APPEAL BOARD DECISIONS
OF THE DEFENSE OFFICE OF HEARINGS AND APPEALS
Are they Arbitrary and Capricious?

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"Abandon hope all ye who enter here"
Dante Alighieri, *The Divine Comedy,* 1306-1321.

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INTRODUCTION

When I began researching this article, it was to understand why the Appeal Board of the Defense Office of Hearings and Appeals ("DOHA") sometimes departed from its stated standards of appellate review to reach a decision that appeared simply to substitute its judgment for that of the trial judge. To my surprise, after reviewing all (898) of the Appeal Board decisions between January 2000 and May 2006, I found that it did this with some frequency, but almost without fail in one category of cases, those of applicants with contacts or relatives in, or other ties to foreign countries.[2] In those six and one-half years, the Appeal Board, in cases involving a foreign connection, affirmed all (144) decisions denying a clearance, and reversed all but four (45) decisions granting a clearance.[3] In only one of those four cases did the applicant have immediate family living in a foreign country and that one was an anomaly.

While Department Counsel, the prosecution branch of DOHA, does not appeal all foreign connection decisions granting a clearance, it does appear to limit its appeals to decisions involving countries in the Middle East including Israel, and in the Far East including China, South Korea and Taiwan. If Department Counsel appeals a decision granting a clearance, it is virtually assured that the Appeal Board will reverse. Yet, if an applicant appeals a decision involving a foreign connection denying a clearance, the Appeal Board will assuredly affirm the denial. This apparently unwritten policy of the Department of Defense of a blanket denial if appealed, is a lure for the unwary applicant. If there is such a policy, it should be published to put applicants on notice that if they appeal the denial of a clearance involving a foreign connection, or the government appeals the grant of such a clearance, any hope for success at the DOHA Appeal Board is virtually nil.

CREATION AND AUTHORITY OF THE DOHA APPEAL BOARD

The genesis for granting a trial-type hearing to a defense contractor's employee if the employee's security clearance is challenged, is *Green v. McElroy*, 360 U.S. 474 (1959). The Supreme Court there held that if an employee's loyalty was questioned, the employee had the right to be shown the government's evidence and the opportunity to demonstrate that it was untrue. (See, *Cohen, Security Clearances*, Chapter 1). That requirement led to the creation of the Defense Office of Hearings and Appeals and its Appeal Board.

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[2] The Appeal Board's decisions by type of Guideline charged are collected at Appendix A to this article.

[3] The Reversal and Remand Decisions from January 2000 through May 2006 are collected at Appendix B to the Article.

The source of DOHA's authority is Department of Defense Directive 5220.6, most recently issued January 2, 1992 (the "Directive").[4] The Directive gives the General Counsel of the Department of Defense the authority to designate attorneys to be Administrative Judges as members of the DOHA Appeal Board.[5] In practice, the Appeal Board decides each case by a panel of three Administrative Judges.[6] Those Judges are generally selected from among DOHA trial judges assigned to hear cases, or from "Department Counsel" who are government attorneys assigned to represent the government's position at the hearings. An assignment to the Appeal Board is not permanent, and an Administrative Judge who is an Appeal Board member may occasionally be reassigned to try cases.[7]

The Directive includes several Enclosures which provide specific standards and procedures for adjudicating security clearances. Enclosure 3, entitled "Addition Procedural Guidance," describes the procedures for administrative hearings and appeals from those hearings. It provides that after a full hearing before a DOHA trial judge, either the applicant for a security clearance or the government, as represented by Department Counsel, may appeal the decision of the trial judge to the DOHA Appeal Board. Upon receipt of a Notice of Appeal, the Appeal Board is provided with the case record, and "no new evidence [may] be received or considered by the Appeal Board."[8]

The Directive gives specific direction to the Appeal Board and the scope of review to be applied by it. It states:

> The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred. Its scope of review shall be to determine whether or not:
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> (1) The 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

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[4] The Appeal Board is created by Paragraph 5.2.9. of the Directive.

[5] Ibid.

[6] The decisions of the DOHA Appeal Board may be found at www.defenselink.mil/dodgc/doha/isp.html. Appeal Board decisions are identified by the case number, followed by the letter "A". Decisions of the trial judge hearing the evidence are identified by the case number, followed by the letter "H".

[7] While both the Appeal Board judges and the judges initially hearing the cases are Administrative Judges, for the purposes of clarity in this article, the Administrative Judges initially trying the appeals are referred to as "trial judges".

[8] Directive, Encl. 3, Paragraphs E3.1.28, and E3.1.29.

Appeal Board shall give deference to the credibility determinations of the Administrative Judge;

(2) The Administrative Judge adhered to the procedures required by [Executive Order] 10865 and this Directive; or

(3) The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.[9]

The scope of review is similar to that which Federal Courts of Appeal are directed to use by the Administrative Procedures Act (the "APA").[10] Notably absent from the Directive is the authority found in the APA to review for "abuse of discretion," or the right to make de novo review of the facts.

The Directive also limits the extent of the Appeal Board's authority, stating:
The Appeal Board shall issue a written clearance decision addressing the material issues raised on appeal. The Appeal Board shall have authority to:

(1) Affirm the decision of the Administrative Judge;

(2) Remand the case to an Administrative Judge to correct identified error. If the case is remanded, the Appeal Board shall specify the action to be taken on remand; or

(3) Reverse the decision of the Administrative Judge if correction of identified error mandates such action.[11]

APPEAL BOARD'S EXERCISE OF ITS AUTHORITY

How the Appeal Board describes its authority and how it exercises that authority often differs. It bears close scrutiny as frequently it honors its authority in the breach to reach a desired

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[9] Directive, Encl. 3, Paragraph E3.1.32.

[10] 5.U.S.C. §706. The Administrative Procedures Act provides that a reviewing court shall set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to the constitution, in excess of statutory jurisdiction, authority or limitations, without observance of procedure required by law, unsupported by substantial evidence, or unwarranted by the facts to the extent that they are subject to trial de novo by the reviewing court.

[11] Directive, Encl. 3, Paragraph E3.1.33.

result. The Appeal Board has described its scope of review in various ways. For example, it has stated:

> An Administrative Judge's decision can be arbitrary and capricious if: 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.[12]

The Appeal Board has also described its scope of review as follows: A Judge is not at liberty to draw whatever inferences or conclusions the Judge wants to. Rather, the Judge must draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence, evaluate the facts and circumstances of an applicant's case in a manner consistent with the "whole person" analysis required by the Directive, and consider the totality of an applicant's conduct and circumstances under the "clearly consistent with the national interest" standard.[13]

The Appeal Board has also held:

> 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.". . . 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.[14]

In another case the Appeal Board held:

> Under the whole person concept, a Judge must avoid a piecemeal analysis of an applicant's conduct and circumstances (citation omitted). Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct

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[12] ISCR Case No. 00-0317 at p. 5, n. 9 (Mar. 29, 2002). *Accord*, ISCR Case No. 02-02052, n. 2 (Apr. 8, 2003); ISCR Case No. 02-06928 (Sept. 17, 2003).

[13] ISCR Case No. 99-0228 (Mar. 12, 2001).

[14] ISCR Case No. 00-0628 (Feb. 24, 2003). *Accord*, ISCR Case No. 01-02270 (Aug. 29, 2003); ISCR Case No. 99-0205, p. 2 (Oct. 19, 2000).

> and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner.[15]

It has also held:

> Although there is no requirement that a Judge specifically cite and address every piece of record evidence, a Judge must make findings and reach conclusions that take into consideration relevant record evidence (whether that evidence is favorable, unfavorable or mixed in nature).[16]

The Appeal Board has, in a variety of cases, held that: it reviews the trial judge's decision in its entirety, not just isolated sentences, to discern what the judge found and concluded;[17] the trial judge is not measured against a standard of perfection;[18] the trial judge's decision must be a common sense determination;[19] there is a rebuttable presumption that the trial judge considered all of the evidence in the record unless the judge specifically states otherwise;[20] and that credibility determinations are entitled to deference on appeal.[21] It has held that even if there are certain disqualifying or mitigating conditions present, the trial judge can still render a decision, for or against under the "whole person" concept.[22] Sometimes the Appeal Board describes its standard of review conversely. It has held that a trial judge's decision can be arbitrary and capricious if the judge: does not examine relevant evidence; fails to articulate a satisfactory explanation for the conclusions; fails to give a rational connection between the facts found and the choice made; does not consider relevant

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[15] ISCR Case No. 00-0628 (Feb. 24, 2003). *See*, ISCR Case No. 01-00677 (May 21, 2002).

[16] ISCR Case No. 02—00318 (Feb. 25, 2004); *Cf.* Directive Encl. 3, Para. E3.1.32.1.

[17] ISCR Case No. 01-03107, at p. 5 (Aug 27,2002).

[18] Eg., ISCR Case No. ISCR No. 01-025452, at p. 10 (Nov. 21, 2002); ISCR Case No. 01-01642, at p. 4 (Jun. 14, 2002).

[19] Eg. ISCR Case No. 97-0765, at p. 7 (Dec, 1, 1998); ISCR Case No. 97-0627, at p. 7 (Aug. 17, 1998).

[20] Eg., ISCR Case No. 01-19879, at p. 2 (Oct. 29, 2002); ISCR Case No. O1-10301, at p. 3 (Dec. 31, 2002).

[21] Eg., ISCR Case No. 01-02677, at p. 4 (Oct. 17, 2002); ISCR Case No. 00-0713, at p. 3 (Feb. 15, 2002).

