FORMAL WRITTEN TESTIMONY OF MARK S. ZAID, ESQUIRE[*]

DELIVERED BEFORE THE
COMMITTEE ON GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

Can You Clear Me Now?:
Weighing "Foreign Influence" Factors in Security Clearance Investigations

THURSDAY, JULY 13, 2006

Good afternoon Mr. Chairman, Members of the Committee, it is with pleasure that I testify today before this distinguished Committee on such an important topic that relates to the national security interests of the United States.

The timing for this hearing could not be better. This is a period in our history when our country desperately needs individuals with foreign language expertise and intimate experience with other cultures to assist in the U.S. Government's ongoing fight in the war against terror. The logical population from which to recruit individuals up to the task are those American citizens, whether native or naturalized, with foreign ties or backgrounds. Yet our agencies are losing the ability to utilize hundreds, if not thousands, of loyal Americans simply because they brazenly admitted to affection for their parents residing overseas, dared to telephone their siblings back in the home country or – through no action of their own – hold dual citizenship. As a result, rather than be permitted to contribute to our national security interests they are punished with a red scarlet letter associated with the denial or revocation of a security clearance that can prevent the start of an important career path if not destroy an existing one.

The disqualifying conditions of "Foreign Influence" and "Foreign Preference", as the terms are known in the industry, are often applied arbitrarily and inconsistently throughout the U.S. Government and more disturbingly even within the same agency to deny or revoke a security clearance. In recent years, in fact, it has become somewhat common for the Department of Defense (DoD) to seek to revoke a clearance based on Foreign Influence or Preference of those who have been in a possession of a clearance for years, even decades. Oftentimes these individuals have never misled or lied to the government about their foreign relatives or origins, but nevertheless out of the blue DoD has decided that the person poses a risk that never previously existed before.[1]

---

[*] Managing Partner, Krieger & Zaid, PLLC, 1920 N Street, N.W., Suite 300, Washington, D.C. 20006. Tel. No. 202-454-2809. E-mail: ZaidMS@aol.com. A short biography is attached at Exhibit "1". Some portions of this testimony were originally presented to the House Government Reform Committee's Subcommittee on National Security, Emerging Threats, and International Relations at a hearing entitled "*National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation*" held on February 14, 2006. In that testimony, a copy of which can be accessed at *http://reform.house.gov/UploadedFiles/Zaid%20 Congressional%20Testimony%20-%20Security%20Clearance2.pdf*, I discussed numerous problems within the security clearance system throughout the federal government and identified several areas where Congress can play an enhanced role particularly to correct the problems. The views expressed herein reflect the opinion of only myself and should not be attributed or ascribed to any organization with which I may be affiliated.

[1] One example is a former Air Force OSI contractor/State Department linguist who had his clearance suspended in the wake of 9/11 based on the filing of false allegations against him. Given the fact the contractor was of Middle Eastern origin and the climate at the time, he was perceived as Muslim and treated as a potential terrorist. He is, however, a Lebanese Christian who had fought with the Israelis and our covert forces during the Lebanese Civil War in the early 1980s. To this day agencies of the U.S. Government refuse to grant him a "permanent" security clearance for work in the territorial United States though they routinely seek to utilize his expertise on

I have had several cases involving the Central Intelligence Agency (CIA) where individuals wasted months through the application/training process only to eventually be informed that their foreign background/connections, which had neither changed nor been hidden from the outset, prevented their being granted a clearance. This included instances where the applicant repeatedly questioned whether their foreign background would pose a problem. CIA recruiters continually stated it would not, but CIA security later concluded otherwise.

The premise for this hearing, at least to the extent I view my role, is two-fold: first, to understand why the Department of Defense has intentionally refused to immediately adopt and implement revised Adjudicative Guidelines that were issued by the President last December and the impact of that decision; second, to explore how to address a legitimate concern that federal agencies are losing potentially valuable resources by denying or revoking security clearances of loyal and trustworthy individuals who have ties to foreign countries.

I have been handling cases involving national security claims (which has included my authorized access to classified information up to the TS/SCI level) for more than a decade, and I have represented nearly 100 individuals in security clearance cases before numerous federal agencies. Just last month I co-taught a DC Bar Continuing Legal Education class on defending adverse security clearance decisions. Additionally, my firm has represented hundreds of federal employees and contractors within the Intelligence and Military Communities regarding matters that touch directly upon national security and clearance issues.

The experience I bring before you today is crucial to understanding exactly how the security clearance environment operates for unlike our legal system precedent plays little to no role. Indeed, only two agencies – the Department of Defense's Office of Hearings and Appeals (DOHA) and Department of Energy (DOE) – even publish decisions in security clearance cases that are available to the public, and these are at best incomplete in offering a portrait of the system.[2]

With respect to the private sector most of what we know about security clearance decisions comes from the anecdotal experience of those, such as myself, who handle these types of cases.[3] Of course, anecdotal experience has its own drawbacks because it is limited to

---

classified short-term projects in dangerous foreign environments when it suits their interests. This has included protecting former U.S. Iraqi Civilian Administrator Paul Bremer in the initial months of the war. Most recently, after promises from senior officials, the CIA denied this individual a security clearance based on Foreign Influence. The case is currently on appeal, but few appeals succeed with the CIA.

[2] The DoD/DOHA issues its opinions at *http://www.defenselink.mil/dodgc/doha/industrial/* while the DOE's decisions can be found at *http://www.oha.doe.gov/persec2.asp*.

[3] There are few indepth government reports that analyse the specific challenge process or the substance of revocation/denial decisions. The General Accounting Office (GAO) has issued several reports and provided testimony pertaining to DoD's security clearance program over the last few years. *See e.g.* GAO-06-748T, *DoD Personnel Clearances: New Concerns Slow Processing of Clearances for Industrial Personnel* (May 17, 2006); GAO-06-233T, *DoD Personnel Clearances: Government Plan Addresses Some Longstanding Problems with DoD's Program, But Concerns Remain*, (Nov. 9, 2005); GAO-05-842T, *DoD Personnel Clearances: Some Progress Has Been Made but Hurdles Remain to Overcome the Challenges That Led to GAO's High-Risk Designation* (June 28, 2005); GAO-04-632, *DoD Personnel Clearances: Additional Steps Can Be Taken to Reduce Backlogs and Delays in Determining Security Clearance Eligibility for Industrial Personnel* (May 26, 2004); GAO-04-344, *DoD Personnel Clearances: DoD Needs to Overcome Impediments to Eliminating Backlog and Determining Its Size* (Feb. 9, 2004); GAO-01-465, *DoD Personnel: More Consistency Needed in Determining Eligibility for Top Secret Security Clearances* (Apr. 18, 2001); GAO-00-246, *DoD Personnel:*

specific cases and the experiences of those relaying their knowledge. My experiences, therefore, may or may not be similar to those of my colleagues. Nevertheless, having studied this issue and conversed with colleagues who often routinely handle these types of cases, I am confident I can provide this Committee with a realistic and accurate depiction of the current circumstances, at least from a private practitioner's viewpoint.

