# ISRAEL: FOREIGN PREFERENCE - FOREIGN INFLUENCE CASES, A REVIEW OF DOHA DECISIONS

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## I. INTRODUCTION AND OVERVIEW

"Foreign Preference" (Guideline C) and "Foreign Influence" (Guideline B) issues have become an increasingly significant part of the security clearance cases adjudicated by the Defense Office of Hearings and Appeals (DOHA).[2] In a previous article (posted on my website) I examined

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[2] The Defense Office of Hearings and Appeals is a part of the Department of Defense, Office of General Counsel. It adjudicates security clearance issues for employees of government contractors, and renders advisory opinions to Military Departments Clearance Appeal Boards in appeals by U.S. government employees.

DOHA Foreign Preference-Foreign Influence issues involving all countries.[3] While this article focuses on Israel cases, the principles of law and standards of review applied by the DOHA Appeal Board in these cases are equally applicable to applicants with ties to other foreign countries. Because the question of religious bias is sometimes raised in Israel cases, these cases are specifically examined here.

The issues of Foreign Preference and Foreign Influence are particularly acute with applicants who have family members in Israel because they involve not only ties of ethnicity and nationality common to applicants from other countries, but because there are frequently emotional ties due to religion and historic persecution. Also, Israel has highly developed technical and scientific industries, accounting for frequent movement of skilled professionals between Israel and the United States. For perhaps that reason, there appear to be an unusually large number of Israel cases on the DOHA docket.

Since 1996, when DOHA began posting its decisions to its web site, until February 2006, the latest review, there have been 47 cases identifying Israel as the foreign country in question.[4] These cases have resulted in 18 applicants being granted clearances and 29 being denied. There may be more Israel cases than these 47, however, until the Director of DOHA required Administrative Judges to identify the country involved, countries were frequently identified as "Country A," "Country B," etc.[5] Of the 47 cases reviewed, 21 were appealed to the Appeal Board. Fourteen appeals were filed by the applicant and all denials were affirmed by the Appeal Board. Seven decisions granting clearance were appealed by the government; of those, five were reversed by the Appeal Board, and two, the first and the most recent, were affirmed.[6] Thus, Appeal Board's overall record is nineteen to two against applicants who had ties to Israel.

The initial decisions of the Administrative Judges are closely divided: clearances were granted in 23 cases and denied in 24 cases. Of those Judges with more than one Israel decision, Judge Matchinski, who had the most, denied two and granted five applications for clearance; Judge Lokey-Anderson denied four and granted two; Judge Mason granted four and denied none; Judge Young denied three and granted one; Judge Testan denied two and granted one; Judge Wesley

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[3] Foreign influence and Foreign Preference Considerations and National Security Clearances, posted at www.sheldoncohen.com.

[4] www.defenselink.mil/dodgc/doha. Several cases were found on ly by reviewing each of the yearly listing of decisions. They could not be located using the search engine on DOHA's home page. (Eg., ISCR Case Nos. 03-10390 (Apr. 12, 2005); and No. 03-11765 (April 11, 2005)).

[5] Memorandum from Director, DOHA, to Appeal Board and Department Counsel, Oct. 30, 2002.

[6] ISCR Case Nos. 99-0452, (Mar. 21, 2000); 03-11096, (Feb. 3, 2005).

granted two, one of which was reversed, and denied none; Judge Heiney granted two, one of which was reversed, and denied one; Judge Wilmeth denied two and granted none; and Judge Braeman granted one which was reversed, and denied one. The remaining judges each issued only one decision so there is no comparative data for them.

In nine of the cases denying a clearance there were other issues involved, including Guideline E (personal conduct), Guideline J (criminal conduct), and Guideline L (outside activities). In only one Foreign Influence-Foreign Preference case in which another Guideline was involved was a clearance granted, and that decision was one of the two sustained on appeal.[7] Having legal counsel substantially increased the chances of success. In the 20 cases where applicants were represented by counsel, clearances were granted 13 times and denied 7, for a 65 percent success rate. In the 27 cases where applicants represented themselves, clearances were granted 7 times and denied 20, for a 26 percent success rate.