[22] ISCR Case No. 03-19101 (Jan. 31, 2006) (relatives in Israel). *Accord,* ISCR Case N. 04-04330 (Feb. 16, 2006) (relatives in Russia and Israel).

factors; reflects a clear error of judgment; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or renders a decision that is so implausible that it cannot be ascribed to a mere difference of opinion.[23]

A case which typifies the Board's reasoning when it wants to affirm an adverse trial judge's decisions, and its responses to the normally raised arguments is one in which the applicant appealed the denial of a clearance.[24] In that case the applicant had relatives who were citizens of Yemen but who resided in Saudi Arabia. In response to the applicant's arguments that the trial judge failed to consider the totality of the record evidence and ignored and failed to discuss evidence favorable to the applicant, the Board held that there is a rebuttable presumption that the trial judge considered all of the record evidence unless the judge specifically stated otherwise. It said that the appealing party must do more than simply cite record evidence which is not specifically discussed or mentioned in the trial judge's decision. The applicant further argued that the trial judge failed to consider the applicant's statement that he would not succumb to threats.

The Board, in response, held that a trial judge's weighing of the record evidence is not reducible to a simple formula, but he must consider the record evidence "as a whole and nothing dictates what weight, if any, a judge must give a positive piece of evidence." Moreover, it ruled, even if a judge concludes a witness' testimony is credible, a favorable credibility determination is separate and distinct from the weight the judge can give to the evidence. In deciding whether a judge acted reasonably in weighing the record evidence, the Board held it does not look at the pieces of evidence in isolation, but rather considers whether the judge exercised "common sense and sound judgment" in weighing the evidence and in reaching conclusions that "reflect a reasonably, plausible interpretation of the record evidence as a whole taking into account whether there is record evidence that runs contrary to the judge's findings and conclusions."

In response to the applicant's further arguments that the decision was arbitrary and capricious because the judge did not apply the "whole person concept," did not properly consider certain mitigating conditions, and imposed an impossible burden of proof which nullified the Adjudicative Guidelines, the Board held that it is the applicant's burden to demonstrate that the Government of Saudi Arabia would not bring pressure on the applicant. The Board rejected the impossibility of proof argument, rejected the argument that the trial judge failed to give proper weight to the evidence that the governments of Saudi Arabia and Yemen are not hostile to the United States, and rejected the distinction between friendly and hostile nations, a distinction which it had made in other cases.

Although the Board agreed with the applicant that the trial judge had made several errors of law, it did not reverse. It found that the trial judge had made no significant findings as to the nature or frequency of applicant's contacts with his immediate family who live in Saudi Arabia, and had not articulated any reason why he did not apply Foreign Influence, Mitigating Condition 3.

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[23] ISCR Case No. 00-0317, at p. 5, n. 9 (Mar. 29, 2001).

[24] ISCR Case No. 02-02892 (Jun. 28, 2004).

Nevertheless, considering the record as a whole, the Board concluded that the mistakes were harmless error because there was no significant chance that the trial judge would reach a different result if the case was remanded with instructions.

AFFIRM/REVERSAL RECORD OF THE APPEAL BOARD

In the six and one-half years spanning January 2000 through May 2006, the Appeal Board has decided 898 appeals. Of those, the trial judges were affirmed in 745 cases and reversed in 88 cases. 65 cases were remanded for further proceedings. That record, in itself, is not surprising since it is to be presumed that trial judges in most cases know the law and will decide the facts in accordance with the law. It is also to be expected, of course, that errors will occur in a small number of cases which is why the judicial process allows for appeals.

A closer examination of the cases, however, reveals some surprising results that weigh very heavily in favor of the government's appeals. Of the 745 appeals by applicants of the denials of a clearance, only six cases were reversed for a 0.83 percent reversal rate. Of the 111 cases appealed by Department Counsel on behalf of the government where clearances were granted, 82 were reversed for a 73.9 percent reversal rate.[25]

Even more surprising is the Appeal Board's record in Foreign Influence/Foreign Preference cases. In those cases, in 144 appeals of denials by applicants, the Board affirmed all and reversed none. Of the 49 appeals by the government granting clearances in such cases, the Appeal Board reversed 45 decisions and affirmed four. The 45 decisions that were reversed in Foreign Influence/Foreign Preference cases were decided by 31 different trial judges. How one may ask, can 31 experienced trial judges, who presumably know the law and know how to apply the facts to the law, be wrong in 92 percent of those cases granting clearances appealed by Department Counsel, but right in 100 percent of the cases denying clearances, appealed by applicant's. The inescapable conclusion is that in the last six and one half years, the Appeal Board has permitted a security clearance to be granted to anyone with foreign relatives or a foreign connection in only four cases and each of those cases was an anomaly. In two of the cases there were no foreign relatives, in one

[25] No government agency publishes statistics on its security clearance decisions, so one does not know what percentage of Foreign Influence or Foreign Preference cases, or for that matter any category of cases, result in clearances being granted or denied. There are cases which result in clearances being granted before an initial adjudication, and cases which are adjudicated but not further appealed to the DOHA Appeal Board. Also, the decisions of the DOHA Appeal Board concern only contractor's employees and, as such, do not include all Department of Defense cases. A number of DOD cases involve government employees or military personnel and go through different channels to Department appeal boards which do not publish their decisions. Agencies such as the CIA and NSA do not publish any of their initial or appeal decisions for either contractor employees or government employees. Thus, there are an unknown number of cases involving applicants with foreign influence/foreign preference issues which may result in a clearance being granted or denied.

case, the relatives were those of the applicant's wife, and in the fourth case Department Counsel did not appeal on the issue of the foreign relatives, much to the dismay of the Appeal Board.

The four foreign influence/foreign preference cases between 2000 and 2006 affirming the grant of a clearance each presented very unique circumstances. The first case, decided in 2000, was prior to the issuance of the "Money Memorandum" which banned the holding of a foreign passport, and was the reason for its issuance.[26] That case was a Foreign Preference, case and did not involve the applicant's having any family in a foreign country. The issues were solely having a dual citizenship, and holding of a foreign passport. With the issuance of the memorandum prohibiting the holding of a foreign passport on August 16, 2000, by Assistant Secretary of Defense, Arthur L. Money, that issue was thereafter foreclosed.[27]

The second case affirming a favorable decision was four years later.[28] That case presented an odd set of circumstances. Applicant was of Korean background but was born in the United States at a time when his father was here attending medical school. After completion of his training, his father and mother returned to Korea where they had three more children. Applicant's wife and her two brothers, were also citizens of Korea living in the United States but had not yet applied for U.S. citizenship. Applicant's sister was a resident U.S. alien, and his two brothers, who were in the United States illegally, had applied for immigration amnesty. Strangely, the only issue appealed by Department Counsel was the situation of applicant's two brothers. The Appeal Board concluded that Department Counsel failed to make a persuasive argument about the two brothers, and affirmed the

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[26] ISCR Case No. 99-0452 (March 21, 2000). The reaction of the Department of Defense was immediate. The day after the decision was issued, the Director of DOHA issued a Directive stating "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving dual citizenship issues." On April 11, 2000, DOHA's Director issued a further Directive limiting the moratorium only to "cases involving an applicant's use and/or possession of a foreign passport." This was followed on August 16, 2000, by a Directive from Assistant Secretary of Defense, Arthur L. Money, known as the "ASDC^{3}I Memorandum," or the "Money Memorandum," prohibiting the granting of a clearance to anyone holding a foreign passport unless approved by a U.S. Government Agency. The moratorium on hearing cases dealing with passport issues was lifted on September 1, 2000. Since then no one holding a foreign passport has been granted a clearance.

[27] On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC^{3}I) issued a memorandum entitled: "Guidance to DOD Contract Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudications Guideline," which prohibited the further issuance of a security clearance to a holder of a foreign passport resulting from dual citizenship, "unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." See, ISCR Case No. 99-0454, (Oct. 27, 2000).

[28] ISCR Case. No. 02-30929 (Jan. 7, 2004).

decision granting the clearance. It noted that while it did not necessarily agree with the trial judge's reasoning or analysis concerning the issue of the parent's foreign influence issue, it could only address the issues raised by the parties. The Board indicated that had Department Counsel challenged the influence of applicant's parents living in Korea it would have reversed.

In the third Foreign Influence case in which the Board affirmed the grant of a clearance the applicant also did not have any foreign relatives.[29] The applicant was a highly decorated retired U.S. military officer who had sought and received permission from appropriate U.S. government officials to perform work on behalf of the Israeli government after his retirement. Later, he was employed by a U.S. defense contractor and was again granted permission to provide consulting services to further that company's business with Israel. The applicant had no financial interests or assets located in Israel. Under those circumstances, and most likely because of the applicant's outstanding military record, the Board affirmed the decision granting a clearance. In response to Department Counsel's argument that the judge did not consider the "hostility of Israel towards the United States," and that the record evidence shows that "Israel remains a security concern for the United States," the Board held that "the decision below does not indicate or suggest that the judge concluded Israel poses no security concern to the United States." While the Appeal Board was not prepared to concede that Israel is not hostile towards the United States, it took pains to note that the trial judge did not conclude that Israel did not pose a security concern.

The last foreign influence case, in which the Board affirmed the grant of a clearance also had unique circumstances. The applicant, an American-born Caucasian, had married a Chinese woman who he met through the internet.[30] The wife's family still lived in China. Applicant spoke no Chinese, the family spoke no English, and applicant had no contact with them. He testified he told his wife that even if they "began sending her body parts from her family" he would not disclose classified information. The Appeal Board, apparently convinced by applicant's sincerity, "from his clear and graphic language" concluded that he would not be subject to duress and affirmed the grant of a clearance.[31]

One asks how can such an overwhelming number of clearances be denied. After all, the controlling Directive sets out clear standards of review, and the Appeal Board has articulated those standards in detail. The answer appears simply to be that when the Appeal Board does not like the outcome of a case, it makes itself a "super trial judge," making its own *de novo* interpretations of the

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[29] ISCR Case No. 03-11096 (Feb. 3, 2005).