I should note that in many of the revocation/denial cases "Foreign Influence" or "Foreign Preference" are typically not the only disqualifying conditions asserted against the individual. The proverbial security clearance "kitchen sink" is often thrown at an individual in a Statement of Reasons as justification for the proposed adverse action. Thus even were the Foreign Influence or Preference concerns favorably resolved it may not alleviate the specific agency's concerns, and at times it may be difficult to even discern which disqualifying condition is actually the paramount reason for the proposed or finalized denial/revocation.

Moreover, it is generally the case that the potentially derogatory or disqualifying information originated directly, and usually voluntarily, from the individual either through the filing of the customary security paperwork[4] or a follow-up investigative interview with the subject. It is seldom, though by no means would it be significantly surprising, that the information is obtained through an independent background investigation or third-party sources.

Though my testimony can possibly be construed as more critical of the process than positive, I do wish to highlight at the outset that there are many shining examples of how some agencies, and the individuals who are employed therein, implement their security clearance programs. My testimony today is in no way designed to ignore or minimize the excellent contributions many make to the system.

Indeed, I would rate DOHA, whose activities will be widely discussed today in a critical light, as one of the better, if not, best venue for challenging security clearance denials or revocations. I have particularly found DOHA's staff attorneys and judges to be highly professional and competent. Of course, that is not to say that there are not significant shortcomings to correct within DOHA and other agencies. It is necessary to present the darker side of the process that continues to increasingly spread throughout the system in order to bring about necessary change.

INTRODUCTION

DoD and its entities are responsible for the majority of all active personnel security clearances. Clearances can permit access to a range of information from Confidential to Top Secret code-words so high that even the names of the compartments are themselves classified. More than 2 million people alone have security clearances that permit access to Secret

---

More Accurate Estimate of Overdue Security Clearance Reinvestigations Is Needed (Sept. 20, 2000); GAO-00-215, *DoD Personnel: More Actions Needed to Address Backlog of Security Clearance Reinvestigations* (Aug. 24, 2000); GAO-00-12, *DoD Personnel: Inadequate Personnel Security Investigations Pose National Security Risks* (Oct. 27, 1999). Other than DoD, the GAO reports are much older. *See* GAO-93-14, *Administrative Due Process: Denials and Revocations of Security Clearances and Access to Special Programs* (May 5, 1993).

[4] Such as the SF-86, a copy of which can be found at *http://www.usaid.gov/procurement_bus_opp/procurement/forms/SF-86/sf-86.pdf*.

information.[5] According to a 2001 GAO report, DoD alone was rendering approximately "200,000 decisions annually to grant, deny, or revoke security clearances for its civilian, military, and contractor personnel."[6]

DOHA is the largest component of the Defense Legal Services Agency and part of the DoD Office of General Counsel. As noted on its website, it:

> provides hearings and issues decisions in personnel security clearance cases for contractor personnel doing classified work for all DoD components and 20 other Federal Agencies and Departments; conducts personal appearances and issues decisions in security clearance cases for DoD civilian employees and military personnel; settles claims for uniformed service pay and allowances, and claims of transportation carriers for amounts deducted from them for loss or damage; conducts hearings and issues decisions in cases involving claims for DoD School Activity benefits, and TRICARE/CHAMPUS payment for medical services; and functions as a central clearing house for DoD alternative dispute resolution activities and as a source of third party neutrals for such activities.[7]

"In implementing the federal adjudicative guidelines, DoD Regulation 5200.2R, *Department of Defense Personnel Security Program*, January 1987, sets forth the policies and procedures for granting DoD military, civilian, and contractor personnel access to classified information. The policies and procedures for granting industrial personnel security clearances are also contained in DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, April 20, 1999."[8]

BRIEF LEGAL ANALYSIS SURROUNDING CHALLENGES TO ADVERSE DECISIONS

Following World War II, various presidents have issued a series of Executive Orders designed to protect sensitive information and to ensure its proper classification throughout the Executive Branch.[9] Those afforded the luxury of a security clearance are typically required to undergo a background investigation that varies according to the degree of adverse effect the applicant could potentially have on the national security, i.e., the higher the level of clearance that is to be granted the greater the potential threat to national security and the risks that must be assessed.[10]

---

[5] Report on the Commission of Protecting and Reducing Government Secrecy, S. Doc. 105-2, 103rd Cong. (1997).

[6] GAO-01-465, *DoD Personnel* at 3.

[7] *http://www.defenselink.mil/dodgc/doha*.

[8] GAO-01-465, *DoD Personnel* at 10 fn 1.

[9] *See e.g.,* Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1979); Exec. Order No. 12356, § 4.1(a), 3 C.F.R. 174 (1983); Exec. Order No. 12968, 60 Fed.Reg. 19,825 (1995).

[10] *See* Exec. Order No. 10450, § 3, 3 C.F.R. 937 (1949-1953 Comp.).

Except in very, very limited circumstances, most courts hold the view that there does not exist any right to judicial review of any aspect of a substantive security clearance determination.[11] This perception came about from a decision of the U.S. Supreme Court in the landmark case of *Department of Navy v. Egan*.[12] Since this decision time and time again federal courts have declined to address substantive clearance decisions.[13] Denial of relief is primarily based on the false premise that the courts lack appropriate jurisdiction or knowledge to adjudicate or review the merits of any security clearance determination. Indeed, it makes little sense to conclude that Article I judges, who render security clearance determinations daily, are somehow better suited to do so than Article III judges who do not even require security clearances simply due to the nature of their status.

In *Egan* the Court ruled that "[i]t should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"[14] The Court also noted that "a clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States." "The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'"[15]

To those who believe their clearance determinations were inappropriately or even vindictively pursued, the Court condemned any realistic chance of judicial oversight when it opined that:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the

[11] The primary exceptions are challenges to procedural due process violations (i.e., failure of an agency to afford certain administrative rights or abide by applicable regulations) or an allegation of a Constitutional violation (virtually impossible to prove). *See e.g., Webster v. Doe*, 486 U.S. 592 (1988); *Service v. Dulles*, 354 U.S. 363, 373 (1957); *Stehney v. Perry*, 101 F.3d 925 (3rd Cir. 1996); *Hill v. Dep't. of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988).

[12] 484 U.S. 518 (1988).

[13] The cases could be listed ad naseum. *See generally Bennett v. Chertoff*, 425 F.3d 999 (D.C.Cir. 2005); *Ryan v. Reno*, 168 F.3d 520 (D.C.Cir. 1999); *Stehney*, 101 F.3d at 932; *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

[14] *Egan*, 484 U.S. at 528.

[15] *Id*. at 528-529 (internal citations omitted).

> potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Thus, unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.[16]

However, the *Egan* case dealt specifically solely with whether or not the Merit System Protection Board had statutory jurisdiction to handle a clearance challenge. The true value of *Egan* should never have expanded beyond that limitation but it did and thousands of individuals have suffered as a result. Thus, now is the time for Congress to meet the Judiciary's challenge head-on. In order for any legitimate oversight to exist in the realm of security clearances, Congress must take action.

