of the information otherwise available suggests that the government applied for a Title III wiretap between March and December 1999. If the government was concerned that

he might somehow communicate the existence of the tapes to a third party, it should have requested a wiretap. It may be that the wiretap was requested and received, but the absence of any such request would strongly undermine the government's claim that restricting his communications was necessary to protect the tapes.

200. Unless otherwise noted, all the information in this section is drawn from a chronology prepared by the Department of Justice and forwarded to the Senate Judiciary Committee on June 22, 2001.

201. Mark Holscher, letter to Robert Gorence and John Hudenko, of March 10, 1999: 1. [DOJ–WHL–00001–00002]

202. FBI Chronology of Wen Ho Lee investigation from 1999–2000: 2.

203. Mark Holscher, letter to John Kelly, of March 19, 1999: 1–2. [DOJ–WHL–00005–00006]

204. The Chronology of Wen Ho Lee investigation from 1999–2000 says this is discovered on March 21, 1999. See Chronology, 2.

205. Mark Holscher, letter to John Kelly, of March 23, 1999: 1–2. [DOJ–WHL–00009–00010]

206. Mark Holscher, letter to FBI Director Louis J. Freeh, of March 23, 1999: 1–3. [DOJ–WHL–00011–00013]

207. Mark Holscher, letter to Robert Gorence, of March 29, 1999: 1. [DOJ–WHL–00014]

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

209. Thompson and Lieberman Statement, 28–29.

210. Thompson and Lieberman Statement, 28.

211. In view of DOJ's assertion that it never had any sort of wiretap on Dr. Lee, this likely refers to FISA material from the investigation of the other scientist to whom Dr. Lee spoke by telephone in December 1982.

212. John Kelly and Robert Gorence, letter to Mark Holscher of April 16, 1999: 1–2. [DOJ–WHL–00015–00016]

213. FBI Chronology of Wen Ho Lee investigation from 1999–2000: 5.

214. FBI Chronology of Wen Ho Lee Investigation from 1999–2000: 6.

215. John Kelly and Paula Burnett, letter to Brian Sun, of May 5, 1999: 1–2. [DOJ–WHL–0017–0018]

216. Brian Sun, letter to John Kelly and Paula Burnett, of May 6, 1999: 1–2. [DOJ–WHL–00021–00022]

217. FBI Chronology of Wen Ho Lee investigation from 1999–2000: 7.

218. John Kelly, letter to Mark Holscher, of June 15, 1999: 1–2. [DOJ–WHL–00030–00031]

219. FBI Chronology of Wen Ho Lee investigation from 1999–2000: 8–9.

220. No subpoenas were issued pursuant to these resolutions because the investigation into the Wen Ho Lee case was suspended in December at the request of Director Freeh and the Department of Justice. The resolutions were intended as temporary measures to ensure that the subcommittee could continue its work during the congressional recess. When the Senate returned the following January, several other individual subpoenas on matters under investigation by the subcommittee were, in fact, debated and voted on. No subpoena requested by the subcommittee was defeated in the full committee.

221. Walter Pincus and David A. Vise, ''Blunders Undermined Lee Case,'' Washington Post, September 24, 2000: A1.

222. Senator Arlen Specter, letter to FBI Director Louis J. Freeh of December 7, 1999. 1–2.

223. FBI Director Louis J. Freeh, letter to Senator Arlen Specter of December 10, 1999: 1.

224. Director Freeh letter of December 10, 1999: 1–2.

225. United States Senate, Joint Hearing before the Senate Select Committee on Intelligence and the Senate Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 63.

226. There are a number of other issues that raise questions as to whether the government fully pursued all the information it had available during the course of its investigation. These questions were identified in a June 27, 2001 letter from senators Patrick Leahy and Arlen Specter to Attorney General Ashcroft. With the exception of confirming that Dr. Lee has told investigators that the tapes were still in his office as of December 23, 1998, however, the Department continues to refuse to answer these questions on the ground that the case is still open.

227. United States Senate, Joint Hearing before the Senate Select Committee on Intelligence and the Senate Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 83.

228. In response to a question from staff on July 5, 2001, Sheryl Walter of DOJ's Office of Legislative Affairs confirmed that Dr. Lee had never been the target of electronic surveillance.

229. Transcript of a closed Detention hearing on December 29, 1999, United States v. Wen Ho Lee, 59.

230. FBI Chronology of Investigation from 1999–2000: 6.

231. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 7.

232. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 7.

233. Robert J. Gorence, ''RESPONSE TO DEFENDANT WEN HO LEE'S MOTION TO REVOKE JUDGE SVET'S ORDER OF DETENTION,'' United States v. Wen Ho Lee, December 23, 1999: 18.

234. Robert J. Gorence, ''RESPONSE TO DEFENDANT WEN HO LEE'S MOTION TO REVOKE JUDGE SVET'S ORDER OF DETENTION,'' United States v. Wen Ho Lee, December 23, 1999: 7–8.

235. Robert J. Gorence, ''RESPONSE TO DEFENDANT WEN HO LEE'S MOTION TO REVOKE JUDGE SVET'S ORDER OF DETENTION,'' United States v. Wen Ho Lee, December 23, 1999: 14.

236. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 1.

237. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 10.

238. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 10–11.

239. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 12–13.

240. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 13.

241. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 14.

242. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 14.

243. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 16.

244. Judge James A. Parker, ''MEMORANDUM OPINION AND ORDER,'' United States v. Wen Ho Lee, December 30, 1999: 19.

245. Taken from the ''Overview'' section of the website, http://wenholee.org/

246. Memorandum from Lawrence Barreras, Senior Warden to Rick Ploof, Supervisor Deputy United States Marshal For Prisoner Operations dated December 14, 1999 re: High Security Supervision.

247. Memorandum from Lawrence Barreras, Senior Warden to Rick Ploof dated January 4, 2000 re: Segregation Inmates.

248. Mark Holscher, letter to John Kelly and Robert Gorence, ''Re: Dr. Wen Ho Les,'' of December 21, 1999: 1.

249. Energy Secretary William Richardson, letter to Attorney General Janet Reno, ''Re: United States v. Wen Ho Lee,'' of December 27, 1999: 1.

250. United States Marshal John S. Sanchez, letter to Warden Lawrence Barreras, ''Re: Federal Inmate Wen Ho Lee,'' of January 6, 2000: 1–2.

251. Mr. John D. Cline, letter to Mr. Robert Gorence, ''Re: United States v. Wen Ho Lee,'' of January 6, 2000: 1.

252. Principal Associate Deputy Attorney General Gary G. Grindler, ''MEMORANDUM FOR THE ATTORNEY GENERAL and THE DEPUTY ATTORNEY GENERAL,'' January 12, 2000: 1.

253. See Attorney General Janet Reno, ''MEMORANDUM FOR JOHN W. MARSHALL, SUBJECT: Origination of Special Administrative Measures of Confinement Conditions on Federal Government Pre-Trial Detainee Wen Ho Lee,'' of January 13, 2000: 1.

254. Energy Secretary Bill Richardson, letter to Attorney General Janet Reno of May 4, 2000: 1.

255. FBI Special Agent in Charge David V. Kitchen, letter to Norman C. Bay of May 2, 2000: 1.

256. See the letter of Warden Barreras to Mr. Stamboulidis of July 18, 2000, in which he notes that per their telephone conversation and the letter of July 17 from Mr. Stamboulidis, the Warden has removed Dr. Lee's restraints during exercise, but has declined to allow weekend recreation time as it will involve additional staff costs.

257. See, for example, the letter of Mr. John Cline to Mr. Stamboulidis of July 26, 2000, in which Mr. John Kline says that in the two weeks since Mr. Stamboulidis claimed in open court that Dr. Lee would be permitted to exercise without restraints, Dr. Lee had not, in fact been allowed to do so.

258. Warden Lawrence Barreras, letter to Mel George Stamboulidis of August 1, 2000.

259. United States Attorney Norman C. Bay, letter to Attorney General Janet Reno of September 7, 2000: 2.

260. United States Senate, Joint Hearing of the Senate Select Committee on Intelligence and the Senate Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 75.

261. United States Senate, Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, October 3, 2000: 73.

See United States Senate, Joint Hearing of the Senate Select Committee on Intelligence and the Senate Judiciary Committee, ''Joint Hearing of the Wen H. Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 79–80, where Attorney General Reno read Mr. Cisneros' letter into the record.

263. Assistant Attorney General Robert Raben, letter to Senators Leahy, Graham, Hatch And Shelby, of January 20, 2001: 1.

264. Assistant Attorney General Robert Ruben, letter to Senators Leahy, Graham, Hatch and Shelby, of January 20, 2001: 2.

265. Assistant Attorney General Robert Ruben, letter to Senators Leahy, Graham, Hatch and Shelby, of January 20, 2001: 2.