[30] ISCR Case No. 04-06564 (May 30, 2006).

[31] Acting Chief Judge Michael Ra'anan was on the panel in this case. In an odd concurring opinion by him in another case where a clearance was denied to an applicant with family in China, he said that he did not think that applicant, who had twice sought out foreign spouses, including a country with a history as problematic as China, was the type of person to whom the nation's secrets should be entrusted. ISCR Case No. 01-10128 (Jan. 6, 2005).

evidence, making its own judgments of credibility of witnesses, and supplying missing evidence by "Administrative Notice." When the Appeal Board approves of a case's outcome, it rules that a trial judge is presumed to have been aware of all of the evidence even though not discussed in the decision, but when it disapproves, it points to a particular bit of evidence not mentioned in the decision, and rules that the trial judge failed to give all of the evidence due consideration. A witness's demeanor which is often critical in determining credibility simply becomes inconsequential because the Appeal Board rules on credibility without ever seeing the witness.

Despite the Appeal Board's rules of appellate review, when it does not approve of the outcome of a case it will find a reason to ignore the rule or find a counter-rule. Clearly, the Appeal Board does not like cases granting clearances to applicants with family in foreign countries. When confronted with such cases it requires proof of an issue that is impossible to prove, i.e., that a foreign country will not bring influence to bear on the foreign family member in the future, when there is no evidence it has ever done so in the past. The Appeal Board simply states that it is not the government's burden, but the applicant's to offer that proof. An examination of Appeal Board decisions reversing the granting of clearances clearly demonstrates its practice.

APPEAL BOARD'S REVERSAL DECISIONS

1. De Novo Review

While the Appeal Board in every case recites its mantra of not reviewing a trial judge's decision *de novo*, it, in fact, does that very thing when it disagrees with the outcome of a case. This review takes many forms; it will reverse on the basis that the trial judge did not discuss a particular piece of evidence in the decision, or that the judge gave too much weight to a particular item of evidence, or that a judge gave too much weight to the credibility of a witness, or that the Board did not find a witness credible, or that looking at the record as a whole the trial judge was arbitrary and capricious. The Board couches its decisions as reversing errors of law, but they are, by any other name, simply a new review of the evidence to reach the opposite conclusion. The following are specific examples of this practice.

In a case that typifies the Appeal Board's substituting its view of the evidence for that of the trial judge, it reversed a favorable decision where the applicant had failed to disclose the full extent of his marijuana use on a security clearance application.[32] There was a substantial body of evidence showing that applicant had become a trustworthy and reliable person and that the judge found the applicant to be a credible witness. There was also evidence showing that applicant's disclosure was deliberate and his rehabilitation belated, and that he minimized his falsification at the hearing. Weighing all of the evidence, the trial judge found in applicant's favor. The Board, looking at the

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[32] ISCR Case No. 03-02486 (Aug. 31, 2004). *Accord*, ISCR Case No. 01-12350 (July 23,2003) (marijuana use). The Board in an alcohol abuse case reviewed the "totality of the evidence" to come to the opposite conclusion. ISCR Case No. 02-11454 (Jun. 7, 2004). *Accord,* ISCR Case No. 03-22819 (Mar. 20, 2006).

same evidence, reversed finding that the trial judge did not have "unfettered discretion" to decide what weight can reasonably be given to the testimony "in light of the record as a whole", and that its looking at the totality of the evidence led to the opposite conclusion. In another case, the Board held that even though the judge concluded the applicant was credible, the trial judge could not have found the applicant to be credible on all issues in the case.[33]

The Board has also created new legal standards *post hac*. It reversed a trial judge's finding that six alcohol related arrests over a 23 year period were not indicative of a pattern, even though the Board acknowledged that it had never previously defined a "pattern" in terms specific numbers over a given time. It declared in this case that six arrest over 23 years was a pattern as a matter of law.[34] The Board also reversed a trial judge's finding that the applicant had a demonstrated intent not to use marijuana in the future, because the Board was dissatisfied with the reason the applicant gave for his decision not to again use marijuana.[35]

Similarly, the Board has reversed a decision when a particular item of evidence is not mentioned by the trial judge, on the grounds that the judge "failed to discuss a significant aspect of the case".[36] It has also reversed where the applicant had a negative history of minor criminal violations but a positive history of successful work, rehabilitation and reform. The Board, in reviewing all of the evidence, held that the trial judge "gave undue weight to the evidence of reform in light of applicant's overall negative history."[37] One can only conclude that the Appeal Board will find that a particular item of evidence must be discussed, or not discussed in the trial judge's decision depending on the outcome the Appeal Board desires.

The Board has also annunciated a "reasonably disinterested person" standard to review the evidence *de novo*. In a case of an applicant with family in Taiwan the Board held that the trial judge was arbitrary and capricious in finding that Taiwan is a friendly country with a good human rights record.[38] Although stating that there is a rebuttable presumption that the trial judge considered all of the record evidence unless the judge specifically states otherwise, the Board held that presumption can be rebutted when a party can point to significant record evidenced that runs contrary to the judge's findings and conclusions, and which, as a matter of common sense or practical reasoning, should have been explicitly acknowledged and expressly taken into account. In holding that the trial

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[33] ISCR Case No. 02-12329 (Dec. 18, 2003).

[34] ISCR Case No. 01-22403 (Sept. 5, 2002).

[35] ISCR Case No. 01-21285 (Sept. 12, 2002).

[36] ISCR Case No. 02-13595 (May 10, 2005).

[37] ISCR Case No. 01-03695 (Oct. 16, 2002).

[38] ISCR Case No. 02-22461 (Oct. 27, 2005).

judge did not consider all of the evidence, the Board ruled that "there must be some basis in the record that would permit a reasonable disinterested person to fairly question whether the judge considered the record evidence." The Board concluded that since the trial judge focused on the evidence concerning the friendly nature of U.S./Taiwan relations and failed to mention or discuss the contrary evidence, he failed to consider all of the evidence. It thus held that the trial judge had evaluated the case in a "piecemeal manner."

The Board also rejected a trial judge's credibility finding because it was inconsistent with the Board's "reasonable interpretation of the record evidence as a whole."[39] In yet another case the Board held that a "reasonable person" would not have interpreted the security clearance application as applicant said she did, so the trial judge erred in finding her testimony credible.[40]

The Appeal Board has also substituted its own "reasonable mind" for that of the trial judge when it finds the result particularly unpalatable.[41] In a case where the applicant had twice been charged with child rape and both charges were ultimately dismissed, the Board found that the trial judge's decision "was unsustainable, given the substantial volume of record evidence that [was] not significantly rebutted other than by Applicant's denial".[42] The Board relied on a police report and a medical investigation to reverse, finding that the judge's decision was not "acceptable to a reasonable mind." The Board also rejected the trial judge's credibility determination regarding the applicant even though it was supported by his supervisor, stating that the supervisor had little interaction with the applicant outside of the work place and because there was a significant amount of contrary evidence which detracted from the applicant's credibility.[43] The Board simply was not going to allow a clearance to be granted to someone accused of, but never convicted of child rape. So much for the presumption of innocence until proven guilty.

"Piecemeal analysis" and "the whole person concept" are other fall-backs when the Board disagrees with a decision. In another Foreign Influence case, the Board, while acknowledging that the trial judge recited favorable elements of applicant's background, held that the trial judge did not

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[39] ISCR Case No. 01-06870 (Sept 13, 2002).

[40] ISCR Case No. 00-0713 (Feb. 15, 2002).

[41] The "reasonable mind" standard of review is authorized by the Directive at Para. E3.1.32(1). See, f.n. 7, supra.

[42] ISCR Case No. 01-02407 (Jan. 13, 2003).

[43] Administrative Judge Jacksetic disagreed with his colleagues on the credibility issue.

discuss or explain how those elements addressed the security concerns raised by the evidence.[44] It held that the judge failed to articulate a rational basis for his conclusion, therefore the trial judge's review of the record was "a piecemeal analysis which is not consistent with the whole person concept."[45]

Similarly, the Board reversed finding that the trial judge had analyzed numerous acts of misconduct separately. It held that the judge failed to consider the significance of applicant's pattern of conduct.[46] In not considering the "evidence as a whole" the judge did not apply the "whole person concept."

"Common sense" is another standard within the Board's superior purview. In a case involving an applicant who was charged with making false statements under oath earlier in his career, the Appeal Board reversed the trial judge, holding that he did not properly evaluate the applicant's case "under the whole person concept . . . in a common sense manner that is supported by the record evidence as a whole".[47] It held that the trial judge failed to articulate a satisfactory explanation for his conclusion that the applicant had recognized the gravity of his false statements, and his conclusion, therefore was "arbitrary and capricious." Under this boundaryless criterion, the Board simply made a *de novo* review and came to its own conclusion and its own "common sense determination" in "considering the record as a whole."

Sometimes the Board just looks at the evidence, weighs it, and comes to the opposite conclusion. In reversing the grant of a clearance in a case involving alcohol abuse, the Appeal Board held that the trial judge was wrong in concluding that the alcohol abuse which had occurred a number of years earlier was no longer a problem because the applicant had not completely abstained from using alcohol.[48] Whether the moderate drinking indicated a "current problem" is the very type of determination vested in the trial judges by the Directive, but the Appeal Board made a *de novo* review as a "super trial judge" to impose its own view of the evidence.[49]

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[44] ISCR Case No. 02-22461 (Oct. 27, 2005).