GENERAL EXPLANATION OF SECURITY CLEARANCE APPEAL PROCESS

Executive Order 12968, issued by President Clinton in 1995, created the current framework for the granting, denial or revocation of security clearances. Section 5.2 sets forth the minimum requirements an agency must provide for denials or revocations of eligibility for access. Applicants and employees who are determined to not meet the standards for access to classified information established in Section 3.1 of the Order shall be:

> (1) provided as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit;
> (2) provided within 30 days, upon request and to the extent the documents would be provided if requested under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (3 U.S.C. 552a), as applicable, any documents, records, and reports upon which a denial or revocation is based;
> (3) informed of their right to be represented by counsel or other representative at their own expense; to request any documents, records, and reports as described in section 5.2(a)(2) upon which a denial or revocation is based; and to request the entire investigative file, as permitted by the national security and other applicable law, which, if requested, shall be promptly provided prior to the time set for a written reply;
> (4) provided a reasonable opportunity to reply in writing to, and to request a review of, the determination;
> (5) provided written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal;
> (6) provided an opportunity to appeal in writing to a high level panel, appointed by the agency head, which shall be comprised of at least three

[16] *Id*. at 530 (internal citations omitted, emphasis added).

members, two of whom shall be selected from outside the security field. Decisions of the panel shall be in writing, and final except as provided in subsection (b) of this section; and
(7) provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudicative or other authority, other than the investigating entity, as determined by the agency head. A written summary or recording of such appearance shall be made part of the applicant's or employee's security record, unless such appearance occurs in the presence of the appeals panel described in subsection (a)(6) of this section.

Significant discretionary exceptions exist throughout the implementation of the above minimum standards as well as elsewhere within the relevant Sections. Within the Order itself, for example, subsection (c) while noting that agencies may "provide additional review proceedings beyond those required by subsection (a) of this section. This section does not require additional proceedings, however, and creates no procedural or substantive rights." Moreover, subsection (d) permits an agency to certify that if "a procedure set forth in this section cannot be made available in a particular case without damaging the national security interests of the United States by revealing classified information, the particular procedure shall not be made available. This certification shall be conclusive."

Finally, not surprisingly, Section 7.2 (e) notes that "[t]his Executive order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Agency implementation of the Executive Order varies significantly throughout the federal government and inconsistencies exist even within the same agency.[17]

In response to Executive Order 12968, Adjudicative Guidelines were issued in March 1997, in order to establish "a common set of personnel security investigative standards and adjudicative guidelines for determining eligibility for access to classified information."[18] These guidelines pertain to all U.S. government civilian and military personnel, consultants,

[17] For example, since October 2000, hundreds of individuals have had their security clearance revoked due to the enactment of the Smith Amendment, 10 U.S.C. § 986. This Act prohibits the Department of Defense from granting or renewing a security clearance to anyone who was convicted of a crime and sentenced to more than a year in jail. It applies to those who are employees of the Department of Defense, a member of Armed Forces on active or inactive status, or an employee of a defense contractor. As my colleague Sheldon Cohen has noted, "the Smith Amendment has been handled differently not only among the military departments, but even within the Office of the Secretary of Defense, notably regarding the effect of a pardon. The Defense Office of Hearings and Appeals (DOHA) which handles contractor employee cases, has ruled that a pardon does *not* eliminate Smith Amendment consideration. On the other hand, the Washington Headquarters Services, Clearance Appeals Board which reviews clearances for government employees *does* consider that a state pardon removes the case from Smith Amendment sanction." *See* Cohen, Sheldon, "Smith Amendment Update" (May 2004)(emphasis original), available at *http://www.fas.org/sgp/eprint/smithamend2.pdf*. Frankly, the manner in which agencies established even the basic framework for the appeal process varies across the board. Some agencies grant personal appearances as the initial level of appeal, others permit written submissions. Some agencies hold appeal panels for the individual to appear before, but some offer panels where the identities of the deciding officials are not even known. Some agencies allow hearings with live witnesses before an administrative judge, whereas others only the petitioner can appear before a judge. The list of differences and variances goes on and on.

[18] GAO-01-465, *DoD Personnel* at 11.

contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information.[19] "They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information (SCI) and special access programs (SAPs) and are to be used by government departments and agencies in all final clearance determinations."[20] The intended policy was to foster "consistent application of the federal guidelines to facilitate reciprocity among federal agencies…."[21]

As the 1997 Guidelines made perfectly clear:

> the adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:
>
> a. The nature, extent, and seriousness of the conduct;
> b. The circumstances surrounding the conduct, to include knowledgeable participation;
> c. The frequency and recency of the conduct;
> d. The individual's age and maturity at the time of the conduct;
> e. The voluntariness of participation;
> f. The presence or absence of rehabilitation and other pertinent behavioral changes;
> g. The motivation for the conduct;
> h. The potential for pressure, coercion, exploitation, or duress; and
> i. The likelihood of continuation or recurrence.
>
> Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.
> *The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person.*[22]

---

[19] "The guidelines are based on the collective advice and expertise of a broad cross section of senior representatives from 10 federal agencies and the results of studies of prior espionage cases." *Id*. at 11-12. A similar effort led to the issuance of the 2005 guidelines.

[20] *http://www.dss.mil/nf/adr/adjguid/adjguidF.htm*.

[21] GAO-01-465, *DoD Personnel* at 11.

[22] *Id*. (emphasis added).

The adjudication process is based on the whole person concept and security clearance decisions are not to be made in a vacuum. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. The conduct in question could have taken place completely outside the context of work, years prior or include actions that have previously been favorably adjudicated. An adjudicator is being called upon to assess unpredictable future behavior.

Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future.

On December 29, 2005, the President of the United States, through his National Security Advisor, Stephen Hadley, issued a new set of Adjudicative Guidelines to govern security clearance revocations or denials.[23] Mr. Hadley's cover memorandum notes that the Guidelines were to be "implemented immediately."

In both the 1997 and 2005 Guidelines thirteen adjudicative categories exist that can be addressed individually or collectively where deemed appropriate to deny or revoke an individual's security clearance.[24] Each has a non-exhaustive list of disqualifying circumstances that can raise security concerns and conditions that conceivably can mitigate security concerns. The revised Guidelines significantly modified portions of the previous version mostly, if not entirely, in favor of the individual clearance holder or prospective holder. This is especially true with respect to Guideline B: Foreign Influence and Guideline C: Foreign Preference concerns.

A copy of the 2005 version of Guideline B and C are reproduced at Exhibit "2". A side by side listing of the 1997 and 2005 versions in order to allow comparison of the modifications can be found at Exhibit "3".

Obtaining a favorable resolution to a security clearance appeal is primarily based on demonstrating that mitigating circumstances exist rather than necessarily refuting the allegations against the individual. As an extreme example, it is possible that someone who committed murder can be granted a security clearance. As mitigation the individual could show that the incident occurred years earlier when he was a minor, and that he has acted as an exemplary citizen ever since. Or, more commonly, the case would be where an individual

---

[23] A copy of the new Guidelines and cover memorandum can be found at the website for the Information Security Oversight Office (ISOO) at *http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf*. ISOO is a component of the National Archives and Records Administration (NARA) and receives its policy and program guidance from the National Security Council (NSC).

[24] They are Guideline A: Allegiance to the United States; Guideline B: Foreign influence; Guideline C: Foreign preference; Guideline D: Sexual behavior; Guideline E: Personal conduct; Guideline F: Financial considerations; Guideline G: Alcohol consumption; Guideline H: Drug involvement; Guideline I: Emotional, Mental, and Personality Disorders; Guideline J: Criminal conduct; Guideline K: Security violations; Guideline L: Outside activities; and Guideline M: Misuse of information technology systems.

who was arrested for a DUI would need to demonstrate why that incident was the exception rather than the norm.

