

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

AUG 25 2000

R. Stamboulidis
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 99-1417 JP

WEN HO LEE,

Defendant.

ORDER

On August 15, 2000 a hearing was held on Defendant's "Motion for Discovery of Materials Related to Selective Prosecution," (Doc. No. 87). George Stamboulidis, Laura Fashing, Michael Liebman, and Paula Burnett represented the government; Mark Holscher and John Cline represented Defendant, who was present. Having carefully reviewed the briefs, the evidence, and the applicable law, I find that *in camera* review of certain evidence that Defendant seeks is appropriate and would be helpful to me before I make a final ruling on the motion.

Defendant seeks six categories of materials, including:

(1) the reports and memoranda supporting the findings of the DOE's Task Force on Racial Profiling's January 2000 report, (2) the Defensive Information to Counter Espionage videotapes¹ that were created by DOE counterintelligence and shown to DOE employees until last year . . . (3) DOE or DOJ memoranda and reports confirming that the FBI targets Americans of Chinese ethnicity for potential criminal espionage involving the PRC; (4) the DOJ's and DOE's responses to the numerous Congressional inquiries related to the justification for and details of the investigation of Dr. Lee; (5) the classified September 1999 State Department report by Jacqueline Williams-Bridger . . . and (6) information concerning specific cases in which the government declined to prosecute under circumstances similar to, or more egregious than, this case.

(Memo. in Supp. at 4.) This list is based on a letter from Mr. Holscher to the government dated

¹ Mr. Holscher represented at the hearing that there is only one videotape.

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May 1, 2000. (See id. Ex. A.) The May 1, 2000 letter lists thirty-two somewhat more specific items that Defendant contends would support a claim of selective prosecution. (Id.) The government refuses to disclose the requested materials on the grounds that (1) the decision to prosecute is ill-suited to judicial review, (2) law enforcement would be chilled by subjecting the prosecutor's decisions to outside inquiry; (3) discovery would reveal the government's enforcement policy, (4) discovery would reveal the government's strategy, and (5) discovery would divert prosecutorial resources. (See Resp. at 4, Tr. at 40-43)

The government's first concern is premature given that the only question before the Court at this point is whether discovery is warranted. The same is true for the government's second ground for not disclosing the requested information. There is also no evidence, or reason to believe, that law enforcement would in any way be chilled by an *in camera* review of certain of the materials Defendant requests. Similarly, the government's enforcement policy will not suffer from an *in camera* review of certain materials. Also, an *in camera* review will not reveal to Defendant any of the government's prosecution strategy. Further, it is highly unlikely that the materials ordered produced for *in camera* review will reflect any prosecutorial strategy.

What remains is the government's concern, identified in United States v. Armstrong, 517 U.S. 456, 468 (1996), with expending prosecutorial resources. As the government candidly admitted, it can with little effort procure certain of the items described below. (See Tr. at 42.) Certain other categories of materials will require more work to compile. However, any diversion of prosecutorial resources will be minimal given that (1) much of the information for which some research will be required is in the apparent control of, and can be gathered by, individuals/agencies other than the U.S. Attorneys prosecuting this case, and (2) monitoring

compliance with this order will impose a burden that is so slight as to be quite easily performed by persons within the vast array of prosecutorial resources the government has already deployed in this case.

IT IS THEREFORE ORDERED THAT the government must produce, by September 15, 2000, the following materials for *in camera* review:

(1) The DOE's Task Force on Racial Profiling January 2000 report and any interview memoranda on which it is based, including all memoranda of the site visit to Los Alamos National Laboratory in June 1999;

(2) the entire, unredacted DOE counterintelligence Defensive Information to Counter Espionage videotape;

(3) DOE and DOJ records of statements by Notra Trulock discussing that any investigation should focus on ethnic Chinese;

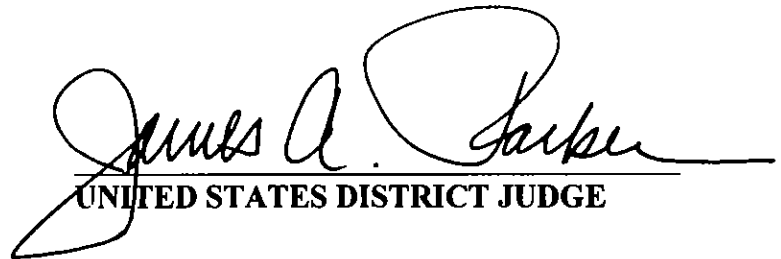
(4) the list of suspects created by Notra Trulock's team as part of the Kindred Spirit investigation;

(5) the full, classified transcript of any testimony given by the Attorney General and any other DOJ (including FBI) and DOE officials before any congressional committee with respect to Defendant and the investigations in this case;

(6) FBI 302s dated November 29, 1998; January 22, 1999; February 26, 1999; and September 3, 1999 which relate the number of individuals who had access to W-88 information;

(7) the classified September 1999 State Department Report by Jacqueline Williams-Bridger; and

(8) the final reports of all administrative inquiries conducted by DOE of LANL employees regarding improper handling of restricted data from the beginning of 1987 to the present.


UNITED STATES DISTRICT JUDGE