[45] Cf, ISCR Case No. 01-16419 (Mar. 19, 2003).

[46] ISCR Case No. 03-27170 (May 5, 2006). *Accord*, ISCR Case No. 01-20906 (Jan 10, 2003)(falsification); ISCR Case No. 01-07657 (Aug. 29, 2002)(financial issues).

[47] ISCR Case No. 03-24233 (Oct. 12, 2005).

[48] ISCR Case No. 02-26915 (Aug. 4, 2005)

[49] *Accord*, ISCR Case No. 01-24385 (Apr. 13, 2004) in which the Board reversed, as arbitrary and capricious, a trial judge's decision that the security violations were isolated or infrequent. The Board's view of the evidence was that there was lax handling of classified

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Another case where the Board weighed the conflicting evidence and made its own credibility determinations concerned alcohol consumption and drug use. There, the trial judge, applying the whole person analysis, accepted the applicant's explanation that he did not believe that two puffs on a marijuana cigarette constituted "use", and determined therefore, that the omissions on his security clearance application were not deliberate.[50] After first stating that trial judge's credibility determinations are entitled to deference on appeal, the Board held that deference is not "unfettered". The Appeal Board made its own determination based on its own review of the evidence that applicant's statements were not credible, and therefore, the trial judge's favorable whole person analysis of applicant was unsustainable.

The Board simply disagreed with the trial judge's findings in another alcohol abuse case where the trial judge found that the applicant no longer abused alcohol, and that the applicant's limited use of alcohol would not adversely effect applicant's ability to safeguard classified information.[51]

Lack of a "plausible explanation" is another Board standard of appellate review. It, predictably, reversed a case where the applicant's brother was an employee of the Syrian government.[52] Even though the trial judge in his decision acknowledged the authoritarian nature of the Syrian government, the Board held that the judge's decision lacked a plausible explanation for why applicant's family ties with immediate family members living in Syria were extenuated or mitigated sufficiently to warrant a favorable security clearance decision.

Lack of "corroboration" is justification for the Board to review the evidence and reverse. Despite the Board's stated deference to the trial judges' credibility determinations, it reversed a favorable decision concerning prescription drug dependence.[53] Although the trial judge made a favorable determination of the applicant's testimony, the Board held that there was no evidence to corroborate the applicant's testimony that he was no longer dependant on prescription drugs, and therefore, it was arbitrary and capricious for the judge to rely on applicant's testimony no matter how credible it was.

"Totality of the findings" is another reason given to reverse. When unhappy with a decision, the Appeal Board will simply review the evidence which could just as easily support the trial judge's

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[49](...continued)
documents.

[50] ISCR Case No. 03-21220 (Aug. 24, 2005).

[51] ISCR Case No. 03-07874 (July 7, 2005).

[52] ISCR Case No. 02-24254 (Jun. 29,2004).

[53] ISCR Case No. 02-20110 (Jun. 3, 2004).

findings, and reverse. For example, an applicant's history of alcohol abuse was found by the trial judge to have been mitigated because the earlier alcohol incidents were dated, because the alcohol consummation had diminished significantly, and because the applicant presented credible evidence that he reformed his drinking habits.[54] After reviewing the evidence the Board reversed, holding the trial judge's conclusion was arbitrary and capricious in light of the totality of the findings which included applicant's having admitted to drinking to the point of intoxication, and the absence of any evidence to corroborate applicant's claim that he has taken corrective action to prevent a pattern of alcohol abuse from developing.

2. The "Whole Person" Concept

The Directive incorporates the government-wide Adjudicative Guidelines for Determining Access to Classified Information, (the "Adjudicative Guidelines") which requires the weighing of a number of variables about the person, past and present, favorable and unfavorable in reaching a determination.[55] These variables, known as the "whole person concept," include: the nature, extent and ‑seriousness of the conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the individual's age and maturity at the time; voluntariness of participation; presence or absence of rehabilitation; the person's motivation, and potential for pressure, coercion, exploitation and duress; and the likelihood of continuation or recurrence.[56] These considerations normally fall within the purview of the trial judge in hearing the testimony, weighing the evidence, and making credibility judgments. Despite the Appeal Board's oft-stated deference to the trial judge's credibility determinations, and its presumption that all the evidence was considered, even if a particular item of evidence was not mentioned in the decision, the Appeal Board has used the generality of the "whole person concept" to overturn decisions which it disfavored. Using the whole person concept, the Appeal Board reversed a trial judge who found that the applicant's one-time use of marijuana four years earlier was an isolated incident.[57] In that case the Appeal Board found that:

> [T]he Administrative Judge's favorable whole person analysis relies in part on his explicit acceptance of Applicant's explanation that he did not believe that two puffs

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[54] ISCR Case No. 03-07848 (July 7, 2005).

[55] Directive, Enclosure 2, Para. E2.2. The Adjudicative Guidelines were originally published in 1998 as Government-wide criteria at 32 C.F.R. Part 147. They were recently updated by a Notice from the National Security Council on December 29, 2005.

[56] Ibid.

[57] ISCR Case No. 03-21220 (Aug. 24, 2005).

> on a marijuana cigarette in 2001 constituted use of the drug and that therefore 'the omissions were not deliberate and are thus mitigated'.[58]

It reversed because:

> The Administrative Judge in his whole person analysis did not analyze Applicant's omission or the credibility of Applicant's explanation for the omission . . .. Although an Administrative Judge's credibility determination is entitled to deference on appeal, the deference is not unfettered. In this case, the Judge's credibility determination is sufficiently undercut by Applicant's own testimony and by relevant aspects of Applicant's prior history, so as to make the Judge's credibility determination unsustainable. Furthermore, the Judge's whole person analysis is also unsustainable for the same reasons.[59]

The Appeal Board made itself a "super trial judge," to make its own credibility and whole person judgments.

The Adjudicative Guidelines, incorporated as Enclosure 2 to the Directive, states that "the adjudicative process is the careful weighing of a number of variables known as the whole person concept", and that each of the Guidelines "is to be evaluated in the context of the whole person".[60] This "whole person concept" is intended to take into account the applicant's background, motivation and circumstances surrounding the conduct in issue. Instead, it has morphed into a justification for reviewing the whole of the evidence so the Board can come to its own conclusions, in other words a justification for a *de novo* review.

In a case involving an applicant who was charged with making false statements under oath earlier in his career, the Appeal Board reversed the trial judge because he did not properly evaluate the applicant's case "under the whole person concept . . . in a common sense manner that is supported by the record evidence as a whole and is not arbitrary and capricious."[61] The Board held that the trial judge failed to articulate a
satisfactory explanation for his conclusion that the applicant had recognized the gravity of his false statements, and that the trial judge's conclusion that the applicant understood the gravity of his conduct and recognized his error is "arbitrary and capricious." The Board made its own "common sense determination", and the "whole person concept" became "the record evidence as a whole."

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[58] Ibid.

[59] Ibid.

[60] Directive, Paras. E2.2.1 and E2.2.3.

[61] ISCR Case No. 03-24233 (Oct. 12, 2005).

In another case the Board reversed and remanded because the trial judge's "whole person analysis" did not take into account several errors that the Board found when the case was appealed.[62]

3. Requiring An Impossible Burden of Proof

The Appeals Board has affirmed all (141) denials and reversed 45 out 47 grants of a clearance involving an applicant with relatives in a foreign country, by requiring the applicant to prove the impossible; that even though there was no evidence that a foreign country had ever sought to influence anyone with a security clearance by bringing pressure on a foreign family member, that such country would not do so in the future.[63] In case after case every variety of argument by an applicant has been rejected.

The "impossibility of proof" argument was directly raised and rejected by the Appeal Board in ISCR Case No. 02-00318 (Feb 25, 2004), and again in ISCR Case No. 02-26978 (Sept 21, 2005) where the Appeal Board was asked to reconsider the issue.[64] In the first case the Board ruled that the applicant had not proven that his elderly mother and sisters, who had no contact or ties with the Iranian government, could not be exploited by the Iranian Government so as to force him to choose between them and his obligation to safeguard classified information.[65] Under the criterion laid out by this and numerous other decisions, there is simply no way that the Board would affirm a trial judge's decision granting a clearance to someone with immediate family in a foreign country.[66] Administrative Judge Michael Y. Ra'anan (now Acting Chief Judge of the Appeal Board) in a 2003 dissenting opinion, expressed concern that Mitigation Condition 1,(i.e., that family members in a

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[62] ISCR Case No. 03-19101 (Jan. 31, 2006).

[63] The two anomalous cases are discussed above, at pages 9 and 10. ISCR Case No. 02-30929 (Jan. 7, 2004); ISCR Case No. 04-06564 (May 30, 2006).

[64] ISCR Case No. 02-00318 (Feb 25, 2004) was appealed to the United States District Court for the Eastern District of Virginia in Civil No. 1:04cv439 where it was argued that requiring an impossible proof was arbitrary, capricious and an abuse of discretion. Summary Judgment was granted to the Government by Judge Leonie Brinkema who did not address the burden of proof issue, but ruled that the granting of security clearances was within the discretion of the administrative agencies. The case was not appealed further.

[65] ISCR Case No. 02-00318 (Feb 25, 2004).