THE DEPARTMENT OF DEFENSE'S WILFULL FAILURE TO ADOPT AND IMPLEMENT THE NEW ADJUDICATIVE GUIDELINES

Notwithstanding the President's simple instructions to immediately implement the new Guidelines, not every agency has interpreted Mr. Hadley's cover memorandum in the same manner. The majority of agencies have appropriately followed the implementation instructions and are currently applying the new Guidelines. [25] However, DoD, and its numerous entities (including NSA, DOHA, DSS, NRO and each military department), has failed to do so. In fact, as far as I know, DoD is the <u>only</u> agency not to have formally done so.

Apparently, as I have been told, DoD believes the Guidelines must be subject to a notice and comment period. Whatever the reason, the hold-up lies apparently with the DoD's Office of General Counsel. DoD's current posture is disappointedly not surprising. It was not until April 20, 1999, after publication in the Federal Register (a useless act given these were issued by the President), that DoD adopted the March 1997 Guidelines. And actual application only commenced with SORs issued after July 1, 1999. Thus, it might not be until early 2008 before DoD implements the 2005 Guidelines. That is unacceptable.

Notwithstanding the DoD position, I now argue in all of my DOHA cases that the new Guidelines, as a matter of law and policy, must be applied. Although DoD supposedly previously instructed its adjudication facilities to follow the 1997 guidelines even before they were issued by the President, that does not appear to be the case this time around. In recent oral arguments involving two Foreign Influence cases, one DOHA Administrative Judge appeared unaware that new Guidelines had even been issued. And DOHA's Chief Administrative Judge explicitly agreed that the new Guidelines should be in effect but noted that DOHA had been specifically instructed by DoD not to apply the 2005 Guidelines.

It serves no purpose to speculate as to DoD's intent or motive in taking this current posture. I do know from conversations with officials at the Defense Intelligence Agency, National Security Agency and DOHA, each an entity that of course must abide by DoD policy, that they are as much in the dark about the process as we all seem to be. There is simply no reasonable excuse for DoD's deliberate conduct and inaction. Given DoD's significant involvement in security clearance adjudication, DoD's wilful failure to utilize the new guidelines is negatively impacting hundreds, if not thousands, of individuals. As a result, if an individual is denied a security clearance based on application of the old guidelines when a favorable result would have been attained under the new guidelines the DoD will have harmed the national security interests of the United States.

Should DoD continue its present course of inaction to implement the revised guidelines, I do foresee the possibility of litigation to challenge this omission.

---

[25] I have specifically personally confirmed that the Departments of Energy, Homeland Security and Justice, Central Intelligence Agency, and the Transportation Security Administration have implemented the new guidelines.

THE INTERPRETATION OF THE FOREIGN INFLUENCE AND FOREIGN PREFERENCE GUIDELINES BY DOHA

Until such time DoD, Congress or the President states otherwise, DoD and its entities will continue to apply the 1997 guidelines. What, then, can individuals possibly expect if they find themselves facing Foreign Influence or Foreign Preference concerns? How significant an impact can there be between application of the old and new guidelines?

It is unfortunate that the Committee was unable to hear today from some individuals who have personally suffered the loss or denial of a security clearance based on the 1997 Guidelines. In preparation for this hearing I spoke with several of my clients to inquire of their interest in participating. Quite frankly, many of those who you would otherwise desire to hear from today are too intimidated by their fear that if they came forward to criticize the process they would be subjected to retaliation with respect to their current or future security clearance eligibility. The Committee is already familiar with one of my client, Chan Moon's, experiences with DOHA. Mr. Moon, who is originally from South Korea, finally acquired his security clearance after a multi-year battle over Foreign Influence and other issues. In light of the fact that the Government had appealed the initial favorable decision, as discussed more fully below, it was a rare victory that was achieved.[26]

Only DoD likely knows how many revocation/denials of security clearances have been based on either Foreign Influence or Foreign Preference concerns but the number has certainly increased during the last few years. For example, as of today, approximately 714 DOHA administrative hearing citations, not including appeals, have been posted on DOHA's Website for 2006 (for the period January through June, but even this list is incomplete and many of the more recent decisions appear inaccessible). Approximately 178 decisions (25%) involved Foreign Influence.[27] The countries at issue involved those most would expect to see such as Iran, People's Republic of China, Taiwan, Afghanistan, Israel but also included New Zealand, France, Italy and Canada, to name just a few. Foreign Preference cases were significantly fewer, but still accounted for more than 50 cases.

Even a casual comparison glance between the 1997 and 2005 Adjudicative Guidelines should leave a reader with the notion that the revisions are more relaxed and flexible towards permitting favorable security clearance adjudication. To the trained eye, and with the understanding of prior application, the new Guidelines will likely make a world of difference in many cases. That means DoD's failure to utilize the new Guidelines will preclude otherwise eligible individuals from attaining a clearance, and no doubt may have already done so.

There are significant varying inconsistencies among the agencies in rendering security clearance decisions, especially in Foreign Influence cases. These inconsistencies extend intra-agency as well and DOHA is not immune. With over 30 administrative judges handling cases, there is a great deal of variance. Of course, this is no different than with any lower court.[28] But when inconsistent rulings are rendered in the judicial system usually there is some degree

[26] *See DOD Contractor Lays His Cards on the Table: Acquiring a security clearance proves tougher for contractors with foreign ties*, Legal Times, June 26, 2006.

[27] A listing of DOHA cases from 1996-2006 can be found at *http://www.defenselink.mil/dodgc/doha/industrial*.

[28] Decisions by DOHA Administrative Judges are not legally binding precedent. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges).

of balance or established policy eventually crafted by a higher appellate court. Yet no such thing exists with DOHA as its Appeal Board rarely seeks to ensure consistency in this realm. For example, there are certain specific terms within the guidelines that are loosely thrown about by Administrative Judges. These terms have definable meanings, and while there certainly needs to be case-by-case evaluations of specific circumstances, there must be some semblance of rationality, and there is not, underlying the application of the terms.[29]

While 100% consistency is likely never possible given the human factors involved in adjudicating clearance decisions, there should be concerted efforts to ensure minimum variance in determining who is or is not a security risk based on similar facts and circumstances, especially under identical guidelines. Not surprisingly, the inconsistencies occur on both sides of the "fence," whether that is a failure to properly adjudicate the existence of disqualifying information or too strict application of the adjudicative guidelines. For example a sampling of DoD cases reviewed by the GAO in or around 2000-2001 found that 10% contained foreign influence disqualifying factors that were not properly considered.[30] This included the failure of DoD adjudicators to record mitigating information for individuals who had "spouses, parents, children, and other relatives who were born in foreign countries, such as the former East Germany, South Korea, and Syria with no proof of U.S. citizenship."[31]

Foreign Influence Cases

While it may be true the "federal government is not required to wait until an applicant poses a clear and present danger to national security before it can deny or revoke a security clearance,"[32] an Administrative Judge's decision, particularly when Criterion B is at issue, still nevertheless rests upon common sense. This common sense judgment is, of course, based upon the direct evidence that the Administrative Judge personally hears and reviews throughout the proceedings.