66. Plea Hearing transcript, September 13, 2000: 55.

267. Transcript of Proceedings, United States v. Wen Ho Lee, August 16, 2000: 13.
268. Transcript of Proceedings, United States v. Wen Ho Lee, August 17, 2000: 12.
269. Transcript of Proceedings, United States v. Wen Ho Lee, August 17, 2000: 92.
270. Judge James A. Parker, ''MEMORANDUM OPINION,'' United States v. Wen Ho Lee, August 31, 2000: 3.
271. Judge James A. Parker, ''MEMORANDUM OPINION,'' United States v. Wen Ho Lee, August 31, 2000: 10.
272. Judge James A. Parker, ''MEMORANDUM OPINION,'' United States v. Wen Ho Lee, August 31, 2000: 14–15.
273. ''STATEMENT OF THE FACTS,'' from the Government's public filing in response to the defense appeal of Judge Parker's initial denial of bail, undated, 3–6.
274. Transcript of Proceedings, United States v. Wen Ho Lee, August 16, 2000: 142.
275. Transcript of Proceedings, United States v. Wen Ho Lee, August 16, 2000: 150.
276. United States Senate, Hearing before the Senate Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, October 3, 2000: 17.
277. United States Senate, Hearing before the Senate Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, October 3, 2000: 24.
278. United States Senate, Hearing before the Senate Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, October 3, 2000: 26.
279. Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 4, 2001: online edition.
280. Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 4, 2001: online edition.
281. United States Senate, Hearing before the Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 27, 2000: 57.
282. United States Senate, Hearing before the Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 27, 2000: 58.
283. Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 5, 2001, online edition. See also, MEMORANDUM CONCERNING THE USE, RELEVANCE, AND ADMISSIBILITY OF THE INFORMATION LISTED IN DR. WEN HO LEE'S FIRST NOTICE UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT.
284 Judge James A. Parker, ''COURT DETERMINATIONS AND ORDER ON FIRST NOTICE OF DR. WEN HO LEE UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT,'' August 1, 2000: 3.
285. Judge James A. Parker, ''COURT DETERMINATIONS AND ORDER ON FIRST NOTICE OF DR. WEN HO LEE UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT,'' August 1, 2000: 4.
286. Judge James A. Parker, ''COURT DETERMINATIONS AND ORDER ON FIRST NOTICE OF DR. WEN HO LEE UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT,'' AUGUST 1, 2000: 5.
287. MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION, United States v. Wen Ho Lee, June 25, 2000: 1.
288. MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION, United States v. Wen Ho Lee, June 25, 2000: 1. [Hereafter Selective Prosecution Memorandum]
289. Selective Prosecution Memorandum, 2.
290. Selective Prosecution Memorandum, 2–3.
291. Plea Hearing, September 13, 2000: 50.
292. See DOE press release, ''Richardson Releases Task Force Against Racial Profiling Report and Announces 8 Immediate Actions,'' January 19, 2001. Richardson said that the Task Force had made several general observations, including ''that some employees believed that counterintelligence efforts were targeting employees of Chinese ethnicity,'' but offered no direct proof of any such profiling.
293. Department of Energy Inspector General Gregory Friedman, Memorandum for the Secretary, ''Special Review of Profiling Concerns at the Department of Energy,'' April 3, 2001: 1.
294. Selective Prosecution Memorandum, 5.
295. Selective Prosecution Memorandum, 5.
296. For a discussion of the timing and reasons for Mr. Trulock's departure from DOE, see James Risen, ''Official Who Led Inquiry Into China's Reputed Theft of Nuclear Secrets Quits,'' New York Times, August 24, 1999, online edition.
297. Selective Prosecution Memorandum, 6.
298. Matthew Purdy and James Sterngold, ''The Prosecution Unravels: The Case of Wen Ho Lee,'' New York Times, February 5, 2001, online edition.
299. When questioned in an October 3, 2000 hearing about an August 1995 FBI document quoting Mr. Vrooman as saying that ''a 'smoking gun' had been found,'' Mr. Vrooman testified that he did not know what the memo referred to. After the hearing, Mr. Vrooman refreshed his recollection and wrote to me that the ''smoking gun'' quote referred to the analytical team headed by Mr. Michael Henderson, otherwise known as the Kindred Spirit Analytical Group.
300. United States Senate, Hearing before the Senate Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' October 3, 2000: 65.
301. United States Senate, Hearing before the Senate Judiciary Subcommittee on Department of Justice Oversight, ''Continuation of Oversight on the Wen Ho Lee Case,'' October 3, 2000: 66.
302. Mr. Vrooman furnished this retirement date in his written testimony to the subcommittee on October 3, 2000. He obviously stayed in touch with the lab and may have consulted on certain security issues, but his contact with the case would have been less than during his tenure at the lab.
303. See Department of Energy Press Release, ''Richardson Announces Results of Inquiries Related to Espionage Investigation,'' August 12, 1999. The release says that a DOE counterintelligence official had been told in October 1997 that an espionage suspect [Dr. Lee] should be moved but decided to leave the suspect in place without consulting with senior management. The DOE press release does not name Mr. Vrooman or the others who were disciplined, but an August 13, 1999 story by Vernon Loeb in the Washington Post identifies the three officials as Sig Hecker, Robert Vrooman, and Terry Craig. See Vernon Loeb, ''Richardson Recommends Discipline for 3 in Los Alamos Case,'' Washington Post, August 13, 1999: A9.
304. United States Senate, Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, ''Continuation of Oversight on the Wen Ho Lee Case,'' October 3, 2000: 52–53.
305. FBI memorandum from Albuquerque Division to FBI HQ, ''Request for: (1) FISA Court Order authorizing the interception of signals emanating from the residence of captioned subject; (2) Application for ELSUR (FISA and MISUR coverage) at subject's residence and business location,'' November 10, 1998: 4. [Hereafter, FISA Request, November 10, 1998]
306. FISA Request, November 10, 1998: 4.
307. FISA Request, November 10, 1998: 5.
308. FISA Request, November 10, 1998: 5.
309. FISA Request, November 10, 1998: 5.
310. Selective Prosecution Memorandum, 7.
311. FBI Special Agent Michael W. Lowe, ''APPLICATION AND AFFADIVIT FOR SEARCH WARRANT,'' April 9, 1999: 1.
312. See RESPONSE TO DEFENDANT WEN HO LEE'S MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION, United States v. Wen Ho Lee, July 21, 2000: 11–12.
313. ''A Reply to Misleading Press Reports Concerning Dr. Wen Ho Lee,'' May 6, 2000.
314. This is item D. of the ''Memorandum in Support of Motion to Compel Discovery on Issues other Than Selective Prosecution,'' filed May 10, 2000. Note that the declassified version of this document redacts must of Item D, including the header, but the Government's response spells out the materials in question.
315. ''Memorandum in Support of Motion to Compel Discovery on Issues Other Than Selective Prosecution,'' United States v. Wen Ho Lee, May 10, 20001: 14.
316. ''Response to Defendant Wen Ho Lee's Motion to Compel Discovery on Issues Other than Selective Prosecution, United States v. Wen Ho Lee, June 9, 2000: 6.
317. Judge James A. Parker, ''ORDER,'' July 13, 2000: 3. [Docket number 107 on the case docket]
318. Judge James A. Parker, ''ORDER,'' August 9, 2000: 1–2. [Docket number 130]
319. Matthew Purdy, ''The Making of a Suspect: The Case of Wen Ho Lee,'' New York Times, February 4, 2001: online edition.
320. Transcript of Proceedings, Plea Hearing, United States v. Wen Ho Lee, September 13, 2000: 34.
321. Transcript of Proceedings, Plea Hearing, United States v. Wen Ho Lee, September 13, 2000: 34–36.
322. Transcript of Proceedings, Plea Hearing, United States v. Wen Ho Lee, September 13, 2000: 36.
323. Transcript of Proceedings, Plea Hearing, United States v. Wen Ho Lee, September 13, 2000: 37.
324. Transcript of Proceedings, Plea Hearing, United States v. Wen Ho Lee, September 13, 2000: 37.
325. Plea Hearing transcript, September 13, 2000: 56–57,
326. United States, Joint Hearing Before the Senate Select Committee on Intelligence and the Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 41.
327. United States Senate, Joint Hearing Before the Senate Select Committee on Intelligence and the Judiciary Committee, ''Joint Hearing on the Wen Ho Lee Case,'' 106th Congress, 2nd Session, September 26, 2000: 41–43.

Mr. SPECTER. Mr. President, I now turn to the report on the handling of the espionage case against Dr. Peter H. Lee: Again, I intend to read only a sentence or two, as I have been advised that a sentence or two would be sufficient to have the remainder of the report printed in the RECORD.

On October 7th and 8th, 1997, Dr. Peter Hoong-Yee Lee confessed to the FBI that he

had provided classified nuclear weapons design and testing information to scientists of the People's Republic of China on two occasions in 1985 and had given classified antisubmarine information to the Chinese in May of 1997. The 1985 revelations, which occurred during discussions with, and lectures to, PRC scientists in Beijing hotel rooms, involved his work on hohlraums, devices used to simulate nuclear detonations in a process called Inertial Confinement Fusion, or ICF.[1] According to a 17 February 1998 ''Impact Statement'' prepared by experts from the Department of Energy,

''the ICF data provided by Dr. Lee was of significant material assistance to the PRC in their nuclear weapons development program. . . . For that reason, this analysis indicates that Dr. Lee's activities have directly enhanced the PRC nuclear weapons program to the detriment of U.S. national security.''[2]

The ''Impact Statement'' further notes that ''the ICF Program, when developed in conjunction with an already existing nuclear program, could assist in the design of more sophisticated nuclear weapons.''[3]

Dr. Lee's 1997 disclosures came in two lectures to PRC scientists, again in China, where he discussed his work on the joint U.S./U.K. Radar Ocean Imaging (ROI) project. The objective of the project, which has been carried out over several years at the cost of more than $100 million, is to study the feasibility of using radars to detect submerged submarines. After viewing videotapes of Dr. Lee's confession, Dr. Richard Twogood, former Technical Program Leader for the ROI project, stated that Dr. Lee's disclosures contained classified information at the SECRET level which went right to the heart of the most significant technical achievement of the U.S./U.K. program up until 1995.[4] Although Dr. Lee was not charged for the 1997 disclosures of classified information, a 9 March 2000 review by the Department of Defense concluded that Dr. Lee's anti-submarine warfare revelations were classified at the CONFIDENTIAL level,[5] which, by definition, would damage U.S. national security.[6] According to the Cox Committee Report, ''this research, if successfully completed, could enable the [Chinese military] to threaten previously invulnerable U.S. nuclear submarines.''[7]

Dr. Lee's confessed crimes caused serious harm to U.S. national security, yet he was offered a plea bargain which resulted in a sentence amounting to one year in a halfway house, 3,000 hours of community service and a $20,000 fine. Considering the magnitude of Dr. Lee's offenses and his failure to adhere to the terms of the plea agreement which called for complete cooperation and truthfulness, the interests of the United States were not well served by this outcome.

During the 106th Congress, I chaired a special subcommittee of the Senate Judiciary Committee for the purposes of conducting oversight on the Department of Justice's handling of this case and several other matters. The Subcommittee's review of the Dr. Peter Lee case identified a number of shortcomings in existing procedures for handling espionage investigations and prosecutions, particularly in cases where highly technical classified information is revealed verbally rather than through the transfer of documents. Communications between and within the Department of Justice and other Executive Branch organizations appear to have broken down at critical points during the Peter Lee case, with the result that several key decisions were made on the basis of incomplete or incorrect information. Had this case been handled more formally and deliberately, with more of the critical information being communicated in writing, the opportunities for misunderstandings would have been greatly reduced, and the chances of Dr. Lee receiving a long prison sentence commensurate with his crimes would have been greatly increased. Specifically, the Subcommittee's investigation showed that:

The classified nuclear weapons design and anti-submarine warfare information that Dr. Lee revealed in 1985, 1997, and on other occasions may have merited prosecution under 18 USC 794, the most serious of the espionage statutes.

Senior DoJ officials, including the Attorney General and the Deputy Attorney General, were not sufficiently involved in or aware of the case. Principal Deputy Assistant Attorney General John Keeney, the official with final approval authority in the case, advised that he would not have approved the plea bargain had he known the trial prosecutor would ask for only a short period of incarceration and would charge only an attempt to transmit classified information.[8]

The Department of Justice's ability to seek a tougher plea agreement or to prosecute Dr. Lee under section 794 was hampered by its failure to fully understand the classification level of, and the damage to national security from, Dr. Lee's nuclear weapons design revelations prior to offering him a plea agreement.

DoJ failed to inform the court that Dr. Lee repeatedly confessed to disclosing classified information to the PRC in 1997, allowing the defense to convince the judge during sentencing that the only time Dr. Lee intentionally passed classified information was more than 13 years prior.

DoJ did not have the DoE's ''Impact Statement,'' which stated that Dr. Lee had provided significant material assistance to the PRC nuclear weapons program, until February 1998, well after the plea agreement was concluded.

The reluctance of the Department of Defense, and the Navy in particular, to support the prosecution of Dr. Lee for his anti-submarine warfare revelations had an adverse impact on the case.

The ambiguity of the 14 November 1997 memorandum authored by Mr. J.G. Schuster, head of the Navy's Science and Technology Branch, seriously undermined DoJ efforts to prosecute Dr. Lee. This memorandum was based on incomplete information, without knowing the details of what Dr. Lee confessed to disclosing to PRC scientists.