[66] Eg,. ISCR Case No. 02-26826 (Nov. 12, 2003) (relatives in Turkey); ISCR Case No. 01-20908 (Nov. 23, 2003)(relatives in Iran); ISCR Case No. 02-04786 (Jun. 27, 2003); ISCR Case No.99-0532 (Feb 27, 2001)(relatives in "FC", presumably Iran).

foreign country could not be exploited to bring pressure on an applicant) was rendered unusable.[67] He was quite correct, but in every case since, he has agreed with the other Appeal Board members to require the applicant to prove the impossible. Yet Department Counsel, inexplicably, does not appeal all such cases. As noted in an earlier article by this author concerning foreign preference/foreign influence cases dealing with Israel, the choice of why some decisions are appealed by Department Counsel and others not, can only be rationalized as arbitrary and capricious.[68]

In reversing another decision granting a clearance to an applicant with family in Iran, the Appeal Board did note that the Judge "[made] mention of 'tension' between the U.S. and Iran". However, it reversed the trial judge on the basis that the applicant had not proven that his elderly mother and sisters, who had no contact or ties with the Iranian government, could not be exploited by the Iranian Government so as to force him to choose between them and his obligation to safeguard classified information. By placing on the applicant the impossible burden of proving that something which has not happened in the past, will not happen in the future, assures that no ruling of any trial judge granting a clearance concerning a country of which the Appeal Board does not approve will ever be sustained on appeal, regardless of the evidence or rational of the trial judge's decision.

In another case involving an applicant with family in Syria and Saudi Arabia, the trial judge's finding that applicant's family members in Syria were not agents of the Syrian government was not challenged by the government.[69] However, the Appeal Board again ruled that the applicant could not prove that his immediate family members, even though not associated with the Syrian government or its foreign intelligence service, would not be subject to influence if the Syrian government chose to apply it. Applicant argued that the evidence of his character and his ties to the United States showed that he "would make the right choice if the Syrian government tried to exploit his ties with his parents in Syria." The Appeal Board held that argument to be unpersuasive, and that the possible foreign influence on his parents did not hinge on what choice the applicant might make if he were forced to choose between his loyalty to his family and his loyalty to the United States, rather on whether the applicant presented evidence sufficient to demonstrate that he would not be placed in a position where he would be forced to make such a choice.[70]

In a case involving an applicant with family in Israel the Board reversed the trial judge's favorable decision. Typical of many other cases, the applicant testified that his mother living in Israel was elderly and was not dependant on applicant for support, and that neither his sister nor

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[67] ISCR Case No. 02-04786 (Jun. 27, 2003).

[68] See *Israel: Foreign Preference-Foreign Influence Cases-A Review of DOHA Decisions, March 2006*, at www.sheldoncohen.com/publications.

[69] ISCR Case No. 03-24933 (July 28, 2005).

[70] ISCR Case No. 04-06564 (May 30, 2006); *Accord*, ISCR Case No. 00-0484 (Feb. 2, 2002).

brother who lived in Israel had ever worked for the Israeli government. The Board, reversing, stated that the applicant did not offer proof that the government of Israel would never apply influence on his elderly mother, his sister or his brother.[71] In that case the applicant testified that he had long-standing ties to the United States and that if he were ever approached by anyone seeking information on his classified work, he would report such a contact or threat to a responsible security official. The Appeal Board ruled that it could not rely on what the applicant stated he would do under a hypothetical set of circumstances since he had never been approached to provide classified information, and he could not prove what he would do if subjected to that influence.

Based on the same arguments and the same reasoning, the Appeal Board reversed the grant of a clearance in two cases where the applicants had family in Taiwan.[72] The Appeal Board held that it was immaterial whether the applicant testified as to what choice he would make between immediate family members and the United States, and immaterial whether the foreign country is friendly or unfriendly. In the second of those cases the Board held that not only is it immaterial what choice the applicant testified he would make if confronted and forced to make such a choice, it is also immaterial whether applicant's contacts with his immediate family members are infrequent. The burden of proof, the Board held, is always on the applicant to show that immediate family members in a foreign country would not be subject to influence and pressure exerted by the foreign government regardless of what action the applicant stated he would take if confronted with that situation.[73] Clearly, so long as a family member is in a foreign country, there is no proof that could be offered to mitigate that situation. In another case involving family members in Iran, the Board held that it did not matter that: (1) applicant lacked frequent contact with his relatives; (2) the relatives did not depend on applicant for support; (3) applicant refused to travel to Iran; (4) applicant strictly followed rules related to work; (5) the choice applicant might make if forced to choose between his loyalty to his family and to the United States; or (6) there was no evidence that the Iranian government had ever targeted applicant or his family in the past. The Board held that none of that evidence was sufficient to support a conclusion that the Iranian government was not likely to target applicant in the future.[74] In short, there is no evidence that an applicant can produce that

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[71] ISCR Case No. 03-15485 (Jun. 2, 2005). *Accord*, ISCR Case No. 03-04033 (Feb. 16, 2006) (family in Russia and Israel).

[72] ISCR Case No. 02-31154 (Sept. 22, 2005); ISCR Case No. 02-24267 (May 24, 2005). *Accord*, ISCR Case No. 03-09053 (Mar. 29, 2006) (relatives in China).

[73] ISCR Case No. 02-24267 (May 24, 2005). *Accord*, ISCR Case No. 01-26893 (Oct. 16, 2002);(family in Iran); ISCR Case No. 01-17496 (Oct. 28, 2002) (family in Israel).

[74] ISCR Case No. 03-15205 (Jan. 21, 2005); *Accord*, ISCR Case No. 03-02382 (Feb. 15, 2005). (Relatives in Iran); ISCR Case. No. 04-06564 (May 30, 2006)(relatives in China); ISCR Case No. 02-21927 (Dec. 30, 2005)(relatives in Saudi Arabia, remanded); ISCR Case No. 02-24254 (Jun. 29,2004)(relatives in Syria); ISCR Case No. 02-15339 (Apr. 29, 2004)(relatives

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will overcome that presumption. In a case involving an applicant with relatives in Taiwan, the Board held that the trial judge was arbitrary and capricious in finding that applicant's relatives were not subject to coercion and duress by the government of Taiwan when the judge's findings were based on his relatives being elderly, that they had no ties to the government, they were financially self sufficient, they were eager to become permanent residents of the United States and that Taiwan was a friendly country and a commercial ally.[75] As in other cases, regardless of any evidence the applicant could muster, he could not prove the impossible.

In a case where the applicant's brother was an employee of the Syrian government the Board reversed, noting that Syria has been on the U.S. list of state sponsors of terrorism since 1979 and that the trial judge had acknowledged the authoritarian nature of the Syrian government.[76] The Board held that the judge's decision lacked a plausible explanation for why applicant's family ties with immediate family members living in Syria were extenuated or mitigated sufficiently to warrant a favorable security clearance decision.

In a case of an applicant with immediate family members in Iran, the Board held that even though: (1) applicant had a security clearance for many years without violating security; (2) the government did not tell her before the proceedings that her contacts with family members in Iran posed a security risk; (3) there was no evidence that the Iranian government was aware of her access to classified information; and (4) her family members living in Iran would not betray U.S. classified information for the benefit of the Iranian Government, that was not sufficient to meet the requirement that the applicant's family members not be subject to foreign influence.[77] The Board held that the judge's favorable credibility determination of applicant's testimony was no substitute for record evidence that would provide a basis to conclude that applicant's family would not be subject to influence.

The Board rejected the argument that consideration should be given to countries that are friendly to the United States in the case of an applicant with immediate family members in Taiwan.[78] The Board noted that there are cases where individuals have committed espionage against the United States by passing classified information to countries that are not considered hostile to the United States.

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[74](...continued)
in China).

[75] ISCR Case No. 02-23860 (Jun. 30, 2005).

[76] ISCR Case No. 03-24933 (July 28, 2005).

[77] ISCR Case No. 02-14995 (Jul. 26, 2004).

[78] ISCR Case No. 02-18668 (Feb. 10, 2004).

In another reversal involving an applicant with family in Taiwan, the Appeal Board held that the trial judge placed undue significance on the absence of any security violations by the applicant.[79] Since employers are required to record and report only security violations, and do not make a record where there are no violations, there is no way that an applicant can prove a negative, particularly where the government would have unique knowledge if there were any security violations.

4. Discretion of the Trial Judge

One of the favorite phrases of the Board, when it simply disagrees with a trial judge's decision, is that the judge does not have "unfettered discretion". Never has the Board defined what it considers "unfettered" discretion, so one can only conclude that a trial judge must hear the case wearing leg irons.[80]

Typical of this reasoning is a case in which the applicant had family in Israel.[81] The applicant had been married four times and each of the wives had dual citizenship with other countries. He also had four children and step-children who had dual citizenships. The Board concluded, given the network of family members in foreign countries, that mitigation was not warranted irrespective of the trial judges's favorable view of the applicant's testimony and the testimony of the character witnesses. The Board held that the "application of the Adjudicative Guidelines is not left to the unfettered discretion of the trial judges, but requires the exercise of sound judgement within the parameters set by the Directive."

The Board in another case held that the trial judge, in weighing the evidence, did not have "unfettered discretion" to decide what weight could reasonably be given to the testimony in light of the record as a whole, and held that the totality of the evidence led it to conclude that the judge committed harmful error.[82] Also, it held, a trial judge does not have "unfettered" discretion to relax the technical rule of evidence.[83]

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[79] ISCR Case No. 03-16848 (Aug. 30, 2005).

[80] "Fetters" are leg restraints to prevent prisoners from fleeing. Compact Oxford English Dictionary.

[81] ISCR Case No. 03-11765 (Apr. 11, 2005)

[82] ISCR Case No. 03-02486 (Aug. 31, 2004).

[83] ISCR Case No. 02-06478 (Dec. 15, 2003).