The numbers alone do not tell the whole story, and trying to understand why an administrative judge granted or denied a clearance by examining the facts of each case adds little, because on similar facts the decision went either way. The Appeal Board decisions also shed little light, since an applicant's chance of overturning an unfavorable decision appears nil, while the chance of a favorable clearance decision being upheld on appeal appears only slightly better.

The real decision-making power appears to lie in the hands of Department Counsel, the government's prosecutor, because of the overwhelming record of the Appeal Board's record of granting the government's appeals and denying applicants' appeals. If Department Counsel does not appeal, the applicant will get the clearance, if it does the applicant will not. Accordingly, the methodology used to try to predict an outcome has been to review those cases where there has been a decision favorable to the applicant which the government has not appealed, with those that it has, and to try to glean the difference, if any, in such cases. The documentary evidence offered by Department Counsel in Israel cases has also been reviewed to understand the strategy and tactics used by that office in trying such cases. Applicants' rebuttal evidence to Department Counsel's submissions is also discussed.

## II. DOHA APPEAL BOARD DECISIONS

The Appeal Board decisions are here examined to understand the general principles it applies to these cases (as well as cases concerning other countries). In only two Israel cases decided by the Appeal Board which were reviewed, the first, and the most recent, has the Board affirmed the grant of a security clearance. In the first case, Chief Administrative Judge Robert R. Gales made a security determination in favor of the applicant.[8] The applicant, who was born in Israel, became a naturalized citizen of the United States but retained his dual citizenship and his Israeli passport which he used

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

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

when traveling to Israel. He had a sister living in Israel. Although the applicant expressed a willingness to renounce his dual citizenship, he had not done so because it would "interfere with his ability to interact with his sister." He had also served in the Israeli Army as a young man while an Israeli citizen, and testified that if ordered by Israel to again serve in its military he would refuse to do so, but if the United States ordered him to active duty he would comply.

The government appealed on a number of grounds, among which was that the Administrative Judge failed to give due weight to the security significance of the applicant's obtaining and using a foreign passport after becoming a naturalized U.S. citizen. On March 21, 2000, the Appeal Board affirmed Judge Gales' decision granting a clearance. It held that the applicant's strong preference for, and loyalty and allegiance to the United States, and his unequivocal willingness to renounce foreign citizenship were sufficient to overcome the holding of a foreign passport. The Appeal Board accepted the argument of "legal necessity," i.e., since Israeli law required the use of an Israeli passport by dual citizens to enter the country, a person did not thereby express a foreign preference by respecting the law of the foreign country.

The reaction of the Department of Defense was immediate. The following day, 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."[9] 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."[10] This was followed on August 16, 2002, 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.[11] 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.[12]

The next two cases to come before the Appeal Board were appeals by the Government of decisions granting a clearance to the applicant. Both were reversed. In the first of these cases, the

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[9] See, ISCR Case No. 99-0454 (Oct. 17, 2000).

[10] *Ibid.*

[11] 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).

[12] ISCR Case No. 99-0454 (Oct. 17, 2002).

applicant held dual U.S.-Israel citizenship and had an Israeli passport which he had used a number of times after becoming a U.S. citizen. The initial administrative judge's decision had been decided before the issuance of the "Money" Memorandum.[13] On appeal, the Appeal Board reversed its earlier holding that the use of a foreign passport could be justified due to legal necessity. It held that using a foreign passport for personal convenience *was* evidence of foreign preference, that the "Money" Memorandum overruled the claim of "legal necessity" as a mitigating condition, and that the Memorandum required reversal of the Administrative Judge's decision in favor of the applicant.[14] The Appeal Board further held that while there is no legal requirement to renounce foreign citizenship, "a conditional willingness to renounce foreign citizenship is entitled to less weight than an unconditional willingness to do so."[15] The Appeal Board further held that not only must family ties in a foreign country be considered with respect to possible blackmail, but also with respect to "vulnerability to subtle or noncoercive influence."[16] As an example, the Appeal Board used the hypothetical situation of an applicant being asked to disclose classified information, not for the purpose of harming the United States, but to either increase the security of Israel so his family in Israel could live in peace and safety, or to reduce threats to the lives of Israeli military personnel which might include the applicant's sister and brother. The Appeal Board further noted that, despite there being compulsory military service, even a junior enlisted person could be considered a component of the foreign government.