DoJ prematurely determined that Dr. Lee could not be prosecuted for the 1997 revelations, and the explanation that the information Dr. Lee revealed was already in the public domain is contradicted by two classified memoranda from Lawrence Livermore National Laboratory which show that the disclosures extended beyond what was publicly available.

DoJ's failure to prosecute on the 1997 disclosures, or at least to add them as a separate count to the plea agreement, had a material adverse effect on the disposition of the case. Coupling the 1997 disclosures with the 1985 revelations would have demonstrated that Dr. Lee's classified disclosures were not limited to a single incident long ago, but were ongoing. Obtaining a conviction on the 1997 disclosures would not have been a foregone conclusion—pushing the matter risked disclosing certain information that the FBI and the prosecutor wanted very much to protect, and the Navy was reluctant to assist in the prosecution—but these were not insurmountable obstacles. At a minimum, an effort should have been made to add a separate count to the plea agreement to address these disclosures.

DoJ communications were confused on the critical question of what authority the trial prosecutor had with regard to a charge under Section 794. DoJ officials advised that the Internal Security Section would have reconsidered a prosecution under Section 794 if the plea agreement broke down,[9] which was unknown to the trial prosecutor who thought he could only take the watered-down plea bargain or get nothing at all.[10]

The fact that Dr. Lee was an espionage suspect while working on the Joint U.S./U.K. Radar Ocean Imaging project was not disclosed to the program's sponsors within the Office of the Assistant Secretary of Defense/Command, Control, Communications and Intelligence (OASD/C3I).[11]

Electronic surveillance under the Foreign Intelligence Surveillance Act was terminated at a critical juncture in September 1997, just when the FBI was stepping up its activity with regard to Dr. Lee and electronic surveillance could have yielded important counter-intelligence information. Although the listening device in Dr. Lee's home had been discovered in July, thereby decreasing the utility of that particular device, the FBI Field Office felt strongly enough about the need for continued surveillance to make a verbal renewal request to FBI Headquarters in August, but not strongly enough to ensure the request was granted.

The problems which affected this case were serious enough to require remedial steps. The Counterintelligence Reform Act of 2000 (S.2089), which became law on 27 December 2000 as Title VI of Public Law 106–567 (H.R. 5630), contained a provision that will address many of the shortcomings in the way the DoJ handled this case. That provision, Section 607, amended the Classified Information Procedures Act (CIPA) to require that the Assistant Attorney General for the Criminal Division and the appropriate United States attorney provide briefings to senior agency officials from the victim agency in cases involving classified information. The section further required that these briefings occur as soon as practicable after the Department of Justice and the United States attorney concerned determine that a prosecution could result and at such other times thereafter as are necessary to keep the affected agency fully and currently informed of the status of the prosecution.

The Subcommittee's investigation revealed other problems that have not yet been addressed through legislation, primarily because it was not possible to reach a consensus on how best to solve them. The Counterintelligence Reform Act moved through the Judiciary Committee and the Senate Select Committee on Intelligence without a single vote in opposition. The Judiciary Committee reported the measure favorably on 23 May 2000 and the Intelligence Committee did the same on 20 July 2000. As the bill's chief sponsor, I opted to work toward a consensus measure to ensure that the important reforms we had identified during oversight on this case and the Dr. Wen Ho Lee case could be implemented in a timely fashion. Rather than wait until we could work out acceptable language on other proposals arising from the Peter Lee case, I felt it more important to accomplish what could be done in the time available and address the more difficult matters later. I also withheld publication of this report during the last Congress so as not to inject it into the presidential election. Now that the election is over and the 107th Congress is well underway, it is appropriate to release this report and begin working on legislation to solve the other problems identified by our oversight but upon which we were unable to achieve consensus.

Specifically, I am introducing legislation to require victim agencies—the agencies whose classified information is lost—to

produce a written ''damage statement'' which specifies the level of classification of the material alleged to have been revealed, and justifies the classification level by describing the potential harm to national security from such revelations. The legislation further requires the prosecution team to consider the ''damage statement'' before any final decision is made as to whether the case should be taken to trial or a plea bargain should be offered. I also strongly believe, but will not attempt to mandate through legislation, that key instructions from Main Justice (Internal Security Section, etc.) to the U.S. Attorney's Office with responsibility for prosecuting the case, including charging authority and plea bargain authority, should be in writing. These written instructions should be shared with the investigating agency or agencies and the victim agency so they have an opportunity for input before any final decisions are made.

The findings and recommendations included in this report are based on a review of more than 6,000 pages of documents from the FBI, the Department of Defense and its subcomponents, the Department of Justice and information submitted to the court during the sentencing process. The Subcommittee conducted three open hearings, three closed hearings, two ''on-the-record'' Senators' briefings, and numerous staff interviews, which resulted in hearing from more than 30 individuals who played key roles in the conduct of the case. The information presented here is derived from unclassified documents and testimony, or relies upon unclassified extracts from classified documents.

SUMMARY OF DR. PETER H. LEE'S ESPIONAGE ACTIVITIES

Dr. Peter Lee is a naturalized U.S. citizen who worked for TRW Inc., a contractor to Lawrence Livermore National Laboratory, from 1973 to 1976. Dr. Lee worked at Lawrence Livermore from 1976 to 1984, and at Los Alamos National Laboratory from 1984 to 1991. He returned to TRW from 1991 until December 1997, when he was dismissed in the wake of his plea agreement for passing classified information to the Chinese.[12]

According to his October 1997 confession to the FBI, Dr. Lee traveled to China from 22 December 1984 to 19 January 1985 (while he was employed by Los Alamos National Laboratory).[13] On 9 January 1985, Dr. Lee met with Chen Nengkuan, a PRC scientist employed by the China Academy of Engineering Physics (CAEP), in a hotel room in Beijing. Chen told Dr. Lee that he had classified questions to ask, and that Dr. Lee could answer just by nodding his head yes or no.[14] Chen drew a diagram of a hohlraum (a device in which lasers are fired at a glass globe to ''create a small nuclear detonation which is then studied and used in the design of nuclear weapons),''[15] and asked the classified questions, which Dr. Lee, by his own admission, knew were classified but answered anyway.[16]

The following day, Dr. Lee accompanied Chen to a hotel in Beijing where another group of PRC scientists was waiting. These scientists were also from the China Academy of Engineering Physics, which is ''responsible for all aspects of the PRC's nuclear weapons program.''[17] Among the scientists Dr. Lee briefed was Yu Min, who has been called ''the 'Edward Teller' of the PRC nuclear weapons program.''[18] For two hours, Dr. Lee answered questions and drew diagrams, including several hohlraums. Dr. Lee also ''discussed problems the U.S. was having in its nuclear weapons testing program.''[19] Dr. Lee further admitted discussing with the Chinese scientists at least one portion of a classified document he authored in 1982. Although the document, titled ''An Explanation for the Viewing Angle Dependence of Temperature from Cairn Targets,'' was subsequently declassified in 1996,[20] revealing its contents in 1985 was an illegal act that could be expected to provide substantial assistance to the Chinese from 1985 to 1996 and to harm U.S. national security.

Dr. Lee again visited China, while he was employed by TRW, from 30 April to 22 May 1997.[21] Although Dr. Lee claimed on his travel request form, and in a 25 June 1997 interview with FBI Agent Gilbert Cordova, that the visit to China had been a pleasure trip for which he paid all his own expenses, the truth was that Dr. Lee traveled as a guest of the Chinese Institute of Applied Physics and Computational Mathematics (IAPCM), which is part of the China Academy of Engineering Physics.[22]

During this May 1997 trip, Dr. Lee gave a lecture at the PRC Institute of Applied Physics and Computational Mathematics in Beijing. The lecture covered his work for TRW in support of the Radar Ocean Imaging Project, and was attended by nearly 30 top PRC scientists.[23] When asked about the applicability of his work to anti-submarine warfare, Dr. Lee showed the scientists a surface ship wake image (which he had brought from the U.S. to show them), drew a graph, explained the physics underlying his work, and told the Chinese where to filter the data within the graph to enhance the ability to locate the ocean wake of a vessel.[24] A few days later, Dr. Lee gave the same lecture in another city, using the graphs that the Chinese had saved from his first lecture and had brought to the second lecture for his use.[25]

Upon his return from the PRC, Dr. Lee filled out a TRW Post-Travel Questionnaire in which he denied that there ''were any requests from Foreign Nationals for technical information,'' and denied that there were any attempts to persuade him to reveal or discuss classified information.[26]

On 5 August and 14 August 1997, Peter Lee was interviewed by FBI agents at a Santa Barbara, California, hotel. During these interviews, Dr. Lee admitted that he had lied on his travel form about the purpose of his trip to China in May, and that he had lied about receiving requests for technical information. However, he continued to insist that he had paid for the trip to the PRC with his own money.[27]

After the two FBI interviews, Dr. Lee contacted a Chinese official named Gou Hong by e- mail on 25 August 1997, and requested that Gou provide Lee with receipts indicating that Lee had paid for the trip to the PRC, that the receipts contain the names of Lee and his wife in English, and that they show that Lee paid cash for the trip.[28] On 3 September 1997, Dr. Lee provided the FBI with copies of hotel and airline receipts for the May 1997 trip which stated that Lee had paid for the trip in cash. Based on a review of e-mail transmissions and telephone conversations between Lee and Gou, however, the FBI concluded that these receipts were false.[29]

On 7 October 1997, Dr. Lee was interviewed and polygraphed by the FBI. The polygraph examiner believed that Lee showed deception when he answered ''no'' to the following questions: (A) Have you ever deliberately been involved in espionage against the United States? (B) Have you ever provided classified information to persons unauthorized to receive it? (C) Have you deliberately withheld any contacts with any non-U.S. intelligence service from the FBI?[30] After being told that he had failed the polygraph on these questions, Dr. Lee made a videotaped confession in which he admitted ''having passed classified national defense information to the PRC twice in 1985, and to lying on his post-travel questionnaire in 1997.''[31]

During this same interview, Dr. Lee also repeatedly confessed that he intentionally revealed classified information during his 1997 anti-submarine lectures in China. Dr. Lee was not prosecuted for these revelations, and the judge was not adequately informed of these admissions at sentencing.

On 8 December 1997, Dr. Lee pleaded guilty to a two count information that he violated: (1) 18 USC 793(d)—Attempt to communicate national defense information to a person not entitled to receive it, and (2) 18 USC 1001—False statement to a government agency.[32] According to the press release from the office of U.S. Attorney Nora Manella, Dr. Lee ''admitted that he knew the information was classified, and that by transmitting the information he intended to help the Chinese.''[33] The offenses to which Lee pleaded guilty could have resulted in a maximum sentence of 15 years in federal prison and a fine of $250,000. Under the terms of the agreement, the Government asked for a ''short period of incarceration,'' a formulation that was negotiated by the trial attorney and approved by Mr. John Dion in the Internal Security Section, but was not approved by Principal Deputy Assistant Attorney General Keeney, the DoJ official with final authority, who advised the Subcommittee that he would not have approved the plea agreement had he known that it would request only a short period of incarceration as an opening position.[34]

On 26 March 1998, Dr. Lee was sentenced by U.S. District Court Judge Terry Hatter to one year in a community corrections facility, three years of probation, 3,000 hours of community service, and a $20,000 fine. The sentence was based upon a sealed plea agreement from 8 December 1997.[35] The plea agreement and other key documents in the case were unsealed at the request of the Subcommittee in late 1999.[36]

Every DoJ official interviewed by the Subcommittee expected Dr. Lee to receive jail time, during which they planned to seek his further cooperation. When he received no jail time, all leverage was lost by the government.