One of the more common disqualifying conditions under Guideline B (Foreign Influence) that leads to the ineligibility of an individual for a clearance under the 1997 guidelines states:

> A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other

[29] *Cf.* ISCR Case No. 02-27028 (March 15, 2004)(clearance granted where e-mails sent once or twice or year, four visits in eight years, prior financial payments to relatives, are all infrequent and casual); ISCR Case No. 02-09102 (February 24, 2004)(four visits in fourteen years, phone calls about once a month and mail about four or five times a year with relatives in China is infrequent, and discussions of family affairs is casual so clearance is granted); ISCR Case No. 02-14995 (February 6, 2004)(contacts with siblings several times per year and five visits to Iran in twenty-fives years is infrequent and casual permitting clearance) *with* ISCR Case No. 02-29403 (April 21, 2004)(clearance denied due to three trips to Pakistan in ten years and phone calls no more than three to four times per year with relatives as they were neither casual nor infrequent).

[30] GAO-01-465, *DoD Personnel* at 21.

[31] *Id.*

[32] *See* ISCR Case No. 02-09907.a1 (March 17, 2004) at 6.

countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

"The Government must establish a *prima facie* case under foreign influence (Guideline B), which establishes doubt about a person's judgment, reliability and trustworthiness."[33] "In a case involving Criterion B, Department Counsel need not present direct or objective evidence that affirmatively proves the applicant is vulnerable to coercion or undue influence, but it does need to present evidence that demonstrates the applicant is engaged in conduct or is in a situation that, as a matter of common sense (Directive, Section F.3.) raises the kinds of security concerns covered by Criterion B."[34]

Mitigating Condition 1 justifies the granting of a security clearance when there exists:

> A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States

The first prong is straightforward enough: family members cannot be "agents of a foreign power." The second prong is more complex, and has to be examined carefully. An Administrative Judge must somehow assure himself that the immediate family member is not (a) "in a position to be exploited by a foreign power", (b) "in a way that could force", (c) "the individual to choose between loyalty to the person(s) involved and the United States." Should any one of those parameters not apply, and each aspect can and should be examined separately, the entire second prong is mitigated.

While (a) "in a position to be exploited by a foreign power" does apply to the immediate family members,[35] (b) and (c) refers to the Applicant alone. Moreover, an immediate relative could be "in a position to be exploited by a foreign power" but *either* not (b) "in a way that could force" *or* where such force requires the Applicant to (c) "choose between loyalty to the person(s) involved and the United States."

The notion of "influence" applies to (b) and/or (c).[36] While this term is nowhere defined, specific limited examples have been discussed. For purposes of Guideline B, it does not matter whether an applicant is personally at risk because the applicant: (1) may be influenced through favorable feelings toward the government or regime of a foreign nation; (2) may be influenced through favorable feelings toward the people (including the applicant's relatives) and culture of a foreign nation; (3) may be influenced through a desire to avoid harm to, or to

---

[33] *See* ISCR Case No. 02-21330 (December 17, 2003) at 5.

[34] *See* ISCR Case No. 98-0507.a1. at 3 (May 17, 1999).

[35] *Id*. ("The analysis of an applicant's case does not end simply because a Judge finds the applicant's relatives are not agents of a foreign power. Even if an applicant's relatives living in a foreign country are not agents of a foreign power, the Judge must consider whether the applicant's relatives are in a position that poses a risk that *they could be exploited* by a foreign power.")(emphasis added).

[36] *See* ISCR Case No. 99-0601 (January 30, 2001) at p. 5 ("The Appeal Board has noted that an applicant may be *influenced through a desire* to avoid harm to his relatives in a foreign nation.")(emphasis added).

gain benefit for, his relatives in a foreign nation; or (4) some combination or variation of such concerns.[37]

However, "[t]he mere possession of family ties with persons in a foreign country is not, as a matter of law, disqualifying under Criterion B. The language of Criterion B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties."[38]

Yet, with respect to exploitation of immediate family members, it is virtually impossible for any applicant to truly affirmatively prove a negative and demonstrate that a foreign relative or contact is not in some way possibly subject to exploitation by a foreign power. [39] In fact, this premise has no true relationship, particularly in our global age, to a territorial connection. A foreign government could easily threaten someone's family members or friends residing here in the United States. It is not even the practical reality of whether that government could or would carry out its threat but the perception of concern that could be raised by the very nature of the threat. Every individual possessing a security clearance is therefore facing a potential genuine risk.

Indeed, this would equally apply to myself. Anyone who conducts research will discover that I routinely handle high-profile national security related cases, and that I have been granted authorized access to classified information, at times up to the TS/SCI level, with several federal agencies. What is to stop a foreign government or terrorist organization from attempting to exploit, coerce or influence me through members of my family in order to gain access to sensitive, classified information? Additionally, if events such as the 1993 bombing of the World Trade Center, its destruction on 9/11 and the 1995 Oklahoma City bombing teach us anything, terrorists live among us as well.

Indeed, notwithstanding the asserted security concerns, I am not aware of any studies, classified or unclassified, that have demonstrated that any foreign power or terrorist organization has specifically targeted U.S. contractors in order to obtain access to classified information. And if there are classified studies, it is highly doubtful that any of the DOHA Judges are aware of them. Are contractors at risk from terrorists in particular? Of course, but anyone who reads a newspaper is aware that a primary danger they face is to be taken as a hostage, not as doorways to access to classified information. Yet these "risks" are repeatedly thrown at applicants without basis and used to deny clearances.

---

[37] *Id*. The "influence" can be either coercive or noncoercive. *See e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at 10-11.

[38] *See* ISCR Case No. 98-0507.a1 (May 17, 1999), at 8.

[39] *See* ISCR Case No. 00-0461 (January 19, 2001)(applicant mitigated security concern where family in Ireland were not agents of foreign power or in position to be exploited, and contact of 12 visits in seven years and monthly phone calls and e-mails were casual and infrequent).

Moreover, the fact is that the evidence commonly utilized to allow a finding that a relative's immediate relatives are not agents of a foreign power is the testimony of the Applicant themselves.[40] Some judges assess great weight to an applicant's statements. Others view them as self-serving. [41] What distinguishes one from the other is unknown.

Another available mitigating factor under Guideline B: Foreign Influence that is commonly raised is that "contact and correspondence with foreign citizens are casual and infrequent." Unfortunately, the terms "casual" and "infrequent" have no standardized definition or application. The Adjudicative Desk Reference, published by The Personnel Security Committee of the U.S. Government Security Policy Board and which was to be used in conjunction with the 1997 guidelines, sets forth this definition:

> 3. **Casual and Infrequent:** Contact and correspondence with foreign citizens is not a concern when it is casual and infrequent. Contact is casual when it is unintended or occurs as an incidental byproduct of other activities, e.g., attending a party where a foreign citizen has also been invited. The contact may not be casual if the subject took the initiative in making it happen. Contact may also be casual if it is limited to an annual exchange of holiday greetings. Whether contact qualifies as infrequent depends upon the nature and circumstances of the contact.[42]

DOHA has made it clear it will not craft a specific test for identifying risk. What is the number of telephone calls to a loved one overseas that should be considered casual or infrequent? Four per year? Seven? Is it the number of calls or is the length of the conversation at issue as well? How many trips back to the home country per decade should arouse suspicion or concern? Two? Ten? Does the identity of the country matter? These are important questions and DOHA's reluctance to craft such a test is perfectly understandable. There is no true barometer that could have any rational general application. Yet, this leads to perceived or actual inconsistencies based on very similar facts.

