IF YOU HAVE FAMILY MEMBERS IN INDIA- GETTING A SECURITY CLEARANCE IS A NEAR CERTAINTY[1]

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Every year American citizens with family ties in India apply for security clearances, and unless they also have substantial business, property or financial interests in India the chances of their getting a security clearance are virtually guaranteed.[3] Unlike Chinese American citizens with family in China who stand no chance of getting a clearance, Indian Americans appear to make up a privileged category at the Defense Office of Hearings and Appeals (DOHA).[4] As shown below in an exhaustive review of the DOHA decisions affecting Indian Americans, despite an apparent unwritten policy of always granting security clearances to this category of applicants, the government puts them through an arduous process of first proposing to deny them a clearance, and then holding a hearing before an administrative judge. At these hearings the government's representative, known as Department Counsel, presents a canned, multi-page document entitled, "Administrative Notice," scourging the government and country of India but says nothing about the applicant and has nothing to do with the applicant.[5] The applicant must spend the time, effort, and

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[3] This article deals only with employees of contractors doing classified business with the Department of Defense and about 20 other non-Defense agencies which, by agreement, have designated the Defense Office of Hearings and Appeals (DOHA) to be the appellate authority for their security clearance appeals. (See, DoD Directive 5220.6). DOHA and the Department of Energy are the only agencies which publish their decisions. This article does not cover appeals by government employees, or employees of contractors of the CIA, FBI, NSA, or DoD contractor employees holding Sensitive Compartmented Information (SCI) clearances which deal with intelligence information. Those clearances are subject to different appeal processes for which decisions are not published. There is no reason to believe however, that the intelligence agencies are more or less stringent in vetting security clearance holders.

[4] For a fuller discussion of Chinese-Americans' difficulty in getting a security clearance see an article entitled: *If You Have a Family Member in China - Chances of Getting a Security Clearance Are Remote,* published on the author's website: www.sheldoncohen.com/publications .

[5] For a discussion of the Government's use of canned Administrative Notice documents see an article entitled: *Reinventing the Wheel: The Defense Office of Hearings and Appeals unfair treatment*

(continued...)

frequently the money to hire legal counsel to rebut this challenge to India as a nation and the result is always the same. In every case, in the written decision following the hearing the Administrative Judge will duly note the Department Counsel's objections and then grant the applicant a security clearance.

The government should do away with the wasteful formality of requiring a hearing and just issue a blanket policy statement, that applicants with family ties in India who do not have substantial business, property or financial interests in India will be granted a security clearance. That would save not only the applicants, but also the American taxpayers the time and money wasted on hearings which virtually always have a predictable outcome.

The criteria for determining whether a security clearance should be granted to anyone, are found in Guidelines that have been issued by the President and which are applicable throughout the government.[6] They cover a wide range of factors, among which is "Guideline B - Foreign Influence". The concern of Guideline B is that:

> 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.

Guideline B further provides that:

> 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.

Among the disqualifying conditions in Guideline B are:

> 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,

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[5](...continued)
of Foreign influence- Foreign Preference cases, published on the author's website: www.sheldoncohen.com/publications .

[6] Memorandum from Steven J. Hadley, Assistant to the President for National Security Affairs, Re: Adjudicative Guidelines, December 29, 2005 as amended.

manipulation, pressure, or coercion, and

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.

There are also a number of considerations in Guideline B that could mitigate security concerns including:

(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; and

(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.

In preparing this study, *all* decisions concerning applicants with family in India published on the DOHA web site since its inception in 2002 to November, 2016 were reviewed, a total of 124 cases.[7] Of those cases, 100 granted clearances to the applicant and 24 denied clearances. In every one of the 24 cases in which a clearance was denied the applicant had substantial business, financial or property interests in India.[8] In the 100 cases where clearances were granted, none of the applicants had any substantial business, financial or property interest in India despite having multiple family members including parents and siblings residing in India.

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[7] A list of the cases reviewed including the date of decision, the case number and the presiding Administrative Judge can be provided on request.