Analysis of the Nuclear Weapons Design Revelations

The importance of Dr. Lee's 1985 disclosures is highlighted by the 17 February 1998 ''Impact Statement'' from the Department of Energy which concludes that:

''the [Inertial Confinement Fusion] data provided by Dr. Lee was of significant material assistance to the PRC in their nuclear weapons development program. . . . For that reason, this analysis indicates that Dr. Lee's activities have directly enhanced the PRC nuclear weapons program to the detriment of U.S. national security.''[37]

The ''Impact Statement'' further notes that ''the ICF Program, when developed in conjunction with an already existing nuclear program, could assist in the design of more sophisticated nuclear weapons.''[38]

The trial attorney wanted to prosecute under Section 794 for the 1985 revelations, but was overruled by Main Justice as well as his supervising attorney.[39] In his 12 April 2000 written statement to the Subcommittee, the Internal Security Section (ISS) line attorney with primary responsibility for the Peter Lee case, explained why he did not feel it appropriate to pursue a 794 charge on the 1985 disclosures.

''In my estimation, both then and now, the sole weakness in the case was the questionable significance of the information Lee compromised, both in 1985 and in 1997. As to Lee's 1985 disclosure, I knew, for instance, that the Department had never prosecuted a case under 794 where the compromised information, as in the case of Lee's 1985 disclosure, had been declassified prior to the crime

being discovered. Let me emphasize this: the information Lee admitted disclosing in 1985 had been declassified.'' [40]

This analysis may be correct as far as it goes, but there were other factors and issues that should have been considered. Dr. Lee's confession, though carefully crafted to limit his exposure, simply confirmed much, but not all, of what the FBI already knew about his espionage activities. The FBI knew well before they confronted Dr. Lee that he had likely been compromising anti-submarine information since the early 1990s,[41] and that in the early 1980s Dr. Lee had allegedly given the Chinese classified information that greatly assisted their nuclear weapons program.[42] One scientist the FBI consulted in trying to evaluate the extent of Dr. Lee's revelations said, ''It seems likely that Peter Lee at least partially compromised every project, classified or unclassified, he was involved with at Livermore, [Los Alamos National Laboratory], and TRW.'' [43]

At a later stage of the proceeding, Dr. Lee admitted that he had given the PRC scientists additional information which had not been declassified. Had the Internal Security Section awaited fuller development of the facts, it might not have declined prosecution under 794 on grounds of subsequent declassification. The Government would have been able to corroborate Dr. Lee's confession and to prove that he had done more than he confessed to. As the prosecuting attorney noted during his 5 April 2000 appearance before the Subcommittee, ''. . . in the many cases I had with a cooperating defendant or a defendant who pled guilty who was debriefed, I never had the kind of information to corroborate what was said as I did in this case.'' [44]

The ISS line attorney's statement regarding the ''questionable significance of the information Lee compromised'' in 1985 is flatly contradicted by the DoE ''Impact Statement'' of 17 February 1998 which states that Dr. Lee did serious harm to U.S. national security. Had the ISS line attorney waited for the experts to evaluate the case, he would have known that a 794 charge should be given much greater consideration than it got.

During testimony before the Subcommittee, the ISS line attorney who handled the case stated that it would have been impractical to wait for a damage assessment which, in his experience, normally takes more than a year. In fact, however, there were two assessments available within less than 90 days of the start of plea negotiations. Dr. Thomas Cook's ''Declaration of Technical Damage to United States National Security Assessed in Support of United States v. Peter Hoong-Yee Lee'' was available in February 1998, as was the Department of Energy ''Impact Statement.''

The Government had spent six years and considerable amounts of money investigating Dr. Lee's espionage activities, had obtained a confession that substantiated much of the information it already had from other sources, and had not charged Dr. Lee with a crime and therefore did not have a speedy trial issue to contend with. Consequently, there was no reason why the Government could not wait for a complete analysis by competent experts of Dr. Lee's espionage activities. The failure to obtain such an analysis prior to entering a plea agreement seriously undermined the Government's ability to prosecute Dr. Lee under section 794, and was a major factor in the unsatisfactory disposition of the case.

In his testimony before the Subcommittee on 12 April 2000, the ISS line attorney who handled the Lee case further argued that the Government would have had a hard time proving that the classified nuclear weapons design information that Dr. Lee provided to the Chinese was related to the national defense, an element of proof that would have been necessary to sustain a charge under 18 USC 794. In response to a question from Senator Sessions, the attorney said that the information Dr. Lee revealed in 1985 ''was classified SECRET, but I'm not sure it would have been ultimately found to be national defense information at the time he compromised it.''

When pressed by Senator Sessions to explain how nuclear weapons design information could be deemed not related to the national defense, the attorney referred to the Supreme Court's opinion in Gorin v. United States.[46] Any reliance on the Gorin decision in the context of the Peter Lee case is misplaced. The Gorin case was decided in January 1941, well before the advent of nuclear weapons. The Court's opinion, written by Justice Reed, makes clear that the information in the Lee case would have been found to be ''national defense information.'' In the words of the Court:

''National defense, the Government maintains, ''is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.'' We agree that the words ''national defense'' in the Espionage Act carry that meaning.'' [47]

When the Supreme Court held, as it did in Gorin, that reports ''as to the movements of fishing boats, suspected of espionage and as to the taking of photographs of American war vessels'' [48] constituted national defense information, there can be no doubt that nuclear weapons design information would be encompassed by the term.

The DoJ attorney also cited the decision of the Second Circuit Court of Appeals in United States v. Heine.[49] That case has no applicability to this matter since all the information given to a German automobile corporation was publicly available at the time of disclosure.[50]

During the sentencing hearing, Dr. Lee's lawyer, Mr. James Henderson, tried to downplay the significance of the 1985 revelations through character witnesses who claimed that the disclosures were not related to nuclear weapons but to energy production.[51] These witnesses did not have access to the text or tape of Dr. Lee's confession which detailed the extent of his revelations.[52] Dr. Cook and the authors of the 17 February 1998 DoE ''Impact Statement'' had access to Dr. Lee's confession and were in a position to evaluate the extent of damage and of the espionage. In view of these facts it was surprising that the ISS attorney advanced the argument:

''that Lee could claim that he made the disclosures to encourage China not to conduct nuclear weapons tests in the field, and he would likely be supported by internal Government documents or even testimony of former U.S. Government or Livermore officials that that was actually one of the reasons the U.S. Government declassified the information beginning in 1990.

''In other words, Lee would have been able to credibly argue that his actions were in the national interest.'' [53]

Any claim by Dr. Lee that his actions were in the national interest would be totally unfounded. Individual scientists do not have the latitude to make determinations—during the course of lectures in Beijing hotel rooms—as to whether or not it is in the national interest to help the Chinese develop more sophisticated nuclear weapons.

The prosecuting attorney made this very point at the sentencing hearing when he said, ''It is not up to the whim of an individual scientist to determine if something is classified. . . . This is one of the nation's top scientists from one of the nation's top research nuclear weapons facilities giving a two hour lecture regarding classified information to the top nuclear scientists of China.'' [54]

Dr. Lee very likely could have been prosecuted under 18 USC 794, the harshest of the espionage statutes, for his nuclear weapons design revelations. As Senator Sessions said at the Subcommittee's 5 April 2000 hearing:

''I don't think [the prosecuting attorney] would have had a problem getting a conviction on that. [Dr. Lee] confessed to it, number one. Number two, I don't think any jury is going to believe that he was there for his health and a casual conversation to have two different meetings in Beijing hotel rooms with top Chinese scientists. There is no business for that, and anyone with common sense would understand it.'' [55]

In the context of the prosecuting attorney's efforts to proceed under 794 and Senator Sessions' strongly expressed views, there is a strong argument that a 794 prosecution should have been brought.

Internal DoJ Mis-communication and a Lack of High Level Supervision

Unfortunately, the case never went to trial. By late November 1997, the Internal Security Section attorney had completed his analysis of the case, concluding that Dr. Lee should be offered a plea under 18 USC 793 or section 224(b) of the Atomic Energy Act of 1954 for the 1985 compromise, in combination with a charge under section 1001 for the false statements on his travel form.[56] When it became apparent that ''Lee was balking at a plea with a potential 10-year exposure for the 1985 incident,'' the attorney recommended to Mr. Dion that ''although the section 794 case for that incident in 1985 had problems, it was sufficiently robust that we could ethically use it as leverage.'' [57] Mr. Dion testified that he called the prosecuting attorney and authorized him to:

''seek a plea of guilty by Lee to a violation of 18 USC Section 793(d) for his 1985 disclosures and to a violation of the false statement statute, 18 USC Section 1001. As such a plea would require Lee to waive the 10-year statute of limitations, [the prosecuting attorney] was authorized to advise counsel that no final decision had been made as to the prospect of charging Lee with a violation of Section 794.'' [58]

The prosecutor, who was emphatic in his testimony that his instructions were to accept a plea under 793 and 1001, or nothing,[59] obtained a plea on both counts, but had to concede to only a ''short period of incarceration'' to secure Dr. Lee's agreement.[60] Principal Deputy Assistant Attorney General John Keeney told the Subcommittee that, ''. . . I was not aware, so far as I recall, that it would call for only a short period of incarceration or would charge only an attempted 793 charge. Had this been our opening position in plea negotiations, I doubt that I would have approved it, particularly, the 'short period of incarceration.' '' [61] He then tried to justify DoJ's handling of the case by saying that ''this was the best that could be hoped for given the sentencing practices of the courts in the Central District of California.'' [62]

Had Dr. Lee cooperated, as he was required to do under the plea agreement, it might have been possible to achieve an acceptable disposition in the case even with the weak plea agreement. Had Dr. Lee told the whole truth and provided whatever counter-intelligence information he knew, that would mitigate the need to punish him with a long sentence. It might have been acceptable to balance counterintelligence information gained from a cooperating defendant against the need to punish wrongdoing. However, there is no benefit in accepting a plea contingent upon the defendant's cooperation

and then not getting that cooperation. Dr. Lee did not live up to his obligation to be truthful. The ''Position with Respect to Sentencing Factors'' that the Government submitted to the court acknowledged ''concerns that defendant has still not been completely forthcoming about the nature, quality and extent of his improper contacts with scientists of the PRC.'' [63] Dr. Lee's lack of cooperation was further highlighted in the February 1998 DoE ''Impact Statement'' where the authors note that:

''[W]e do not believe that Dr. Lee has been fully cooperative in identifying or describing other classified information he may have compromised. We believe that Dr. Lee confessed to compromising selected classified information in the hope his other, more damaging activities would not be discovered or fully investigated.'' [64]

On 26 February 1998, Dr. Lee failed an FBI-administered polygraph where he was asked whether he had lied to the FBI since his last polygraph examination regarding passing classified information.[65] When interviewed by DoE scientists in March 1998, Dr. Lee again failed to cooperate fully. As Dr. Thomas Cook pointed out during his testimony before the Subcommittee on 29 March 2000, when asked questions about what he had done, Dr. Lee ''repeatedly denied any knowledge or any interest in classified programs and publications. He was, however, the author and/or the technical editor of some of these publications which he denied knowledge of.'' [66] In view of these repeated lies and lack of cooperation, there should be no doubt that Dr. Lee did not comply with the terms of the plea agreement, and the Government could have successfully sought to breach it.