Consider one case in particular where I represented a defense contractor originally from Pakistan whose clearance was denied based on Foreign Influence. My client provided unrefuted testimony that he had "infrequent contact" with his siblings, "perhaps telephone contact 3-4 times per year lasting only a few minutes at a time to merely inquire about their health and family life." Although the Administrative Judge ruled that there is nothing in the record to indicate that Applicant's brother is an agent of a foreign power, she nevertheless ruled that "there is no evidence to show that he is not in a position to be exploited by a foreign

---

[40] *See e.g.* ISCR Case No. 02-10378.h1 (December 15, 2003)(only applicant testified to Korean family history, clearance granted); ISCR Case No. 02-14351.h1 (October 9, 2003)(same); ISCR Case No. 02-30929.h1 (June 30, 2003); ISCR Case No. 02-18810.h1 (May 21, 2003)(same); ISCR Case No. 02-02172.h1 (May 16, 2003); ISCR Case No. 01-19960.h1 (May 20, 2002))(same).

[41] A Judge is not required to accept a witness's testimony in an uncritical manner or weigh such testimony in isolation from the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12. Moreover, a Judge is not compelled to accept a witness's testimony at face value merely because it is unrebutted. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 4 and n.9; ISCR Case No. 99-0005 (April 19, 2000) at p. 3

[42] This document was previously accessible at *http://www.dss.mil/nf/adr/forinfl/forinflF.htm* and was directly linked to DOHA's website. It was removed several months ago without explanation, though presumably due to the issuance of the revised 2005 guidelines, notwithstanding the fact that DoD has not yet implemented them.

power in a way that might force Applicant to choose between him and his well-being and his loyalty to the United States."[43]

It was noted that "despite Applicant's sincere demeanor and his assurances that he is not a security risk, the circumstances of his family situation argue otherwise. He was unable to put forward evidence that could mitigate the security concerns discussed herein and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information." Yet neither the Administrative Judge nor Government counsel questioned the Applicant's credibility and, in fact, the Judge concluded that "[n]othing in Applicant's testimony or demeanor suggested he was not a loyal American citizen and a credit to his adopted country."[44]

What then was beyond the Judge's rationale for the unfavorable decision?

> Applicant's case requires the recognition that Pakistan and the United States have a special political and economic relationship. At the same time it is also necessary to recognize that Pakistan is on the front lines in the war against international and regional terrorism and, despite the efforts of its government, there are individuals and groups within Pakistan who have acted and continue to act in a hostile manner to U.S. security interests.[45]

Beyond the fact that in today's world this generic assumption and description fits dozens of countries throughout the world, including the U.S. itself, it was completely inconsistent with factual findings reached by other DOHA Administrative Judges and this Administration. Consider another ruling issued just three months after the devastating terrorist attacks of September 11, 2001, wherein the Administrative Judge held:

> Applicant's situation is in marked contrast to a situation where an applicant's family reside in a country whose interests are considered inimical to those of the US. Pakistan is not a hostile country, but a country who enjoys allied support with the US in their current joint security efforts. Put another way, Pakistan is not a country hostile to the security interests of the US, but a country whose political institutions (while not democratic at present) are sufficiently aligned with our own traditions (which include the rule of law) to absolve Applicant of any foreseeable security risk. While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the nature of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Because of the presence of Applicant's immediate family members in Pakistan (a country whose interests have recently been friendly to those of the US), any potential risk of a hostage situation becomes unlikely, or at the very least, an acceptable one.[46]

---

[43] ISCR Case No. 02-29403 (April 21, 2004) at 6.

[44] *Id.*

[45] *Id.* at 5.

[46] ISCR Case No. 01-07212 (December 26, 2001).

Despite literally facts identical to my client's case including immediate family members living in Pakistan, sporadic visits to Pakistan, certain family members in ill health, evidence that the majority of the family members were in private industry though some were connected to the government, particularly the military, completely opposite policy rulings were reached.[47]

Although DOHA Administrative Judges have authority to adjudicate the security eligibility of applicants under Executive Order 10865 and the Directive, that authority does not extend to adjudicating foreign policy and foreign relations issues.[48] The nature and status of United States relations with other countries or foreign entities involve sensitive policy decisions and judgments with potentially serious international, diplomatic, national security, and legal ramifications that are not suitable for adjudication in adversarial proceedings such as these. As the DOHA Appeal Board noted in ISCR Case No. 02-00318.a1 (February 25, 2004), it "does not have the authority to make its own pronouncements about the nature of relations between the United States and foreign countries. Pronouncements about the relationship between the United States and any given foreign country are committed to the President of the United States and other duly authorized Executive Branch officials." Yet adjudicators and DOHA Administrative Judges do so all the time.

To some extent the changes promulgated in the new guidelines merely implement existing perception about foreign preference cases that was shared by many including DOHA Administrative Judges. They reflect practical and rational modifications to fit a more realistic environment. The new guidelines legitimately raise the bar, or perhaps more precisely set a more appropriate bar, for the government to revoke/deny an individual's security clearance based on Foreign Preference. The most frequently cited disqualifying condition now requires a "heightened risk", though that term is undefined, "of foreign exploitation, inducement, manipulation, pressure, or coercion."

More importantly the mitigating condition now specifically and explicitly takes into consideration "the nature of the relationships with foreign persons" and "the country in which these persons are located." Additionally, the bar is lowered for the individual to demonstrate that "the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S."

I do firmly believe that the results of my client's case above would very likely have been different had the 2005 Guidelines been applied. Whether, of course, the application of the new

[47] With respect to my specific case, the Administrative Judge concluded that the Applicant's "actions toward his father and father-in-law make it clear that his relationship with them is not casual and infrequent but intense and seriously concerned for their welfare." ISCR Case No. 02-29403 (April 21, 2004) at 6. Yet the only evidence in the record regarding Applicant and his father was that he speaks to him on the telephone twice per month, though this frequency is not followed diligently. He had visited his father a mere four times in over ten years. The conversations and meetings never concerned the Applicant's work and dealt solely with casual family issues, particularly to keep his father's morale up after being widowed. The Judge also concluded that "[w]hile his widowed father and father-in-law are not agents of a foreign power, *they are in fragile health and could be exploited by a foreign power* in a way that could force Applicant to choose between loyalty to them and the United States." *Id*. (emphasis added). How an individual's foreign relative being in "fragile health" versus good health exacerbates the potential concern for exploitation is unknown. Is a terrorist or a hostile government more likely to threaten an ailing relative than a healthy one in order to compromise classified information? Does an individual's affection for a person increase because the relative is in ill-health? These are some of the types of security assessments being utilized by DOHA Judges.

[48] *See* ISCR Case No. 02-00318 (February 25, 2004) at 6-7.

Guidelines results in different outcomes is yet to be seen. But on paper the modifications are a welcome change.