Where an applicant could not account for six classified documents over a period of time, the Board held that it was arbitrary or capricious for the trial judge to categorize the violations as isolated or infrequent, finding there was lax handling of classified documents for the applicant.[84]

5. Supplying Missing Evidence

Despite the Directive's requirement that "no new evidence shall be received or considered by the Appeal Board",[85] the Appeal Board has held that it (and a trial judge) may take administrative notice of documents or evidence not in the record, and it (and a trial judge) is not precluded merely because none of the parties cited the document or asked that trial notice of it be taken.[86] It has held that administrative notice is analogous to judicial notice, citing Federal Rule of Evidence, 201(f), which states that "Judicial notice may be taken at any stage of the proceeding."[87] The Appeal Board has held that that Rule of Evidence clearly is embraced in its decisions.[88] It has taken administrative notice of Department of State publications, and of official documents posted by Federal departments or agencies on their web sites.[89] It has held that there is no denial of due process stemming from its taking administrative notice, even though a document was not offered by either party at the hearing.[90]

6. Failure to Discuss an Item of Evidence

Part of the Appeal Board's usual spiel is that the trial judge does not have to discuss every item of evidence in the decision, and that it is presumed that the judge has considered all of the evidence. The Board will condone a trial judge's failure to discuss relevant evidence when it approves of the desired outcome.[91] But when it wants to reverse, the Board will find a particular piece of evidence or testimony, and use the lack of a reference to it in the trial judge's decision as justification to reverse. The Appeal Board uses the rubric that the trial judge must consider the "totality of the record evidence" to reevaluate the evidence in any case with which it disagrees, in order to come to a different result. For example, in an alcohol abuse case the Board reversed a trial

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[84] ISCR Case No. 01-24358 (Apr. 13, 2004).

[85] Directive, Encl. 3, Para. E3.1.28, and E3.1.29.

[86] ISCR Case No. 98-0507 (May 17, 1999); ISCR Case No. 00-0244 (Jan. 29, 2001).

[87] ISCR Case No. 02-06478 (Dec. 15, 2003).

[88] ISCR Case No. 99-0452 (Mar. 21, 2000).

[89] ISCR Case No. 02-06478 (Dec. 15, 2003); ISCR Case No. 99-0452, f.n.7 (Mar. 21, 2000).

[90] ISCR Case No. 00-0244(Jan. 29, 2001)

[91] *See,* ISCR Case No. 99-0228 (Mar. 12, 2001).

judge who found that the applicant no longer abused alcohol.[92] The Board noted that the trial judge made no mention that the applicant was still under court imposed probation for an earlier DUI incident, and that his failure to discuss "an important aspect of the case" was error.

In another case where the applicant's mother and two sisters lived Iran, the Board noted that the judge failed to make any mention that Iran was hostile to the United States even though there was evidence of that in the record. It held that there was a serious question as to whether "the judge forgot that aspect, ignored, failed to take it into account, dismissed that aspect of the case for no apparent reason, failed to understand the significance of that aspect of the case or engaged in an arbitrary or capricious analysis."[93] The Appeal Board declined to remand to give the judge the opportunity to discuss the hostility of the government of Iran. Similarly, in a case involving relatives in Libya, the Appeal Board acknowledged that it is well settled that the trial judge need not discuss every piece of evidence. Nevertheless, it reversed because the judge's conclusions in the written decision did not take into account Libya's human rights record.[94]

The Appeal Board will ignore its repeated pronouncement that the trial judge is presumed to have considered all of the evidence in the record unless specifically stated otherwise, and will reverse a decision not to its liking by selecting a statement from the transcript, or an exhibit not mentioned or not emphasized in the trial judge's decision. For example, the Appeal Board reversed a decision granting a clearance to an applicant who had a sister living in Iran where Department Counsel had presented evidence that the Government of Iran was hostile to the United States. Applicant did not rebut or challenge that evidence. Nevertheless, the Appeal Board noted that:

> Although the Administrative Judge found that 'Applicant decided to leave Iran in order to pursue a life free of the dictatorship imposed by the ruling fundamentalist regime in the [Iran], the Administrative Judge did not discuss, mention or acknowledge the record evidence indicating that the Government of Iran is hostile to the United States".[95]

The Appeal Board acknowledged applicant's argument that "there is a rebuttal presumption that the judge considered the record evidence and there is no requirement that the judge cite to Board decisions in issuing his own decision". Yet despite the existence of numerous prior Board decisions discussing the hostility of Iran, it held that:

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[92] ISCR Case No. 03-07874 (July 7, 2005).

[93] ISCR Case No. 02-02195 (April 9, 2004). *Accord,* ISCR Case No. 02-22461 (Oct. 27, 2005)(Taiwan).

[94] ISCR Case No. 04-05317 (Jun. 3, 2005). *Accord*, ISCR Case No. 02-13595 (May 10, 2005). (Tension between the U.S. and Iran).

[95] ISCR Case No. 02-00318 (Feb. 25, 2004).

> the Judge's failure to discuss or even acknowledge the hostility of the Iranian government toward the United States . . . indicated the Judge overlooked or ignored significant record evidence that runs contrary to his finding and conclusions and demonstrates the arbitrary and capricious action."[96]

One can only conclude that either the Appeal Board felt that the Administrative Judge had not read a newspaper or any Appeal Board decision in the last thirty years, or that it simply was not going to allow a security clearance to anyone with a relative in Iran regardless of the evidence or the trial judge's decision.

On the other hand, when the Appeal Board approves of the outcome, it simply dismisses, as unimportant, the trial judges's failure to discuss significant evidence. In the case of an applicant with a family member in Saudi Arabia, the Appeal Board affirmed the denial of a clearance stating:

> Applicant presented evidence about his contacts with his immediate family members to show that they are not frequent and to rebut the presumption that they are not casual. Apart from the referring to Applicant's contacts with his parents as 'sporadic' the Administrative Judge made no specific finding about the nature or frequency of Applicant's contacts with his immediate family members who live in Saudi Arabia, and did not articulate any reason for why he did not apply Foreign Influence Mitigating Condition 3. However, considering the record as a whole, the Board concludes the Judge's failure constitutes harmless error because there is not a significant chance that the Judge would reach a different result if the Board were to remand the case with instructions that the Judge explicitly discuss Foreign Influence Mitigating Conditions 3.[97]

Similarly, in a case involving an applicant with relatives in Jordan and Syria, the Appeal Board dismissed the applicant's argument that the trial judge's failure to mention applicant's testimony that he would not betray the United States if family were threatened, indicated that the trial judge did not consider that testimony. The Appeal Board, while agreeing that such testimony was relevant, did not reverse because it held such testimony was "of limited relevance" and could not have had much weight on the trial judge's decision.[98]

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[96] Ibid.

[97] ISCR Case No. 02-02892 (Jun. 28, 2004).

[98] ISCR Case No. 02-26978 (Sept 21, 2005).

7. Reviewing Credibility Determinations

The Appeal Board's stated position that credibility determinations are entitled to deference on appeal is often ignored when the Board disagrees with the outcome of the case.[99] While it has held that a trial judge's credibility determination without the benefit of demeanor observations is no different than a judge's fact finding on a purely documentary record,[100] the Board will make its own credibility determination as it sees the need arise. For example, in a case where the applicant with immediate family members in Iran testified that: (1) she held a security clearance for many years without violating security; (2) the government did not tell her before the proceedings that her contacts with family members in Iran posed a security risk; (3) there was no evidence that the Iranian government was aware of her access to classified information; and (4) her family members living in Iran would not betray U.S. classified information for the benefit of the Iranian Government, was not sufficient to show that the applicant's family members would not be subject to foreign influence.[101] The Board held that the judge's favorable credibility determination of applicant's testimony was no substitute for record evidence that would provide a basis to conclude that applicant's family might be subject to influence.

The Board has reversed credibility determinations solely on the basis that they were not corroborated.[102] It has ruled it to be arbitrary and capricious for a trial judge to accept a witnesses testimony without considering whether it is plausible and consistent with other record evidence.[103]

In a case involving an applicant who was charged with making false statements under oath earlier in his career, the Appeal Board reversed the trial judge stating he did not properly evaluate the applicant's case "under the whole person concept . . . in a common sense manner that is supported by the record evidence as a whole and is not arbitrary and capricious."[104] The Appeal Board had little use for the trial judge's credibility determination, holding that "the judge's conclusion that applicant was a credible witness did not mean that the judge was free to accept

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[99] Eg, ISCR Case No. 01-02677, at p. 4 (Oct. 17, 2002); ISCR Case No. 00-0713, at p. 3 (Feb. 15, 2002).

[100] ISCR Case No. 01-12350 (July 23, 2003).

[101] ISCR Case No. 02-14995 (Jul. 26, 2004).

[102] ISCR Case No. 00-0620 (Feb. 19 2001).

[103] ISCR Case No. 00-0228 (Mar. 12, 2001).

[104] ISCR Case No. 03-24233 (Oct. 12, 2005). *Accord*, ISCR Case No. 03-02486, (Aug. 31, 2004)(judge does not have unfettered discretion to decide what weight to give to the evidence).

applicant's testimony in an uncritical manner without regard to its meaning and significance in light of the record evidence as a whole."

In one of the few cases where an applicant's appeal of an adverse decision was reversed, the Board held that the record as a whole did not support the trial judge's negative credibility determination, which significantly affected his decision on other issues in the case.[105]

The Board reversed a favorable decision concerning prescription drug dependence. Despite the trial judge's favorable credibility determination of the applicant's testimony, the Board held that there was no evidence to corroborate his testimony that he was no longer dependant on prescription drugs, and therefore it was arbitrary and capricious for the judge to rely on applicant's uncorroborated second hand lay testimony about the medical opinion of applicant's pain management specialist.[106]

Despite what the Board says it does, credibility determinations are what they appear to be in the eyes of the last beholder.