When asked by Senator Specter why he did not breach the plea agreement in view of this lack of cooperation, the prosecuting attorney explained that he could not abrogate the deal because he had nothing to fall back on,[67] and because doing so risked exposing extremely sensitive classified information he had been instructed to protect.[68] The prosecutor advised that he was told that if there was a risk of certain evidence coming out, he would have to drop the case. As the case unfolded, however, there was no risk of that evidence being disclosed. In the absence of any problem as to disclosure of the sensitive information, and had the prosecutor known he could have, or at least might have been able to proceed with the 794 prosecution, then the better course would have been to have abrogated the plea agreement on the basis of Peter Lee's failure to cooperate which could have been established without disclosing any classified information.

Due to the significance of the sensitive information about which the prosecutor was concerned, and the restrictions it placed on the prosecution of the case, it is troubling that at no time during the course of the Subcommittee's review of the case did Mr. Dion or anyone else from DoJ ever brief Congress about the information until after the prosecuting attorney raised the subject in the context of explaining why he had not sought to abrogate the plea agreement. The Classified Information Procedures Act (CIPA) specifically provides procedures whereby the Government can deal with the risks of exposing such information, even to the extent of permitting the Attorney General to decline prosecution if the risk of exposing classified information is too high. There is no evidence that the Department of Justice formally considered this sensitive information in the CIPA context.

The prosecutor's understanding of his limited authority was caused by a breakdown of communications. As he understood his authority, since Dr. Lee had waived the statute of limitations on the 793 count to accept the plea, breaching the plea would leave the Government with only the 1001 count, which was also in the plea. Therefore, the prosecutor felt he had to stick with the plea agreement because it was that or nothing.[69] Even though the prosecutor knew Dr. Lee was lying and was not cooperating, he felt he could not abrogate the plea agreement because he thought he could not charge Dr. Lee under Section 794 due to constraints imposed by the Internal Security Section at Main Justice.

Mr. Dion conceded at the Subcommittee's 12 April 2000 hearing that he did not recall discussing with the prosecuting attorney that he (Dion) might reconsider a 794 prosecution if the proposed plea agreement fell through:

Senator SPECTER: You say no final decision had been made . . . as to whether he would be charged with 794?

Mr. DION: That's correct, sir. . . .

Senator SPECTER: . . . Mr. Dion, when you say no decision had been made and I interrupted you at that point as to what would happen if the plea bargain broke down, [the prosecuting attorney] testified very emphatically that he wanted to proceed with 794 but was told that all he could do was do the best he could under the authorized plea bargain, so that is why he proceeded as he did, asking for only a short period of incarceration and not taking action when Dr. Lee lied on his polygraph and did not give further answers. But are you suggesting, if that plea bargain had broken down, that you might have reconsidered and authorized a 794 prosecution?

Mr. DION: We definitely would have reconsidered our course of action, sir.

Senator SPECTER: Well, did you tell [the prosecutor] that?

Mr. DION: I don't recall specifically if we discussed that or not. We did discuss that no final decision had been made on the 794 and that he should proceed with plea negotiations on that basis.[70]

In the face of the prosecuting attorney's testimony that he was authorized only to take the weak plea agreement or nothing, it seems clear that he was correct on what authority was communicated to him.

The prosecuting attorney was not the only one who did not understand the Internal Security Section's position with regard to a charge under Section 794. An FBI e-mail of 25 November 1997, from an attorney in the National Security Law Unit, to an FBI Supervisory Special Agent in the National Security Division, noted in relevant part that ''According to [the FBI Supervisory Special Agent], ISS/Dion said that if [Dr. Lee] doesn't accept the plea proffer, then he gets charged with 18 USC 794, the heftier charge.''

The Secretary of Defense was told the same thing. On 26 November 1997, Colonel Dan Baur prepared a memorandum for the Secretary of Defense and the Deputy Secretary of Defense, in which he relayed information on the case he had received from the FBI. Colonel Baur's memo stated that DoJ had granted the U.S. Attorney authority to offer to let Lee plead guilty under 18 USC 793 and 18 USC 1001 to avoid being charged under Section 794.[72] Furthermore, the memo noted that ''should Lee decline the offer, the U.S. Attorney will seek an indictment against him for violation of Section 794.'' When read relevant portions of these communications at the Subcommittee's 12 April 2000 hearing, however, Mr. John Dion stated that they were incorrect.[73] Clearly there was a miscommunication on this very important issue, both within the Department of Justice and between DoJ and DoD.

It is surprising and disturbing that a critical piece of information in the case exactly what the Assistant U.S. Attorney was authorized to do and under what terms he was authorized to do it could be subject to such differing interpretations and understandings. In an effort to understand how such a fundamental point could be misunderstood, the Subcommittee traced the information that appeared in Colonel Baur's memo to Secretary Cohen back to its origins. It appears that Mr. Dion spoke to the prosecutor, who then spoke to the Los Angles case Agents. Sometime thereafter, the FBI Supervisory Special Agent in Los Angles was briefed by one of the two case agents, or by both. One of these agents relayed the information to the attorney in National Security Law Unit, who passed it on to the FBIHQ Supervisory Special Agent, for subsequent relay to Colonel Baur. Whatever the actual path of the information—and wherever the mis-communication was introduced—it is clear that the information did not pass, as one might expect, from the Internal Security Section to the Department of Defense. The ISS line attorney handling the case testified that he never spoke to anyone in DoD about the plea discussions. As a consequence of this failure to communicate, the victim agency and officials within the Department of Justice were acting without a clear understanding of the actual decisions that had been made.

It is obvious that the case would have benefitted from more direct supervision by high level Justice Department officials, which would have likely reduced the confusion within the Department of Justice and between DoJ and the Department of Defense. Attorney General Reno was provided with three ''Urgent Reports'' informing her of ''(1) Peter Lee's admission on October 7, 1997, (2) his entry of a guilty plea on December 9, 1997, and (3) the court's imposition of sentence on March 26, 1998.'' [75] On 31 October 1997, as required by law, she also signed the document authorizing the use of FISA-derived information for law-enforcement purposes. She was not otherwise involved in the case, leaving the matter to subordinates. The Deputy Attorney General, Mr. Holder, was also uninvolved in the case.

Mr. John Dion was the supervisory attorney in the Internal Security Section, but one of his subordinates made the substantive decisions in this case. When questioned about allegations that Dr. Lee's revelations extended beyond what he confessed to, for example, Mr. Dion deferred, saying that one of his subordinate attorneys was ''more directly familiar with that information than I am. . . .'' [76] More direct supervision by key DoJ personnel may have ensured a better outcome in this important espionage case.

Analysis of the Anti-Submarine Warfare Revelations

It also appears that Dr. Lee should have been prosecuted in relation to the information he revealed in his May 11, 1997 briefing of Chinese scientists. Charges should have been filed under Section 794(a) which applies to ''any other major weapons system or major element of defense strategy.'' The U.S. nuclear submarine fleet, which comprises one leg of the nation's strategic triad, would qualify as a major weapons system. The potential harm from Dr. Lee's 1997 revelations was described by the Cox Committee Report:

''Lee admitted to the FBI that, in 1997, he passed to PRC weapons scientists classified research into the detection of enemy submarines under water. This research, if successfully completed, could enable the PLA to threaten previously invulnerable U.S. nuclear submarines.'' [77]

To determine whether or not the information Dr. Lee revealed would qualify for prosecution under section 794, the Government first needed to get an assessment of that information. On 14 October 1997, the Assistant

U.S. Attorney handling the case in Los Angeles contacted a representative of the Defense Criminal Investigative Service. He was referred to Dr. Donna Kulla in the Intelligence Systems Support Office where she dealt with the Radar Ocean Imaging (ROI) project on which Peter Lee worked. Dr. Kulla informed the prosecuting attorney that the information that Dr. Lee had revealed was classified CONFIDENTIAL.[78]

In mid-October, the FBI also contacted Dr. Richard Twogood, of Lawrence Livermore National Laboratory (LLNL), and asked for his opinion on the level of classification of Dr. Lee's revelations. Dr. Twogood was the Deputy Associate Director for Electronics Engineering at LLNL, and from 1988 until 1996 had been the Program Leader for the Imaging and Detection Program at LLNL. The Joint U.S./U.K. Radar Ocean Imaging Program, for which Dr. Twogood was the Technical Program Leader from 1990 through 1995, was the single largest component of LLNL's Imaging and Detection Program, and it was the one where Dr. Peter Lee worked and where he would have had access at the DoD SECRET level to the important discoveries and significant advances in the development of methods to detect submarine signatures with remote sensing radars.[79]

Dr. Twogood is an authorized derivative classifier, which means that he can make appropriate judgements about classification based on guidance written by others. Although the Navy had primary jurisdiction over the anti-submarine warfare information that Dr. Lee revealed to the Chinese, Dr. Twogood had personally written some of the classification guidance being used in the Joint U.S./U.K. program, and was therefore familiar with the importance of the information. When he reviewed the videotaped confession on 15 October 1997, Dr. Twogood noted that Dr. Lee himself admitted that he had passed CONFIDENTIAL information. Furthermore, Dr. Twogood informed the FBI that the information was at least CONFIDENTIAL and likely DoD SECRET. More importantly, in Dr. Twogood's view, Dr. Lee's disclosures went right to the heart of the most significant technical achievement of the U.S./U.K. program up until 1995.[80]

The prosecuting attorney was concerned that Dr. Twogood's position could be said to have evolved, from saying it was CONFIDENTIAL when first asked, to the later position that the information was SECRET. The prosecutor was also aware that the defense would be able to find competent scientists who would take a different view about the level of classification due to the similarity of some of the information to what was already in the public domain. These are legitimate concerns, but are not outside the realm of what prosecutors contend with in all espionage cases. They are, by no means, sufficient to justify not going forward with the prosecution.