Foreign Preference Cases

Foreign Preference cases are usually more straightforward and easier to overcome than Foreign Influence. Most DOHA cases where Guideline C is at issue involve an individual's exercise of dual citizenship or possession and/or use of a foreign passport. Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision.[49] Under this guideline, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions."[50] Indeed, a mitigating factor to overcome this concern is to have the individual express "a willingness to renounce dual citizenship." Actual renunciation is not required.

Several years ago this became the hot button issue. On August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence issued a memorandum (called the "Money Memorandum") that "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States." The concern, of course, was that the individual could ostensibly travel abroad without knowledge of the United States.

Part of the problem under the 1997 Guidelines is what is meant by "surrenders"? For some countries there is no mechanism that permits the surrender of a passport. Oftentimes I will simply have the client mail the passport to the country's U.S. Embassy and certify that this had occurred. Possession of even an expired passport can be continuing grounds for concern. Indeed, continuation of dual citizenship would seemingly allow for the re-issuance of a passport anyway. Nevertheless, the new 2005 Guidelines adopt a more practical approach and allow the individual to simply destroy or otherwise invalidate the passport.

DOHA Appeals

Unlike in the majority of federal agencies, a favorable ruling attained by an individual can be appealed by the Government (the DOE is apparently the only other entity where this occurs). When that occurs, the odds are demonstrably in favor of the Government (and lately the resolution can easily take up to a year before a decision is rendered). A recent study that reviewed all DOHA Appeal Board decisions since January 2000 concluded that:

> its standards of appellate review are so vague and elastic that the Board can and does reverse or sustain virtually any decision of a DOHA administrative trial that fits its view of the facts, or despite the facts. The Appeal Board will depart from its frequently stated standards of appellate review to reach a decision that appears to simply substitute its judgment for that of the trial judge. It has done this with some frequency, but almost without fail in one category of cases, those of

[49] *See* ISCR Case No. 99-0454 (App. Bd. Oct. 17, 2000) at 5.

[50] *See* ISCR Case No. 98-0252 (App. Bd. Sep 15, 1999) at 5.

applicants with contacts or relatives in, or other ties to foreign countries.[51]

On appeal, the Board is not supposed to review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error.[52] However, the same study referenced above concluded that, in fact, the Appeal Board *often* issues its own *de novo* decisions in a manner and frequency that is quite alarming.[53]

When the rulings or conclusions of an Administrative Judge are challenged, the Appeal Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law.[54] In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion.[55] In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law.

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge."[56] The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

---

[51] Cohen, Sheldon, APPEAL BOARD DECISIONS OF THE DEFENSE OFFICE OF HEARINGS AND APPEALS Are they Arbitrary and Capricious? (July 10, 2006) at 31. A copy of this study can be accessed at *http://www.sheldoncohen.com/publications*.

[52] Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 02-09907.a1 (5 February 2004)(setting forth review authority of Board).

[53] Cohen, APPEAL BOARD DECISIONS, at 14 (Board acting as "super trial judge").

[54] Directive, Additional Procedural Guidance, Item E3.1.32.3.

[55] *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3.

[56] Directive, Additional Procedural Guidance, Item E3.1.32.1.

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

(1) Is the error harmful or harmless?[57];

(2) Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds?[58]; and

(3) If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded?[59]

The DOHA Appeal Board, under the 1997 Guidelines to be sure, has lost perspective of the specific concern that applies to Criterion B namely that "contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure." I daresay in most DOHA cases there is no evidence submitted into the record – much less any evidence I know of – that purports to link terrorism or terrorist attacks against Americans or their foreign family members for the purposes of *coercion, exploitation, or pressure* in order to compromise classified information. Nor is it customary that any specific evidence is introduced into the record with respect to the conduct of foreign countries either. Occasionally, a generic study on espionage statistics that identify known or presumed countries that engage in such conduct will be submitted for judicial notice.

The statistics involving Appeal Board decisions for Foreign Influence/Foreign Preference cases, in particular, is distressing. Since 2000, the Appeal Board, in cases involving a foreign connection, "has affirmed all (144) of applicants' appeals of decisions involving foreign countries denying a clearance, and reversed all but four (45) of the government's appeals of such decisions granting a clearance. In only one of those four cases did the applicant have immediate family living in a foreign country and in that case the Board could not reverse because the government did not appeal on that issue."[60]

PROPOSED RECOMMENDATIONS FOR LEGISLATIVE CHANGE OR ACTION

In light of my own experiences, and in the canvassing of colleagues who also routinely handle such cases, my recommendations, in no meaningful order, are as follows:

Specific To New Adjudicative Guidelines, Foreign Influence And Foreign Preference

- Require DoD, its components, and any other agencies which have yet to adopt the new Adjudicative Guidelines to do so immediately.

- Task GAO to conduct a thorough assessment and statistical analysis of the security clearance appeal process as it is implemented throughout the federal government, and not just DoD. Standardization should be the norm throughout the federal system. There is

[57] *See, e.g.,* ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

[58] *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (*citing* federal cases).

[59] Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3.

[60] Cohen, APPEAL BOARD DECISIONS at 31.

simply no justifiable reason why one agency should be applying a different level of due process, procedural or substantive, than another.

- Consider removing DOHA's ability to appeal favorable decisions issued by an Administrative Judge unless a better, more balanced framework can be instituted. As far as I know, no other agency other than DOE is permitted to appeal a favorable decision.

- Consider loss of a clearance based on Foreign Influence, and perhaps Foreign Preference depending upon the circumstances, not as a security clearance denial, but as a less stigmatizing suitability decision as no question of loyalty or trust is or may be involved.

- Require modification to the SF-86 and other relevant security clearance questionnaires to include additional initial details about matters that could be disqualifying under Foreign Influence or Foreign Preference so as to permit earlier determinations (existence of expired foreign passport, frequency of contact with foreign nationals, definitions of "bound by affection" and "close and continuing contact". The instructions should also be amended to clarify exactly the specific type of information that is being sought.[61]

General Recommendations Applicable To Security Clearance Process And Challenges

- Create an administrative hearing system similar to that of DOHA and DOE across the board at all federal agencies.

- Create an independent body outside of the involved federal agency (most Offices of Inspector General believe they do not have jurisdiction to entertain challenges or reviews, nor does the Merit Systems Protection Board) to adjudicate final challenges to an unfavorable security clearance decision; OR

- Grant the federal judiciary statutory jurisdiction to review substantive security clearance determinations. While agencies always argue, and federal judges generally seem willing to accept, that such decisions require expertise lacking in the federal judiciary, the fact of the matter is that the majority of the decisions are based solely on common sense rationale. The granting of jurisdiction does not require that agencies no longer be accorded deference to their decisions. Yet Article I Administrative Judges, many of whom have little to no security clearance experience before being hired, substantively adjudicate DOHA and DOE cases and reverse DoD and DOE security decisions, respectively on a daily basis. How is it then that an Article III Judge, who is not even required to undergo a background investigation and is permitted automatic access to classified information by virtue of their Constitutional authority, cannot adjudicate a clearance challenge? Presumably DOHA and DOE Administrative Judges participate in certain trainings before assuming their initial responsibilities so there is obviously no good reason why Article III judges can not do the same.