In that case, the Appeal Board further held that the security significance of the applicant's family ties in a foreign country did not turn simply on whether the applicant's relatives had a job, position or connection with the foreign government, but that an applicant could have strong family ties to relatives in the foreign country even if none of the applicant's relatives had a job, position or official connection with the foreign government. It held that the facts in a case must be considered as a totality, rather than a "piecemeal" analysis. Because the applicant in that case had ties to family members and in-laws living in Israel which were close and continuing, and because he had received his undergraduate education in Israel, had spent 26 years growing up there during his formative years and early adulthood, and because he had served in the Israeli military, the Appeal Board held that all these facts provided "an important context" in which his family ties in Israel had to be considered. In order to be consistent with the "whole person concept," the Appeal Board held it was the totality of facts and circumstances which raised serious questions concerning the security eligibility in that case.[17]

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[13] ISCR Case No. 99-0295 (Nov. 16, 1999).

[14] ISCR Case No. 99-0295 (Oct. 20, 2000).

[15] *Ibid.*

[16] *Ibid. Accord*, ISCR Case No. 99-0511 (Dec. 19, 2000).

[17] *Ibid.*

In the next Israel case to come before the Appeal Board, (also initially decided prior to the "Money" Memorandum) it again reversed an initial decision granting a clearance.[18] At the administrative hearing, the applicant testified that he had been born and educated in Israel, and had served in the Israeli armed forces as part of his compulsory military duty.[19] After coming to the United States and working for a number of years, he returned to Israel, worked in the Israeli aircraft industry on the Lavi fighter plane which Israel was developing at that time, and later returned to the United States. The applicant testified that he was informed by the Israeli government that he needed an Israeli passport to enter and leave Israel, so he obtained one and traveled on it a number of times after becoming a U.S. citizen. The applicant also testified: "I do not hide my sentiments towards Israel, as I am able to separate them from my obligations to the U.S. and keep them secondary to them. My primary loyalty is to the U.S." The decision reported that he further testified that:

> should he be pressured directly or indirectly through coercion or threats of harm against his family members in Israel - which he discounts as highly unlikely - to reveal United States classified information or otherwise violate security rules, he would refuse to cooperate, he would report the pressure or other threat to his company's security officer and to the FBI, he would renounce his Israeli citizenship and turn back his passport, and complain vociferously to the Israeli authorities, courts, and/or press.

In the initial decision, Administrative Judge Silber noted that the applicant "distinguishe[d] the State of Israel from any government that it may have from time to time, or the demands that the latter may make on him." The Judge held that there was "a broad line distinguishing security significant foreign preference of an applicant, from respect for the land that is a cynosure of his or her religion or for the heritage of his or her national origin." Judge Silber held that this case fell well within the "latter category." Based on all the evidence he granted a clearance.[20]

The Appeal Board reversed, holding that even though the United States supported and sanctioned the production of the Lavi fighter plane, there was no evidence that the U.S. sanctioned the applicant's participation in that project. It rejected the notion that:

> any cooperation between the United States and a foreign country could be cited to justify conduct indicative of the exercise of dual citizenship and foreign preference even if an applicant's conduct was not specifically approved, authorized or consented to or otherwise sanctioned by the federal government.

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[18] ISCR Case No. 99-0511 (Dec. 19, 2000).

[19] ISCR Case No. 99-0511 (Dec. 30, 1999)(Silber, AJ).

[20] *Ibid*.

The Appeal Board held that evidence simply of *any* cooperation between the United States and a foreign country was not enough to warrant mitigation, but that an applicant's conduct had to be specifically approved, authorized and consented to by the Federal government.[21] It further held that applicant's conditional willingness to renounce his Israeli citizenship "is so limited and constrained as to make it extremely unlikely that applicant would ever renounce his [Israeli] citizenship because of his strong ties to [Israel.]" It declined to hold that a conditional willingness to renounce foreign citizenship was entitled to *no* weight, but it refused to allow an Administrative Judge to have "unfettered discretion in deciding what weight to give the evidence."[22] In this case, the Appeal Board held that the expression of conditional willingness was so limited and constrained as to render it essentially insubstantial and entitled to practically no weight.