On 28 October 1997, the ISS attorney handling the case attended a meeting with DoD officials for the purpose of determining whether there was publicly available information that could undermine an espionage prosecution for the 1997 compromise.[81] At the meeting, the DoJ attorney provided DoD officials with the draft Cordova affidavit, and made them aware that the confession had been videotaped, but he did not provide copies of the tapes and no DoD officials asked for them.[82] When asked about why he had not provided copies of the tapes to DoD personnel, the ISS attorney replied:

''Because at that point, at the initial meeting, the purpose was not to get a final classification determination or even a preliminary classification determination on this information. It was only to find out one of two things: what publicly available information might be out there that could potentially compromise a Section 794 prosecution on the 1997 compromise, and what could we say about the program generally, as we have here today, in an open trial setting.'' [83]

By 3 November 1997, the Department of Defense had compiled an extensive list of publicly available information on the topic of radar ocean imaging and provided it to the Internal Security Section. Among the documents was a printout from a LLNL website titled ''Radar Ocean Imaging,'' and prepared remarks that Dr. Twogood had presented in open session before the House Armed Services Committee in April 1994. Both of these documents contained general information about the use of radars to detect submarines.[84] Based on his assessment of these documents, the ISS attorney concluded that Dr. Lee could not be prosecuted under section 794 for the 1997 compromise. As he put it in his 12 April 2000 appearance before the Subcommittee:

''The Web site and Dr. Twogood's testimony, coupled with the fact that the underlying 1995 document was only classified under a mosaic theory, convinced me that there was no section 794 case on the 1997 compromise. In my opinion, Senators, it was not even a close call.''[85]

The ISS line attorney was wrong in concluding that the information was already publicly available.[86] Subsequent analysis showed that Dr. Lee's anti-submarine warfare revelations extended beyond what was in the public domain and therefore remained classified.

On 10 November 1997, in response to a 30 October request from the prosecuting attorney, Lawrence Livermore employee Al Heiman provided an FBI Special Agent with a copy of the Security Plan covering the detection results in the U.K./U.S. Radar Ocean Imaging program. The enclosed memorandum from Dr. Twogood described the classification guidelines established for the program. Paragraph 3 of Appendix A of the classification guideline—indicating that ''processing techniques which, when applied to unclassified or classified data, yield a significant enhancement in signature detectability which might apply to the submarine case'' should be classified SECRET—was directly applicable to the information that Dr. Lee revealed to the Chinese.[87]

On 14 November 1997, Mr. John G. Schuster, Jr., wrote the following memorandum for Navy Captain Earl Dewispelaere:

''The signal analysis techniques briefed by the subject are UNCLASSIFIED when applied to environmental data and they have been presented and published in several unclassified forums. Any application of the technique to submarine wake signatures, however, would be classified at the SECRET level, as called out in current classification guides.

''The material that was briefed appears to have been extracted from a CONFIDENTIAL document. This classification was applied based on concern that the document, taken as a whole, might suggest a submarine application even though it was not explicitly stated. Given that the CONFIDENTIAL classification cannot be explicitly supported by the classification guides and that material similar to that briefed by the subject has been discussed in unclassified briefings and publications, it is difficult to make a case that significant damage has occurred. Further, bringing attention to our sensitivity concerning this subject in a public forum could cause more damage to national security than the original disclosure.

''Based on the above, it is recommended that the disclosure of this material should not be considered as the sole or primary basis for further legal action.'' [88]

On 19 November 1997, the Schuster memorandum was sent to Mr. Dion from Navy General Counsel Steven S. Honigman, who stated that he and the Vice Chief of Naval Operations concurred with Mr. Schuster's conclusions. The Schuster memo has been described by various DoJ officials as a ''body blow'' to the prosecution because of their view that it might be ''Brady material'' or in some way exculpatory as to Dr. Lee. At minimum, it seriously complicated DoJ's case.

The ambiguous Schuster memorandum was apparently designed to later enable the Navy to take virtually any position: the signal analysis techniques are unclassified; they could be classified SECRET; the material was extracted from a CONFIDENTIAL document; significant damage may not be provable; bringing the issue to a public forum could damage national security; avoid legal action. When Mr. Schuster was questioned by the Subcommittee, he was unable to explain why the memo was written as it was or what it meant. The most charitable view of the Schuster memo is that it was misleading and should never have been written.

The Schuster memo was based on incomplete information since neither Mr. Schuster nor any other Navy or DoD personnel reviewed the video or audio tapes of Dr. Lee's confession. When that confession was reviewed at the Subcommittee's request, Mr. Schuster, along with Dr. Donna Kulla and Wayne Wilson, signed a memorandum dated 9 March 2000 stating that Dr. Lee's disclosures should have been classified CONFIDENTIAL.

Two additional memoranda were made available to the Department of Justice regarding Dr. Lee's 1997 disclosures, but were apparently insufficient to change the view of the ISS line attorney handling the case. A classified 17 November 1997 memorandum, referencing a conversation with Dr. Twogood, stated that, contrary to Mr. Schuster's opinion, what Dr. Lee revealed to the Chinese in 1997 should be considered SECRET. The memo provides substantial technical detail to make the case that Mr. Schuster was incorrect in his analysis. Lawrence Livermore followed up with another classified memorandum on 21 November 1997, citing the opinions of both Dr. Twogood and Mr. Jim Brase, who was also knowledgeable of the Radar Ocean Imaging project. Most importantly, these memoranda explain, in considerable scientific detail, how the information Dr. Lee provided to the Chinese differed in ways that made it classified from what had been on the LLNL Web site, in Dr. Lee's 1995 article, and in Dr. Twogood's April 1994 House Armed Services Committee testimony.

When questioned at a Subcommittee hearing on 29 March 2000, Mr. Schuster conceded that Dr. Twogood was the person to accurately evaluate Dr. Lee's disclosures:

Senator SPECTER: Dr. Twogood testified that [Dr. Lee] gave away the heart, the core . . . of the information. Would you disagree with that?

Mr. SCHUSTER: He was talking about the information in the program. That is not my program and I don't know that I could speak to the heart or core of that program.

Senator SPECTER: So that is beyond the purview of your expertise or knowledge?

Mr. SCHUSTER: Yes, sir, relative to the program.

Senator SPECTER: So based on your knowledge, you wouldn't have a basis for disagreeing with what Dr. Twogood said?

Mr. SCHUSTER: Not in that sense. I couldn't comment.[89]

Mr. Schuster sought to explain his 14 November 1997 memo by saying that it was his intent to give his assessment to Captain

Dewispeleare and not to the Department of Justice.[90]

Mr. Schuster testified that he never talked to anyone in the Department of Justice and had never been briefed as to how sensitive Navy and DoD information could be protected by the Classified Information Procedures Act.[91] This is in contrast to the prosecuting attorney, who testified, ''We assured the Navy that we could very confidently protect any classified information primarily because it was my analysis that the stuff was less classified, less dangerous.'' [92]

On 21 May 1999, the Navy again weighed in on the subject, writing to the Cox Committee to assert that ''the draft report mischaracterizes the substance and significance of the disclosure made by Lee during his trip to Beijing in 1997.'' [93] The letter further takes issue with the Cox Committee Report draft for creating the:

''erroneous impression that the technology Lee discussed during his 1997 Beijing trip was highly sensitive and previously unknown, and that his disclosure to the PRC caused grave harm to the national security, imperiling our submarine forces. In the considered judgement of the Navy, fortunately that is not the case.'' [94]

When questioned about this letter, Mr. Preston had no facts to support his disagreement with the conclusions of the Cox Committee Report. He conceded that none of the individuals who had been involved in responding to the Cox Committee Report had ever had access to the tapes or transcripts of Dr. Lee's confession, had made no effort to obtain them, and therefore did not know the full extent of what he revealed.[95]

FISA Issues

The loss of electronic surveillance on Dr. Lee occurred at a critical juncture that may have seriously hampered the Government's ability to collect important counter-intelligence information. When the Foreign Intelligence Surveillance Act (FISA) court order expired on 3 September 1997, it was not renewed. The FBI stated during testimony on 29 March 2000 that the FISA had not been renewed for several reasons, including concerns within the DoJ's Office of Intelligence Policy and Review (OIPR) that the information on Dr. Lee was ''too stale,'' [96] but OIPR disagrees with the FBI's characterization of what happened.[97] In view of the disagreement as to what actually happened with the FISA request, it is only possible to conclude that the FBI should have pursued the matter by making a formal written request. The Counterintelligence Reform Act, which became law at the end of the 106th Congress, will prevent future disputes over who is responsible for the loss of FISA coverage by providing a mechanism for the Director of the FBI to raise the matter directly with the Attorney General, who will be required to reply in writing. In this way, senior officials in both the FBI and the Department of Justice can be held accountable for their judgements on important espionage cases.

Additional issues

In addition to the disclosures of classified information for which Dr. Lee was charged, the Government knew that: (1) Dr. Lee asked for and received falsified travel documents from the Chinese, which he presented to the FBI on 3 September 1997,[98] (2) that his travel expenses in China were paid for by the Chinese,[99] (3) that he enlisted the assistance of Chinese officials associated with the CAEP in his attempt to deceive the FBI, and (4) that he confessed on videotape to intentionally passing classified information during his 1997 trip to China.'' [100] The only charge arising from the events of 1997, however, pertained to Dr. Lee's false statements on his Post-Travel Questionnaire submitted to TRW.[101]

It seems apparent that obtaining false documents from a Chinese official would have warranted a separate count under 18 USC 1001, and would have shown that Dr. Lee's 1997 transgressions extended beyond his lies to his employer. The Government's failure to highlight Dr. Lee's collusion with officials from the Chinese institutes where he visited resulted in an inaccurate portrait of his activities, one that was significantly less sinister than the reality of his conduct. Had this case enjoyed better communication within DoJ and better cooperation from the Navy, and a more aggressive approach by senior DoJ officials, Dr. Lee should have been charged or required to plead to at least four counts: (1) a 794 charge for the 1985 hohlraum revelations, (2) a 794 charge for the 1997 anti-submarine warfare revelations, (3) a false statements charge under 18 USC 1001 for his lies on the TRW Post-Travel questionnaire, and (4) a 1001 charge for submitting false travel documents that he got from the Chinese. Had these charges been filed, there is little doubt that the extent of Dr. Lee's espionage and attempted cover-up would have been made known. As it happened, the full range of Dr. Lee's felonious conduct was never presented to the Court.

It should be noted that Judge Hatter could have requested additional information to gain a better understanding of the case, but he did not. DoE witnesses were present and prepared to testify in camera at the sentencing hearing regarding Dr. Lee's 1985 revelations. Had the Judge heard from these expert witnesses, the harm done by Dr. Lee's significant material assistance to the PRC nuclear weapons program could have been made clear to the Court.

RECOMMENDATIONS

The single greatest problem the Government faced was its failure to come to terms with the significance of the information that Dr. Lee revealed to the PRC, both in 1985 and in 1997. Important were decisions were made without an adequate understanding of exactly what Dr. Lee had revealed and what were the consequences of those revelations. To prevent these problems from happening again, I am introducing legislation that would require victim agencies to produce a written ''damage statement'' which states the level of classification of the material alleged to have been revealed, and describes in detail the potential harm to national security from such revelations. The prosecution team should consider the ''damage statement'' before any decision is made as to whether the case should be taken to trial or a plea bargain should be offered.