8. Lack of Corroborating Testimony

When the Appeal Board has nothing else on which to reverse a decision it does not like it has overturned the trial judge's credibility determination because the applicant's testimony lacked corroboration. In a case of concerning a history of alcohol abuse, the applicant was found by the trial judge to have mitigated the abuse because the earlier alcohol incidents were dated, because the alcohol consummation had diminished significantly, and because the applicant presented credible evidence that he reformed his drinking habits.[107] The Board reversed, holding the trial judge's conclusion was arbitrary and capricious in the absence of any evidence to corroborate the applicant's claims that he had taken corrective action to prevent a pattern of alcohol abuse from developing. The Appeal Board made its own review of the evidence which could just as easily have supported the trial judge's finding, and reversed.[108]

Similarly, in reversing the grant of a clearance to an applicant with family in Libya, the Board rejected the judge's findings because it said the applicant offered no "corroboration" for his

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[105] ISCR Case No. 02-12789 (May 13, 2005).

[106] ISCR Case No. 02-20110 (Jun. 3, 2004).

[107] ISCR Case No. 02-11454 (Jun. 7, 2004).

[108] *Accord*, ISCR Case No. 03-27170 (May 5, 2006); ISCR Case No. 00-0713 (Feb. 15, 2002)(testimony regarding repayment of debts).

testimony that his relationship with his brothers in Libya was distant.[109] However, in a more recent case the Board acknowledged the difficulty of corroboration in a case of an applicant with family in China. The Board noted:

> Department Counsel notes that the only evidence on the subject [of applicant's parents] is Applicant's testimony. Given the realities of the evidentiary record available to the Judge in most DOHA cases, and the substantial evidence rule, it untenable to *require*, as a matter of law that Administrative Judges have more than Applicant's testimony for each finding of fact. . . .[That] does not necessarily mean that the finding is entitled to much weight.[110]

Where the issue was applicant's resolution of claims by the IRS for back taxes, the Board held that it was arbitrary and capricious for the trial judge to accept applicant's uncorroborated testimony of his efforts. It said that the judge's finding that the applicant had made good faith efforts to resolve the claim did not reflect a reasonable interpretation of the record as a whole.[111]

9. Review of Entire Record as a Whole

The Board will often use the expressions "piecemeal manner" or "piecemeal analysis" to reach its own conclusion and reverse even when the record is complete, when the trial judge has addressed all of the issues and all of the evidence, and when the credibility determinations are supported by corroborating testimony. It also uses "piecemeal analysis" interchangeably with the term "the whole person concept", confusing how the evidence is analyzed with what the evidence is.[112] In a variation on this theme the Board will reverse if it concludes that the Judge did not consider the "record as a whole."[113]

For example, in reversing the trial judge in a case where the applicant had family members in Taiwan, the Board noted that although the trial judge had correctly recited the legal standards to be applied, he failed to support that recitation with his findings.[114] It held that the trial judge used his finding that Taiwan is a friendly country in an arbitrary and capricious manner, because friendly

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[109] ISCR Case No. 04-05317 (Jun. 3, 2005).

[110] ISCR Case No. 03-10955 (May 30, 2006).

[111] ISCR Case No. 01-03695 (Oct. 16, 2002).

[112] ISCR Case No. 99-0601 (Jan. 30, 2001).

[113] See, ISCR Case No. 03-22563 (Mar. 8, 2006). *Accord,* ISCR Case No. 00-0628 (Feb 24, 2003)(finding that the judge analyzed each foreign contact in Sweden separately).

[114] ISCR Case No. 02-22461 (Oct. 27, 2005).

countries or those who have a good human rights record also engage in intelligence gathering. After stating that there is a rebuttable presumption that the trial judge considered all of the record evidence unless the judge specifically states otherwise, the Board found that he could not have not considered all of the evidence, because:

> there must be some basis in the record that would permit a reasonable, disinterested person to fairly question whether the Judge considered the record evidence. [That] presumption can be rebutted when a party can point to significant record evidence that runs contrary to the Judge's findings and conclusions, and which -- as a matter of common sense or practical reasoning -- should have been explicitly acknowledged and expressly taken into account in order for the Judge's analysis to be reasonable and not arbitrary or capricious.

The Board concluded that since the trial judge focused on the evidence of the friendly nature of U.S./Taiwan relations and failed to mention or discuss the contrary evidence, given the totality of the evidence and the judge's failure to articulate a rational basis for his conclusion, he must have evaluated the case in a "piecemeal manner."

On the other hand, where the trial judge did not recite all of the evidence positive to the applicant, and discussed only the testimony at the hearing, the Board concluded that the judge's review of the record was "a piecemeal analysis which is not consistent with the whole person concept".[115] While acknowledging that the trial judge recited favorable elements of applicant's background, the Board held that the trial judge did not discuss or explain how they addressed the security concerns and, therefore, the judge failed to articulate a rational basis for his conclusion.

In another case, where applicant's parents and sister were citizens and residents of China, the Board held that the judge's decision that the applicant would not be subject to influence and pressure was arbitrary, capricious, and without rational basis.[116] Despite the trial judge's favorable decision based on applicant's testimony that she would not succumb to any attempt by a foreign government to induce her to compromise classified information and despite the corroboration of her testimony, the Board found that was not, "considering the record as a whole, sufficient grounds to affirm."

In a case where applicant's mother and two sisters lived in Iran, the Board held that the "totality of the record evidence concerning applicant's contacts with his immediate family" was not sufficient to rebut the presumption of a close relationship.[117]

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[115] ISCR Case No. 02-22461 (Oct. 27, 2005).

[116] ISCR Case No. 02-15339 (Apr. 29, 2004). *Accord,* ISCR Case No. 02-20365 (May 27, 2005)(Relatives in Lebanon).

[117] ISCR Case No. 02-02195 (April 9, 2004).

10. Errors of Law

There are cases, though not many, where the Appeal Board does reverse for purely legal error and those cases are generally remanded to the trial judge to correct the error. An example of this is where the Board reversed a favorable decision under Guideline D, Sexual Conduct, holding that as a matter of law, applicant's masturbating in his car was sexual behavior within the meaning of the Guideline. The Board held that applicant's conduct did not exhibit "clear evidence of rehabilitation".[118] Other cases were reversed and remanded where it was unclear which of two versions of the Foreign Influence Guideline applied to the case [119], and where the trial judge relied on a superceded version of the Adjudicative Guidelines[120], and where there were documents missing from the record.[121]

An unfavorable decision in a case involving an alleged falsification of a security clearance application was reversed and remanded when the judge at the hearing stated that he saw no intent to deceive, but later, without offering an explanation for changing his ruling, found falsification in his written decision.[122] In other cases there were hand written, material changes to the original transcript of which neither party was aware when filing their appeal[123], or exhibits were missing from the record.[124]

Yet another case was reversed and remanded because the trial judge had made remarks on the record which the Board held, a reasonable person could conclude were biased and prejudiced.[125] The Board also overruled a decision granting a clearance even though the applicant held and used

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[118] ISCR Case No. 02-29035 (Sept. 26, 2005).

[119] ADP Case No. 03-21205 (Dec. 23, 2005).

[120] ISCR Case No. 02-17369 (May 23, 2006).

[121] ISCR Case No. 04-07825 (Jan. 18, 2006).

[122] ISCR Case. No. 02-28917 (Jun. 10, 2005). Cf, ISCR Case No. 02-22883 (Jan. 19, 2006).

[123] ISCR Case No. 03-11420 (Oct. 5, 2005). *Accord*, ISCR Case No. 02-28915 (Mar. 3, 2006).

[124] ISCR Case No. 02-24875 (Mar. 29, 2006)(relatives in Laos).

[125] ISCR Case No. 03-14052 (Sept. 28, 2005).

an Iranian passport. The Board said- the trial judge could not use an "overall common sense determination" to override the legal requirements of the "Money Memorandum."[126]

CONCLUSION

In reviewing the DOHA Appeal Board decisions since January 2000 one finds 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 applicants with contacts or relatives in, or other ties to foreign countries. In the six and one-half years reviewed, 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.

While Department Counsel, the prosecution branch of DOHA, does not appeal all trial judge decisions granting a clearance in a foreign connection case, it does appear to focus its appeals on cases involving Middle Eastern countries including Israel, and the Far East countries including China, South Korea and Taiwan. To Department Counsel's credit, it does not appeal all such favorable decisions, however its reasons for appealing some but not others remains a mystery which can only be answered by that Office. If Department Counsel does appeal a favorable Foreign Influence decision, it is assured that the Appeal Board will reverse. Just as assuredly, if an applicant appeals a decision denying a clearance involving a foreign family relation, the Appeal Board will affirm. This apparently unwritten policy of the Department of Defense is a trap for the unwary applicant. Whether the three members of the DOHA Appeal Board are acting independently, which seems unlikely, or are acting on direction from higher Department of Defense authority is not known, but if there is such a policy, it should be published to put applicants on notice that if they appeal the denial of a clearance involving a foreign connection, or the government appeals the grant of such a clearance, any hope for success at the Appeal Board is virtually nonexistent.

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[126] ISCR Case No. 03-16516 (Nov. 26, 2004).