- Require all federal agencies to audiotape security interviews and, most importantly, polygraph sessions and maintain preservation of those tapes for a reasonable period of time as well as permit unfettered access to at least a written transcript if a security

[61] More than five years ago the GAO noted that the "federal guidelines call for adjudicators to consider, among other things, the 'frequency' and 'recency' of the conduct, whether foreign contacts were 'casual,' and whether foreign holdings were 'minimal.' The guidelines, however, do not provide any guidance as to what represents a frequent or recent action, a casual contact, or minimal holdings." GAO-01-465, *DoD Personnel* at 28. This still remains the case.

clearance denial/revocation proceeding is initiated. Very often clearance decisions come down to a "did he or did he not say" what is alleged, or in what context was the statement made.

- Legislate additional protections into the system to include, but not be limited to, the release of further information and the ability of counsel/petitioners to have access to classified information.

- Remove immunity from civil liability from individuals who submit information that they should know or is known to be false to a federal agency that leads to the initiation of adverse clearance proceedings to include a suspension.

- Legislatively forbid agencies from suspending employees without pay during the pendency of their security clearance proceedings, or at least require agencies to provide back pay to those who favorably resolve their case.

- Legislatively require that agencies cover attorneys fees for those cases in which the adverse decision is reversed.

- Create a system of penalties for those federal officials who knowingly and intentionally retaliate against individuals for Whistleblower or other activities/conduct which then leads to the initiation of adverse security clearance proceedings. Section 6.4 of Executive Order 12968 states that "[e]mployees shall be subject to appropriate sanctions if they knowingly and willfully grant eligibility for, or allow access to, classified information in violation of this order or its implementing regulations. Sanctions may include reprimand, suspension without pay, removal, and other actions in accordance with applicable law and agency regulations." Yet absolutely no sanctions, or even the perceived threat of such, exist for those who abuse the system for purposes of harming others.

- Section E3.1.37 of DoD Directive 5220.6 (1992) states that an "applicant whose security clearance has been finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision." The positive intended effect of this provision is actually to ensure an individual is not penalized from pursuing an appeal following the issuance of an unfavorable initial hearing decision. That is, if an individual is denied a clearance by a decision issued January 1st and appeals that decision, they are eligible for reconsideration no matter the outcome of the appeal the following January 1st of the next calendar year. However, the practical effect of this provision also serves to unfairly penalize those individuals who prevail at their administrative hearing but then face an appeal by the Government. During the pendancy of the appeal that individual remains in absolute clearance limbo and should they ultimately lose to the Government on appeal, which is highly likely, the one year time clock does not begin to run until the appeal decision is issued. This date may be long after the one year period would have expired. For example, if an individual receives a favorable administrative decision on January 1st and the Government appeals, and that appeal results in a reversal nine months later (which unfortunately would not be an unusual lapse of time) on September 1st, this provision would not apply. The individual could not have their clearance access reconsidered until the following September 1st resulting in a loss of nearly one year of valuable time that may have directly caused the individual to lose his business or employment.

These are but just some examples that I would hope you consider. Again, I thank you for the opportunity to appear before this august body today. I am more than willing to answer any questions you might have, as well as work with Members of this Committee and its staff to best design the legislative actions I have suggested today.

EXHIBIT A

BIO OF MARK S. ZAID
RE: SECURITY CLEARANCES

* Practicing law for nearly 15 years. Managing Partner, Krieger & Zaid, PLLC, Washington, D.C., which is said (by agencies of the U.S. Government) to have represented more intelligence officers in the last ten years than any other law firm.

* Specializes in handling administrative and litigation challenges in national security cases.

* Has handled nearly 100 security clearance matters (suspensions, denials, revocations) throughout the Federal Intelligence and Law Enforcement Community during the last eight years. This has included administrative appearances as well as DOHA hearings.

* Frequently represents federal employees and contractors.

* Co-teaches a DC Bar Continuing Legal Education class on defending adverse security clearances.

* Testified in February 2006, as an expert witness on security clearances before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on the Judiciary, U.S. House of Representatives.

* Testified before the Committee on the Judiciary, U.S. Senate, in April 2001, on the use of pre-employment polygraphs by the U.S. Government.

EXHIBIT 2

2005 VERSION OF ADJUDICATIVE GUIDELINES FOR SECURITY CLEARANCES

GUIDELINE B: FOREIGN INFLUENCE

6. *The Concern*. Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(c) counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;

(f) failure to report, when required, association with a foreign national;

(g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;

(h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

8. *Conditions that could mitigate security concerns include:*

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the

interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

GUIDELINE C: FOREIGN PREFERENCE

9. *The Concern.* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

10. *Conditions that could raise a security concern and may be disqualifying include:*

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(2) military service or a willingness to bear arms for a foreign country;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial or business interests in another country;

(6) seeking or holding political office in a foreign country;

(7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest;

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

11. *Conditions that could mitigate security concerns include:*

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;

(f) the vote in a foreign election was encouraged by the United States Government.

EXHIBIT 3

SIDE BY SIDE COMPARISON OF 1995 AND 2005 ADJUDICATIVE GUIDELINES WITH RESPECT TO FOREIGN INFLUENCE AND FOREIGN PREFERNCE

Guideline B: Foreign Influence

1995

The Concern. A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

2005

The Concern. Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Conditions that could raise a security concern and may be disqualifying include:

1995

a. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

2005

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

1995

b. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.

2005

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

1995

c. Relatives, cohabitants, or associates who are connected with any foreign government;

2005

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

1995

d. Failing to report, where required, associations with foreign nationals;

2005

(f) failure to report, when required, association with a foreign national;

1995

e. Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service.

2005

(g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service.

1995

f. Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;

2005

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

1995

g. Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure.

2005

(h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion.

1995

h. A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.

2005

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Conditions that could mitigate security concerns include:

1995

a. A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

2005

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

1995

b. Contacts with foreign citizens are the result of official U.S. Government business;

2005

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority.

1995

c. Contact and correspondence with foreign citizens are casual and infrequent;

2005

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

1995

d. The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons or organizations from a foreign country.

2005

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

1995

e. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

2005

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

1995

None

2005

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Guideline C: Foreign Preference

1995

> ***The Concern.*** When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

2005

> Same

Conditions that could raise a security concern and may be disqualifying include:

1995

> a. The exercise of dual citizenship;

2005

> (a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member.

1995

> b. Possession and/or use of a foreign passport;

2005

> (1) possession of a current foreign passport.

1995

> c. Military service or a willingness to bear arms for a foreign country.

2005

> Same.

1995

> d. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

2005

> Same, except for some minor reorganization of the words.

1995

e. Residence in a foreign country to meet citizenship requirements;

2005

Same.

1995

f. Using foreign citizenship to protect financial or business interests in another country;

2005

Same.

1995

g. Seeking or holding political office in the foreign country;

2005

Same.

1995

h. Voting in foreign elections.

2005

(7) voting in a foreign election.

1995

i. Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

2005

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest.

1995

None.

2005

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

1995

None.

2005

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Conditions that could mitigate security concerns include:

1995

a. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

2005

Same.

1995

b. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

2005

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor.

1995

c. Activity is sanctioned by the United States.

2005

(d) use of a foreign passport is approved by the cognizant security authority.

1995

d. Individual has expressed a willingness to renounce dual citizenship.

2005

Same.

1995

None.

2005

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

1995

None.

2005

(f) the vote in a foreign election was encouraged by the United States Government.