The Department of Justice and the victim agency may wish to consult informally before the damage assessment is reduced to writing so that the victim agency will not unwittingly and incorrectly create Brady [102] problems and hamper any ultimate prosecution. The risks of creating potential Brady material—as might happen if an initial classification assessment were later reviewed and changed—are obvious, but the risks of proceeding to a plea without a clear written statement, made by competent officials, as to the level of classification of the material in question are even greater.

As noted previously, the Counterintelligence Reform Act, which became law in December 2000, contains a provision requiring that the Justice Department provide briefings to victim agency officials regarding the manner in which the Classified Information Procedures Act enables a prosecution to go forward without revealing additional secrets. Contemporaneous written records, particularly the Schuster memo, make it clear that the Navy was reluctant to proceed with a prosecution due to sensitivity about a public discussion of anti-submarine warfare, but the process established by CIPA could have ensured that no sensitive information was disclosed. In the absence of any risk of disclosing classified information, the Navy's general unwillingness to have anti-submarine warfare discussed in a public proceeding should have had no bearing on the Government's decision to proceed with a prosecution. The briefing process established by the Counterintelligence Reform Act will ensure that any legitimate concerns of the victim agency are addressed, and that the Justice Department will be able to distinguish between real security concerns and a general unwillingness to support a prosecution.

Although I do not intend to introduce legislation requiring it, I believe that key instructions from Main Justice (Internal Security Section, etc.) to the U.S. Attorney's Office with responsibility for prosecuting the case, including charging authority and plea bargain authority, should be in writing. These written instructions should be shared with the FBI and the victim agency so they have an opportunity for input before any final decisions are made. There can be no doubt that key officials in this case were operating under severe misunderstandings. The prosecuting attorney thought his instructions were that he had to accept a plea under Sections 793 and 1001 or nothing, while the Internal Security Section claimed that it was still open to a possible 794 prosecution. Key officials within the Department of Defense, up to and including the Secretary, were informed that if Dr. Lee refused the plea agreement, he would be prosecuted under Section 794. With so much misunderstanding, it is surprising that the prosecution did not suffer even more.

CONCLUSION

This was an important espionage case, yet remarkably little was documented during the key weeks leading up to the plea agreement in late 1997. Decision-makers within the Department of Justice and the Department of Defense clearly have discretion in executing their responsibilities, and should not be second-guessed at every turn. However, the need to strike a balance between protecting the national security—which can conceivably be achieved by not prosecuting in certain circumstances—and the equal application of the laws to ensure justice is done, requires that when judgements are made for which the reasons are not immediately apparent, the decision-makers must offer some explanation for their actions. In the absence of such a documented rationale for what may be necessary exceptions, the result is what appears to be arbitrary application of the laws, an outcome which protects neither the national security nor the law. The Government's handling of the Dr. Peter Lee case demonstrates clearly that ongoing, thorough congressional oversight is essential.

ENDNOTES

1. Gilbert Cordova, ''Affidavit in Support of Complaint, Arrest Warrant and Search Warrants: United States v. Peter Hoong-Yee Lee,'' undated: 16.

2. Robin Staffin, Deputy Assistant Secretary for Research and Development, Office of Defense Programs, Department of Energy, Notra Trulock III, Senior Intelligence Officer, Office of Energy Intelligence; and Joseph S. Mahaley, Director, Office of Security Affairs, ''Impact Statement'', 17 February 1998: 2. [DoJ Bates number 00116]

3. Robin Staffin, Deputy Assistant Secretary for Research and Development, Office of Defense Programs, Department of Energy; Notra Trulock III, Senior Intelligence Officer, Office of Energy Intelligence; and Joseph S. Mahaley, Director, Office of Security

Affairs, ''Impact Statement'', 17 February 1998: 2. [DoJ Bates number 00116]

4. Transcript of Proceedings (first draft), hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 29 March 2000: 52–53.

5. Wayne Wilson, John G. Schuster, and Donna Kulla, ''MEMORANDUM FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,'' 9 March 2000: 1.

6. According to Section 1.3 of Executive Order 12958 (April 17, 1995, which superseded Executive Order 12356 of April 6, 1982), information is to be classified as ''CONFIDENTIAL'' if ''the unauthorized disclosure of which reasonable could be expected to cause damage to the national security. . . .''

7. Cox Committee Report, Vol. 1, 88.

8. John C. Keeney, Principal Deputy Assistant Attorney General, Criminal Division, Department of Justice, prepared statement submitted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts Concerning the Peter Lee Espionage Case,'' 12 April 2000: 6.

9. See Transcript of Proceedings (first draft), Hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 12 April 2000: 14, 38–39 and 87–89.

10. Prosecuting Attorney, Transcript of Interview with Senator Arlen Specter in Los Angeles, CA, 15 February 2000: 73–74.

11. Donna Kulla, interviewed by Charlie Battaglia in Washington, DC on January 2000.

12. Bruce Lake, e-mail to Dobie McArthur of January 28, 2000. Lists the following as dates of Peter Lee was employed by TRW: Original hire date: 06/18/73 to 10/08/76 Rehire date: 04/29/91 to 12/08/97 Retired eff.: 12/30/97. See also House of Representatives, Report of the United States House of Representatives Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, May 25, 1999, Vol. 1, 87–88. [Hereinafter, Cox Committee Report]

13. Gilbert Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 13. [DoJ Bates number 000085]

14. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 13–14 [DoJ Bates number 000085–000086]

15. Reporter's Transcript of Proceedings, United States of America, vs. Peter Lee, 26 March 1998: 20. [DoJ Bates number 000023]

16. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 13–14. [DoJ Bates number 000085–000086]

17. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 2. [DoJ Bates number 000074]

18. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 16. [DoJ Bates number 000088]

19. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 14. [DoJ Bates number 000086]

20. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 14–15. [DoJ Bates number 000086–000087]

21. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 7. [DoJ Bates number 000079]

22. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 7. [DoJ Bates number 000079]

23. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 16–17. [DoJ Bates number 000088–000089]

24. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 1. [DoJ Bates number 000089]

25. See Transcript of Proceedings (first draft), Hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 29 March 2000: 39.

26. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 10. [DoJ Bates number 000082]

27. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 10–11. [DoJ Bates number 000082–000083]

28. Cordova, Declaration in the Manner of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 11–12 [DoJ Bates number 000083–000084]

29. Cordova, Declaration in the Manner of United States vs. Peter Hoong-Yee Lee CR No. 97–1181th–TJH, 27 February 1998: 11–12 [DoJ Bates number 000083–000084]

30. Cordova, Declaration in the Manner of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 12. [DoJ Bates number 000084]

31. Cordova, Declaration in the Manner of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 13. [DoJ Bates number 000085] See also Government's Response to Defendant's Position with respect to Sentencing Factors; Declarations of [Prosecuting Attorney], 23 March 1998: 5. [DoJ Bates number 000069]

32. INFORMATION, [18 USC 793 (d): Attempt to Communicate National Defense Information to A Person Not Entitled To Receive It; 18 USC 1001: False Statement to Government Agency], undated, 1–3 [DoJ Bates number 000001–000003]

33. Nora M. Manella, Physicist Pleads Guilty to Transmitting Classified Defense Information to Representatives of the People's Republic of China, News Release, 8 December 1997: 1. [DoJ Bates number 000096]

34. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 90.

35. Nora M. Manella, Nuclear Physicist Sentenced to One Year in Custody for Passing Classified Defense Information to Scientists of the People's Republic of China, News Release, 26 March 1998: 1. [DoJ Bates number 000098]

36. See, for example, GOVERNMENT'S EX PARTE APPLICATION FOR ORDER UNSEALING PLEA AGREEMENT, 22 October 1999 [DoJ Bates number 00235–00240], and GOVERNMENT'S EX PARTE APPLICATION FOR ORDERING UNSEALING GOVERNMENT'S SENTENCING POSITION AND GOVERNMENT'S FILING OF DEPARTMENT OF ENERGY ''Impact Statement'', 25 October 1999 [DoJ Bates numbers 00252–00260]

37. Robin Staffin, Deputy Assistant Secretary for Research and Development, Office of Defense Programs, Department of Energy; Notra Trulock III, Senior Intelligence Officer, Office of Energy Intelligence; and Joseph S. Mahaley, Director, Office of Security Affairs, ''Impact Statement'', 17 February 1998: 2. [DoJ Bates number 00116]

38. Robin Staffin, Deputy Assistant Secretary for Research and Development, Office of Defense Programs, Department of Energy; Notra Trulock III, Senior Intelligence Officer, Office of Energy Intelligence; and Joseph S. Mahaley, Director, Office of Security Affairs, ''Impact Statement'', 17 February 1998: 2. [DoJ Bates number 00116]

39. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Court Hearing regarding the Dr. Peter Lee Case, 5 April 2000: 53.

40. ISS Line Attorney, Prepared Statement submitted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts Concerning the Peter Lee Espionage Case, 12 April 2000: 7.

41. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearings regarding the Dr. Peter Lee Case, 29 March 2000: 37.

42. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 38.

43. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 39.

44. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 5 April 2000: 66.

45. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 67.

46. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 67–68.

47. See the opinion of Mr. Justice Reed, in Gorin v. United States, 312 U.S. 19; 61 S. Ct. 429, 1941 U.S. Lexis 1033; 85 L. Ed 488: at 14–15.

48. See the opinion of Mr. Justice Reed, in Gorin v. United States, 312 U.S. 19; 61 S. Ct. 429; 1941 U.S. Lexis 1033; 85 Ed. 488; at 5.

49. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 68.

50. See the opinion of Circuit Judge L. Hand, in United States v. Heine, 151 F.2nd 813; 1945 U.S. App. Lexis 3049: at 8.

51. Reporter's Transcript or Proceedings, United States of America, vs. Peter Lee, 26 March 1998: 14. [DOJ Bates number 000017]

52. Reporter's Transcript of Proceedings, United States of America, vs. Peter Lee, 26 March 1998: 25. [DOJ Bates number 000028]. See also Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97–1181–TJH, 27 February 1998: 18. [DOJ Bates number 000090]

53. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 29.

54. Reporters Transcript of Proceedings, United States of America, vs. Peter Lee, 26 March 1998: 21–22. [DOJ Bates number 000024–000025]

55. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 5 April 2000: 15. See also Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 73.

56. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 34–35.

57. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing

regarding the Dr. Peter Lee Case, 12 April 2000: 36.

58. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 86.

59. Prosecuting Attorney Transcript of Interview with Senator Arlen Specter in Los Angeles, CA, 15 February 2000: 70–71. See also, Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 5 April 2000: 41,48.

60. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 90.

61. John C. Keeney, Principal Deputy Assistant Attorney General, Criminal Division, Department of Justice, prepared statement submitted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts Concerning the Peter Lee Espionage Case,'' 12 April 2000: 6.

62. John C. Keeney, Principal Deputy Assistant Attorney General, Criminal Division, Department of Justice, prepared statement submitted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts Concerning the Peter Lee Espionage Case,'' 12 April 2000: 6.

63. Prosecuting Attorney, ''Government's Position With Respect to Sentencing Factors: Declarations of [Prosecuting Attorney],'' 27 February 1998: 7.