[8] There is one outlier case in which a clearance was denied to an applicant who was charged only with having relatives in India, but the applicant did not request a hearing and offered no evidence in mitigation or defense. (ISCR Case No. 06-11963, June 27, 2007).

The 100 cases granting a clearance were presided over by 37 different Administrative Judges, each deciding between one and eight cases each. In 54 of those favorable decisions, the applicant represent him or herself, in the remaining 44, applicants were represented by counsel, so having counsel did not apparently alter the outcome. Significantly, not a single one of those favorable decisions was appealed to the DOHA Appeal Board by Department Counsel, the government's representative. [9]

The 24 decisions denying a security clearance were presided over by 19 difference administrative judges almost all of whom had presided over cases granting a security clearance. Nine of the unfavorable decisions were appealed by the applicants to the DOHA Appeal Board , which affirmed eight and reversed and remanded one, on the ground that the Administrative Judge was biased against Indians. That case was assigned to another judge who, on rehearing, granted a clearance to the applicant.[10] (The author of this article was counsel in that case).

There is only one constant in all of the cases reviewed; Department Counsel submits a long canned brief entitled Administrative Notice, arguing that the applicant who has family members in India should not be granted a clearance, decrying India because there is crime, poverty and civil rights violations in that country. Shocking - as if that is not true for every other country in the world including the United States. The brief argues that companies in India conduct industrial espionage in the United States, but the same government source it cites also states that companies in at least 157 countries conduct industrial espionage in the United States (ignoring that fact that companies in the United States do the same in other countries). Department Counsel's brief never cites a single instance of an Indian-American holder of a security clearance having divulged classified information because a family member in India was subject to coercion or duress by the government of India.

In the 100 cases granting clearances, Department Counsel's Administrative Notice is noted and quoted by the Administrative Judge before the Judge rules in favor of the applicant. One would think that Department Counsel would get the message that it is time to concede and move on after 37 administrative judges in 100 cases find that Indian-American applicants with family ties in India are entitled to hold a security clearance unless they also have substantial business, financial or property interests there. Yet, like cases involving Chinese-American applicants with family member in China who never get clearances, Department

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[9] Normally initial decisions of DOHA Administrative Judge's are not considered precedential (ISCR Case No. 02-22606 at 3-5, (App. Bd, June 30, 2003)), but when 37 different Administrative Judges reach the same conclusion in 124 cases that should be considered a consensus of thought.

[10] ISCR Case No. 03-14052.h1 (clearance den., Jul. 19, 2005), 03-13052.a (rev. and remanded, App. Bd, Sept 28, 2005), 03-14052.h2 (clearance granted, Mar. 23, 2006).

Counsel persists in the submitting the same long winded Administrative Notice in cases involving Indian-American applicants who always get clearances. In both situations the applicants are required to spend the time, effort and frequently the money to hire counsel to rebut the Admnistrative Notice , for not doing so is at their peril, as one unfortunate applicant did not. [11]

DOHA officials complain that the Agency is overworked and cannot keep up with its ever increasing workload. Its Judges, who previously took one to three months to issue a decision, are now taking six months or more to do that. DOHA is hiring more judges and attorneys to keep up with its increasing case load, yet cases which formerly were scheduled for a hearing in two to threes months are now taking almost a year before being scheduled.

Undoubtably the United States has the right to deny security clearances to persons with close family ties in India or China or to any other country. However, instead of indulging in the charade of granting a "due Process" hearing whose outcome is a forgone, either favorable or unfavorable, in fairness to those applicants for security clearances, all of whom must be American citizens before they can even apply, and to the American taxpayers who fund the agencies making these decisions, the Government should issue blanket policy statements that security clearances *will* be granted to applicants with family member in India, unless they also have substance business financial or property interests there, and *will not* be granted to persons with immediate family ties to China. This would not only increase government efficiency by ending the waste of taxpayer's money on useless hearings and appeals with foregone outcomes, but would speed up the clearance process for Indian-Americans and, not the least for the sake of decency, would inform hard working, loyal Chinese-American citizens with immediate family members in China to not spend their time, energy, hopes and money on a fruitless effort to get a security clearance.

[11] See footnote 8, supra.