REINVENTING THE WHEEL: THE DEFENSE OFFICE OF HEARING AND APPEALS' UNFAIR TREATMENT OF FOREIGN INFLUENCE-FOREIGN PREFERENCE CASES

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Security clearance appeals concerning "foreign influence" or "foreign preference" require consideration of the foreign county involved.[2] This includes many factors including the politics of the country, whether it is friend or foe of the United States, its record of industrial espionage and its treatment of its own citizens. The Defense Office of Hearings and Appeals (DOHA) hears such cases involving defense contractor employees who have applied for or hold "collateral" i.e., Confidential, Secret or Top Secret clearances. (Clearances for military or civilian government employees, or clearances involving access to Sensitive Compartmented Information (SCI) are heard by each government agency having the authority over the information involved).

DOHA is the only agency which adjudicates security clearance appeals coming before it in an open hearing before an administrative judge and the government is required to present evidence sustaining its charges. Except for the Department of Energy, DOHA is the only agency which publishes its opinions. One would think, therefore, with such openness that contractor cases coming before DOHA would be heard with a high degree of fairness; unfortunately in cases concerning "foreign influence" or "foreign preference" that is not true.

Guideline B, "foreign Influence" specifies 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.

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[2] Foreign Influence is adjudicated under the standards of Guidelines B, and Foreign Preference is adjudicated under the standards of Guideline C both of which are part of the Adjudicative Guidelines for Determining Access to Classified information, first published by the White House on December 29, 2005. They were made applicable to the Military Departments in August 30, 2006 and to the Intelligence Community by Intelligence Community Policy Guidance, Number 704.2, issued by the Director of National Intelligence.

It further states that "Conditions that could mitigate security concerns include . . . the country in which these persons are located." While Guideline C, Foreign Preference, does not explicitly require consideration of the country involved, it is always a factor in determining the outcome of the case.

Dozens, if not hundreds, of "foreign influence" and "foreign preference" cases are heard each year at DOHA involving not only countries with which we now, or in the past, have had an adversarial relationship such as Russia, China or Iran, but also our traditional allies such as Israel, South Korea and Taiwan. Many cases come from India, which provides large numbers of scientists and computer experts, and from middle eastern countries which provide many linguists speaking Arabic, Urdu or other languages the U.S. government needs to know. Yet in each of the hundreds of cases that come before DOHA, Department Counsel, the government's representative, files a multi-page pleading or memorandum entitled "Administrative Notice", collecting all of the negative information it can amass about the country involved in an attempt to convince the administrative judge hearing the case that regardless of the applicant's individual worth, a clearance should be denied simply because of the country involved.

The applicant, if he is savvy or has competent counsel, will then file his own "administrative notice" brief supported by all of the positive information the applicant can find about the country involved. These contradictory briefs are then considered by the administrative judge to arriving at a decision of whether to grant the applicant a security clearance.

While this may seem reasonable on its face, in reality what happens is that DOHA has in its files pre-prepared "canned" Administrative Notice briefs for each country. Department counsel handling a particular case simply selects one of the "canned" briefs and submits it in the case then under review. If the applicant has counsel, counsel does, or should file an opposing "administrative notice" brief, which may take many hours of research and writing, all at the expense of the applicant. An applicant who is unrepresented and chooses to defend himself is generally blind-sided by the government's brief and does not know that the administrative judge will use the government brief as the basis of the decision. The applicant is left arguing "what has that to do with me" when, in fact, it has everything to do with him or her and how the case will be decided. An unrepresented applicant just never knows what hit him.

In case after case, government counsel will file the same canned brief citing the same documents, many of which have been shown in previous cases to be incomplete, out of date or not showing what the Department Counsel claims they stand for. The applicant or his counsel, if he has one, has to reargue the same issues and file the same counter-documents submitted in prior cases to refute the government's arguments about the country involved. Because the same arguments are presented in every foreign influence/foreign preference case the administrative judge's opinions also have become "canned", simply reciting what is in the government's administrative notice brief, or if an opposing brief is filed, incorporating the applicant's administrative notice brief.

Each year many of the initial decisions of the administrative Judges are appealed to the DOHA Appeal Board, yet never has the Appeal Board issued a blanket ruling that any particular country is acceptable or unacceptable, favorable or unfavorable, thus requiring the same issue of

whether a country is a threat to be relitigated case after case, year after year. [3]

Neither the DOHA Appeal Board, the administrative judges nor the Department Counsels act totally independently or in a vacuum. They are all appointed by, and at the discretion of the of theeDirector of DOHA and under his administrative control. The Director himself reports to the Office of General Counsel of the Department of Defense. DOHA is supposed to be the impartial adjudicator of contractor employees security clearances, however it has an inherent conflict of interest. It is the prosecutor, the judge and the appellate reviewer of the administrative judges' decisions. All three functions report to the same administrative office which is responsible for overseeing the efficiency and output of all of its employees, while at the same time charged with the responsibility of insuring a fair hearing to contractor employees and carrying out the the policies of the Department of Defense.

While in theory, and perhaps mostly in practice, this requirement for impartiality works, it does not work in foreign preference, foreign influence cases. It appears that DOHA has made a deliberate decision not to establish a list of presumed acceptable or unacceptable countries, or a list of countries where there is a rebuttal presumption of unacceptability. It has made the decision to use the same discredited materials year after year even though they have been repeatedly rejected by administrative judges. This could be corrected by the stroke of the pen of the Director of DOHA, or by the DOHA Appeal Board on a case-by-case, country-by-country decision, but for reasons yet unexplained it has not.

Counsel experienced in practicing before DOHA know which these countries these are, with a few occasional surprises, but nevertheless must go through the time consuming and costly to their clienssts exercise of refuting the government's arguments over and over again in each new case. But to the unrepresented applicant appealing the denial of his clearance for the first time, it is simply a trap waiting to be sprung. It is time for DOHA to let the public know which countries it finds acceptable and which it does not so the wheel of justice does not have to be reinvented in each new case.

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[3] For Guideline B cases, see eg., ISCR No.07-07976 (App. Bd. 1/15/09)(India, clearance denied); ISCR No.06-17001 (App. Bd. 7/24/07)(Nigeria, clearance denied); ISCR No.08-04488 (App. Bd. 4/23/09)(Taiwan, clearance denied); ISCR No.06-25979(App. Bd. 4/16/08)(Morocco, clearance denied).

For Guideline C cases, see eg., ISCR No.06-25183 (App. Bd. 2/21/08)(Iran, clearance denied); ISCR No. 08-01980 (App. Bd. 10/21/09)(Israel, clearance denied); ISCR No.07-06767 (App. Bd. 5/19/09)(Israel, clearance denied);