64. Department of Energy, ''Impact Statement,'' 17 February 1998: 3: [DoJ Bates number 00117]

65. Gilbert Cordova, ''Declaration of Gilbert R. Cordova,'' 23 March 1998; 2.

66. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 61.

67. Prosecuting Attorney, Transcript of Interview with Senator Arlen Specter in Los Angeles, CA, 15 February 2000: 72.

68. Prosecuting Attorney, Transcript of Interview with Senator Arlen Specter in Los Angeles, CA, 15 February 2000: 76.

69. Prosecuting Attorney, Transcript of Interview with Senator Arlen Specter in Los Angeles, CA, 15 February 2000: 72.

70. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 87–88.

71. SSA, National Security Law Unit, ''Royal Tourist,'' e-mail to FBIHQ Supervisory Special Agent, 25 November 1997: 1.

72. Dan Bauer, Colonel, US Army, ''Possible Espionage Arrest Update (U)—INFORMATION MEMORANDUM,'' MEMORANDUM FOR THE SECRETARY OF DEFENSE, DEPUTY SECRETARY OF DEFENSE, 26 November 1997: 1.

73. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 92–93.

74. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 40.

75. Jon P. Jennings, letter to Senator Orrin G. Hatch, 18 April 2000: 2.

76. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 93–94.

77. Cox Committee Report, Vol. 1, 88.

78. Defense Criminal Investigative Service, ''Report of Investigation,'' 11 September 1998: 2. [DoD Bates number D001003]

79. Transcript of Proceedings (first draft), Hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 29 March 2000: 51.

80. Transcript of Proceedings (first draft), Hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 29 March 2000: 52–53.

81. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 31.

82. Transcript of Proceedings (first draft), Hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 12 April 2000: 58.

83. Transcript of Proceedings (first draft), Hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Dr. Peter Lee Case, 12 April 2000: 58–59.

84. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 32–33.

85. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 34.

86. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 12 April 2000: 34.

87. See Al Heiman, fax cover sheet of November 10, 1997 to FBI Special Agent Dave LeSueur, and Dr. Richard Twogood, memorandum to Bill Cleveland and Al Heiman, ''Classification Guidelines'', November 10, 1997.

88. J.G. Schuster, Jr., ''REQUEST FOR CLASSIFICATION GUIDANCE,'' 14 November 1997.

89. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 100.

90. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 105–107.

91. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 106–107.

92. Prosecuting Attorney, Transcript of Interview with Senator Arlen Specter in Los Angeles, CA, 15 February 2000: 63.

93 Stephen Preston, General Counsel of the Navy, letter to the Cox Committee, 21 May 1999: 1.

94 Stephen Preston, General Counsel of the Navy, letter to the Cox Committee, 21 May 1999: 2.

95. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 79.

96. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 29 March 2000: 24–25.

97. Transcript of Proceedings (first draft), ''Senate Judiciary Subcommittee on Administrative Oversight and the Courts Hearing regarding the Dr. Peter Lee Case, 5 April 2000: 11.

98. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee CR No. 97 1181–TJH, 27 February 1998: 12. [DoJ Bates number 000084]

99. Cordova, Declaration in the Matter of United States vs. Peter Hoong-Yee Lee CR No. 97 1181–TJH, 27 February 1998: 7. [DoJ Bates number 000079]

101. INFORMATION, United States of America v. Peter Lee, filed 5 December 1997:3. [DoJ Bates number 000003)

102. See Brady v. Maryland 373 U.S. 83 (1963), in which the Supreme Court declared that, regardless of the good faith or bad faith of the prosecution, the suppression of evidence favorable to the accused violated due process where the evidence is material to either guilt or punishment. This court ruling imposes an obligation on the Government to provide to the defense any evidence or information in its possession which could be favorable to the accused.

Mr. SPECTER. Mr. President, I ask unanimous consent that two letters from the Justice Department be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, December 19, 2001.

Hon. ARLEN SPECTER,
U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: We have no objection on national security grounds to publication of your final report on the Wen Ho Lee investigation. We have not reviewed the report for the accuracy of the facts or conclusions reflected therein.

Sincerely,

JOHN E. COLLINGWOOD,
Assistant Director, Officer of Public and Congressional Affairs.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, December 20, 2001.

Hon ARLEN SPECTER,
U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: We have no objection on national security grounds to publication of your final report on the Peter lee investigation. We have not reviewed the report for the accuracy of the facts or conclusions reflected therein.

Sincerely,

JOHN E. COLLINGWOOD,
Assistant Director, Office of Public and Congressional Affairs.

Mr. SPECTER. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. One minute.

Mr. SPECTER. As promised, I yield back the remainder of my time.

VOTE ON CONFERENCE REPORT ACCOMPANYING H.R. 3061

The PRESIDING OFFICER. All time having expired, the question occurs on agreeing to the conference report to accompany H.R. 3061.

Mr. SPECTER. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from Hawaii (Mr. AKAKA) is necessarily absent.

Mr. NICKLES. I announce that the Senator from North Carolina (Mr. HELMS) and the Senator from Nevada (Mr. ENSIGN) are necessarily absent.

The PRESIDING OFFICER (Mrs. CLINTON). Are there any other Sentors in the Chamber desiring to vote?

The result was announced—yeas 90, nays 7, as follows:

[Rollcall Vote No. 378 Leg.]

YEAS—90

Allen	Domenici	Lott
Baucus	Dorgan	Lugar
Bayh	Durbin	McConnell
Bennett	Edwards	Mikulski
Biden	Enzi	Miller
Bingaman	Feinstein	Murkowski
Bond	Frist	Murray
Boxer	Graham	Nelson (FL)
Breaux	Gramm	Nelson (NE)
Brownback	Grassley	Reed
Bunning	Gregg	Reid
Burns	Hagel	Roberts
Byrd	Harkin	Rockefeller
Campbell	Hatch	Santorum
Cantwell	Hollings	Sarbanes
Carnahan	Hutchinson	Schumer
Carper	Hutchison	Sessions
Chafee	Inhofe	Shelby
Cleland	Inouye	Smith (OR)
Clinton	Jeffords	Snowe
Cochran	Johnson	Specter
Collins	Kennedy	Stabenow
Conrad	Kerry	Stevens
Corzine	Kohl	Thomas
Craig	Kyl	Thompson
Crapo	Landrieu	Thurmond
Daschle	Leahy	Torricelli
Dayton	Levin	Warner
DeWine	Lieberman	Wellstone
Dodd	Lincoln	Wyden

NAYS—7

Allard	McCain	Voinovich
Feingold	Nickles	
Fitzgerald	Smith (NH)	

NOT VOTING—3

Akaka	Ensign	Helms

The conference report was agreed to.

Mr. DURBIN. Madam President, I move to reconsider the vote.

Mr. LEAHY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Louisiana.

Mr. BREAUX. Madam President, I yield to the Senator from Pennsylvania.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Madam President, I congratulate all those who worked on this bill.

I have already extended my congratulations to my distinguished colleague, Senator HARKIN. I also thank Senator BYRD and Senator STEVENS. We have a very devoted staff. I would like to thank them. For the majority: Ellen Murray who is the majority clerk and an extraordinary worker; Jim Sourwine, Mark Laisch, Erik Fatemi, Lisa Bernhardt, Adrienne Hallett, Adam Gluck, and Carole Geagley. I did not know the majority had so many more than we do. On the minority staff, Bettilou Taylor—Senator Taylor—Mary Dietrich, Sudip Parikh, and Emma Ashburn.

This was an extraordinary bill, very complicated, $123 billion, lots of requests, lots of pages, lots of proofreading, and we are glad it is finished.

I yield the floor.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. DASCHLE. I ask unanimous consent that the Senate proceed to executive session to consider Executive Calendar Nos. 616 and 617; that the nominations be confirmed, the motions to reconsider be laid upon the table, any statements relating to the nominations be printed in the RECORD, the President be immediately notified of the Senate's action, and the Senate return to legislative session.

The PRESIDING OFFICER. Is there objection?

Mr. HARKIN. Reserving the right to object.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. HARKIN. I ask the leader, what nominees?

Mr. DASCHLE. I advise the Senator from Iowa that these nominees are for the First Vice President of the Export-Import Bank and for a member of the Board of Directors of the Export-Import Bank.

Mr. HARKIN. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations were considered and confirmed, as follows:

EXPORT-IMPORT BANK OF THE UNITED STATES

Eduardo Aguirre, Jr., of Texas, to be First Vice President of the Export-Import Bank of the United States for a term expiring January 20, 2005.

J. Joseph Grandmaison, of New Hampshire, to be a Member of the Board of Directors of the Export-Import Bank of the United States for a term expiring January 20, 2005.

LEGISLATIVE SESSION

The PRESIDING OFFICER. The Senate will now return to legislative session.

INVESTOR AND CAPITAL MARKETS FEE RELIEF ACT

Mr. DASCHLE. I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 74, H.R. 1088.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (H.R. 1088) to amend the Securities Exchange Act of 1934 to reduce fees collected by the Securities and Exchange Commission, and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. DASCHLE. I ask unanimous consent that the bill be read a third time and passed, the motion to reconsider be laid upon the table, and any statements relating to the bill be printed in the RECORD, with no intervening action.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (H.R. 1088) was read the third time and passed.

PROVIDING FOR SINE DIE ADJOURNMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES

Mr. DASCHLE. Madam President, I now call up H. Con. Res. 295, the adjournment resolution. I ask that the Senate vote on adoption of the concurrent resolution, with no intervention action or debate.

The PRESIDING OFFICER. The clerk will report the concurrent resolution by title.

The assistant legislative clerk read as follows:

A concurrent resolution (H. Con. Res. 295) providing for the sine die adjournment of the first session of the One Hundred Seventh Congress.

There being no objection, the Senate proceeded to consider the concurrent resolution.

Mr. DASCHLE. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the concurrent resolution.

The clerk will call the roll.

Mr. REID, I announce that the Senator from Hawaii (Mr. AKAKA) is necessarily absent.

Mr. NICKLES, I announce that the Senator from North Carolina (Mr. HELMS), and the Senator from Nevada (Mr. ENSIGN), and the Senator from Kansas (Mr. ROBERTS) are necessarily absent.

The PRESIDING OFFICER (Mr. MILLER). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 56, nays 40, as follows:

[Rollcall Vote No. 379 Leg.]

YEAS —- 56

Baucus	Edwards	Lincoln
Bennett	Feingold	McCain
Biden	Feinstein	Mikulski
Bingaman	Fitzgerald	Miller
Boxer	Graham	Murkowski
Breaux	Gramm	Murray
Bunning	Hagel	Nelson (FL)
Byrd	Harkin	Nelson (NE)
Cantwell	Hollings	Reed
Carnahan	Inouye	Reid
Carper	Jeffords	Rockefeller
Chafee	Johnson	Sarbanes
Cleland	Kennedy	Shelby
Cochran	Kerry	Stabenow
Corzine	Kohl	Stevens
Daschle	Landrieu	Torricelli
Dodd	Leahy	Wellstone
Dorgan	Levin	Wyden
Durbin	Lieberman	