Appendix A
DOHA Appeal Board Decisions, Jan. 2000 to May, 2006

CATEGORY	DENIAL AFF'D	DENIAL REV'D	GRANT AFF'D	GRANT REV'D
For. Inf./Pref.	144	0	4	45
Alcohol	51	0	4	6
Pers. Conduct	107	1	10	12
Drugs	58	4	4	6
Financial	115	0	5	6
Criminal	103	0	0	6
Security	6	0	0	0
Sex Offenses	15	0	1	0
Outside Act.	1	1	0	0
Infoma. Syst.	2	0	1	1
SUBTOTAL	716	6	29	82
Remand				
For. Inf./ Pref.	14			
Alcohol	3			
Pers Conduct	6			
Drugs	3			
Financial	6			
Criminal	18			
Sex Offenses	1			
Other	14			
SUBTOTAL	65			
GRAND TOTAL	898			

Appendix B
DOHA APPEAL BOARD REVERSAL AND REMAND DECISIONS, 2000 - MAY 2006

CASE NO.	DATE	GRANT REV	GRANT AFF	DEN REV	REMAND	TYPE	GUIDELINE	COUNTRY	TRIAL JDG.
99-0254	02/16/00	X				FI / FP	B, C	?	METZ
99-0480	11/28/00	X				FI / FP	B, C	?	HEINY
99-0295	10/20/00	X				FI / FP	B, C	?	MATCHINSKI
99-0452	03/21/00		X			FI / FP	B, C	ISRAEL	GALES
99-0597	12/13/00	X				FI / FP	B, C	U.K.	BRAEMAN
01-06166	10/25/01	X				PERS. CON	E, K		ERCK
99-0532	02/27/01	X				FI / FP	B, C	?	ROSS
99-0424	02/08/01	X				FI / FP	B, C	?	CEFOLA
00-0620	10/19/01	X				CRIMINAL	J, G, E		HEINY
99-0228	03/12/01	X				INFOTECH	M, E		ERCK
99-0601	01/30/01	X				FI / FP	B, C	?	SAX
01-22403	09/05/02	X				ALCOHOL	G, E		ERCK
01-21285	09/12/02	X				DRUGS	H		METZ
01-26893	10/16/02	X				FI / FP	B, C	IRAN	SAX
01-17496	10/28/02	X				FI / FP	B, C	ISRAEL	HEINY
01-06870	09/13/02	X				PERS. CON	E, J		ERCK
01-07657	08/29/02	X				FINANCIAL	F		WESLEY
01-05139	08/05/02	X				FINANCIAL	F		TESTAN
01-03132	08/08/02	X				PERS. CON	E		SMITH
01-03107	08/27/02				X	PERS. CON	E, M		SAX
00-0628	04/26/02				X	FI / FP	B, C	SWEDEN	HEINY
00-0317	03/29/02	X				FI / FP	B, C	YUGOSLAVIA	WESLEY
00-0713	02/15/02	X				FINANCIAL	F		BRAEMAN
00-0484	02/01/02	X				FI / FP	B, C	?	MASON
01-03695	10/06/02	X				FINANCIAL	F, E, J		BRAEMAN
02-26826	11/12/03	X				FI / FP	B, C	TURKEY	CEFOLA
02-12329	12/18/03	X				CRIMINAL	J, E		MALONE
02-06478	12/15/03				X	FI	B	CHINA	WILLMETH
02-05988	12/18/03	X				FI	B, E, L	RUSSIA	MATCHINSKI
01-20908	11/26/03	X				FI / FP	B, C	IRAN	SMITH
02-04455	07/31/03				X	FI / FP	B, C	S. KOREA	METZ
01-12350	07/23/03	X				DRUGS			TESTAN
02-04786	06/27/03	X				FI / FP	B, C	IRAN	METZ
01-16419	03/19/03	X				FI / FP	B, C	EGYPT	HEINY
01-20906	01/10/03	X				FI	B, G	LEBANON	ERCK
01-02407	01/13/03	X				CRIMINAL	J, D, E		CEFOLA
00-0628	02/24/03	X				FI / FP	B, C, L	SWEDEN	HEINY0
3-16516	11/26/04	X				FI / FP	B, C	IRAN	GALES
02-24254	06/29/04	X				FI / FP	B, C	SYRIA	LEONARD
02-20110	06/03/04	X				DRUGS	H		WESLEY
03-02486	08/31/04	X				DRUGS	H		ABLARD
02-14995	07/26/04	X				FI / FP	B, C	IRAN	ABLARD

CASE NO.	DATE	GRANT REV	GRANT AFF	DEN REV	REMAND	TYPE	GUIDELINE	COUNTRY	TRIAL JDG.
02-11454	06/07/04	X				ALCOHOL	G		MOGUL
02-15339	04/29/04	X				FI / FP	B, C	CHINA	BRAEMAN
02-02195	04/09/04	X				FI	B, C	IRAN	HEINY
01-24358	04/13/04	X				FI	B, E, K	CHINA	ABLARD
02-18668	02/10/04	X				FI	B, E, K	TAIWAN	TESTAN
02-00318	02/25/04	X				FI / FP	B, C	IRAN	SMITH
00-30929	01/07/04		X			FI	B	S. KOREA	BRAEMAN
02-20365	11/02/04				x	FI / FP	B, C	LEBANON	BEARD
02-20031	08/24/04				x	FI	B	S. KOREA	HOWE
04-05317	06/03/05	X				FI / FP	B, C	LIBYA	CREAN
03-24933	07/28/05	X				FI / FP	B, C	SYRIA	GALES
03-24356	09/19/05		X			PERS CON	E		ABLARD
03-24333	10/12/05	X				PERS CON	E		ABLARD
03-22912	12/30/05		X			ALCOHOL	G, J, C		YOUNG
03-16848	08/30/05	X				FI	B	TAIWAN	RICCARDIELLO
03-15485	06/02/05	X				FI / FP	B, C	ISRAEL	BRAEMAN
03-07874	07/07/05	X				ALCOHOL	G		TESTAN
02-31154	09/22/05	X				FI / FP	B, C	TAIWAN	BRESLIN
02-26915	08/04/05	X				ALCOHOL	G		LEONARD
02-29035	09/26/05	X				ALCOHOL	G		SAX
02-28917	06/10/05			X		FINANCIAL	F, E		SAX
02-23860	06/30/05	X				FI	B	TAIWAN	BRAEMAN
02-24627	05/24/05	X				FI	B	TAIWAN	BRAEMAN
02-20365	05/27/05	X				FI / FP	B, C	LEBANON	ABLARD
02-13595	05/10/05	X				FI / FP	B, C, E	IRAN	HOWE
02-12789	05/13/05			X		PERS CON	E		YOUNG
03-15205	01/21/05	X				FI	B	IRAN	LEONARD
03-11096	02/03/05		X			FI / FP	B, C,L	ISRAEL	LAZZARO
03-02382	02/15/05	X				FI	B, C	IRAN	BRAEMAN
01-10128	01/06/05	X				FI / FP	B, C	CHINA	WESLEY
02-22461	10/27/05	X				FI / FP	B	TAIWAN	LAZZARO
03-11765	04/11/05	X				FI / FP	B, C	ISRAEL	BRAEMAN
03-21220	08/24/05	X				ALCOHOL	G,H,I,E		ABLARD
03-21927	12/30/05				x	FI / FP	B, C	SAUDI	BRESLIN
03-11420	10/05/05				x	FI / FP	B, C	SUDAN	BRESLIN
03-10452	09/28/05				x	FI	B, L	INDIA	ABLARD
03-21205					x	FI	B	?	BRESLIN
04-09959	05/19/06	X				FINANCIAL	F, E		SAX
04-10671	05/01/06		X			FINANCIAL	F, E		FOREMAN
04-07825	01/18/06				X	ALCOHOL	G		HOWE
04-06564	05/30/06		X			FI	B	CHINA	HENRY
04-02928	02/15/06		X			FINANCIAL	F		WILLIAMS
04-02233	05/09/06	X				FI	B	CHINA	BRUCE

CASE NO.	DATE	GRANT REV	GRANT AFF	DEN REV	REMAND	TYPE	GUIDELINE	COUNTRY	TRIAL JDG.
03-27170	05/05/06	X				DRUGS	A, G, D, E, J		CEFOLA
03-23511	02/15/06		X			FINANCIAL	F		ROSS
03-22883	01/19/06				X	CRIMINAL	J, H, E		MOGUL
03-22819	03/20/06	X				PERS. CON	E, J		BRESLIN
03-22563	03/08/06	X				CRIMINAL	J, E		BRAEMAN
03-19101	01/31/06				X	FI / FP	B, C	ISRAEL	BRAEMAN
03-17620	04/17/06				X	FI	B	S. KOREA	GRAHAM
03-16167	01/17/06				X	PERS. CON	E		RICCARDELLO
03-10955	05/30/06	X				FI	B	CHINA	HENRY
03-09212	05/10/06			X		SEC BEHAV	D, E		METZ
03-09053	03/29/06	X				FI	B	CHINA	MASON
03-06212	01/17/06				X	FINANCIAL	F		SAX
03-04300	02/16/06	X				FI / FP	B, C	RUSSIA, ISR.	BRAEMAN
03-02374	01/26/06		X			DRUGS	H		WILLMETH
02-33714	02/22/06				X	CRIMINAL	J, E		ABLARD
02-28915	03/03/06				X	FINANCIAL	F, E		BRAEMAN
02-27870	02/15/06		X			INFO. TECH	M		GALES
02-24875	03/29/06				X	FI	B	LAOS	METZ
02-17369	05/23/06				X	FI	B	JORDAN	GALES
02-12199	04/03/06		X			SEX BEHAV	D		YOUNG
02-03186	02/16/06				X	ALCOHOL	G		SAX
	TOTAL	70	12	3	19				