The Appeal Board further held that even though there was sufficient evidence to conclude that applicant's immediate family members in Israel were not agents of a foreign power, the Administrative Judge erred by limiting his analysis to situations where Israel might try to pressure or influence applicant through threats to his immediate family members. The Appeal Board held that foreign influence is not limited to situations involving coercive means of influence, but also to non-coercive means, noting that even countries friendly to the United States can attempt to gain access to classified information.

With respect to the applicant's statements of what he would do in the future in response to any attempt to exploit his family ties, the Appeal Board held, however sincere or credible, such statements could not be taken simply at face value. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances, the Board said, is merely a statement of intention that is not entitled to much weight "unless there is record evidence that the applicant had in the past acted in an identical or similar manner under identical or similar circumstances." Accordingly, the Appeal Board held that it was arbitrary and capricious for the Administrative Judge to give "great weight" to applicant's statements about what he would do in the future if the Israeli government were to threaten immediate family members in Israel.

The Appeal Board further held that applicant's testimony that he was unaware of the security implications of his conduct, i.e., his using a foreign passport, was not negated merely because he acted out of ignorance of the legal implications or complications of his voluntary actions. "An individual's good intentions do not trump the negative security implications of conduct or circumstances indicative of foreign influence or foreign preference."

The Appeal Board substituted its own judgement for that of the Administrative Judge in what it considered to be a reasonable weighing of the evidence. Despite a long line of Appeal Board decisions giving deference to an Administrative Judge's discretion weigh favorable and unfavorable evidence, the Appeal Board overruled the Administrative Judge's favorable determination, holding

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[21] ISCR Case No. 99-0511, at p. 5 (Dec. 19, 2000).

[22] *Id* at p. 7.

that the unfavorable evidence outweighed the favorable evidence.[23] It reasoned that is because the

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[23] In ISCR Case No. 02-30373 (Nov. 1, 2004), the Appeal Board has defined its standard of review as follows:

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

"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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

"When an appeal issue raises a question of law, the Board's scope of review is plenary. . . . If an appealing party demonstrates factual or legal error, then the Board must consider the following questions: Is the error harmful or harmless? . . .; Has the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? . . .; and if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded?

The Appeal Board has held in other cases that it reviews the Administrative Judge's decision in its entirety, not just isolated sentences, to discern what the judge found and concluded. (ISCR No. 01-03107 at p. 5 (Aug 27,2002)). It held that the Administrative Judge is not measured against a standard of perfection (Eg., ISCR No. 01-025452 at p. 10 (Nov. 21, 2002); ISCR No. 01-01642 at p. 4 (June 14, 2002)), that the Administrative Judge's decision must be a common sense determination (Eg. ISCR No. 97-0765 at p. 7 (Dec, 1, 1998); ISCR No. 97-0627 at p. 7 (Aug. 17, 1998)), that there is a rebuttable presumption that the Administrative Judge considered all of the evidence in the record unless the Judge specifically states otherwise (Eg., ISCR No. 01-19879 at p. 2 (Oct. 29, 2002); ISCR No. O1-10301 at p. 3 (Dec. 31, 2002)), (continued...)

applicant had strong, long-term ties to Israel, engaged in acts of dual citizenship after he became a naturalized U.S. citizen, returned to Israel to work on Israeli projects for personal reasons without his conduct being sanctioned by the U.S. Government, was married to an Israeli citizen who had not become naturalized, had immediate family members in Israel, and possessed and used an Israeli passport after becoming a naturalized U.S. citizen, that the *totality* of such evidence failed to be sufficiently mitigating to warrant granting him a clearance.

The next Israel case to come before the Appeal Board was from a decision against the applicant.[24] Clearance was denied because the applicant had used his Israeli passport numerous times after becoming an American citizen, and had not surrendered it by the time of the hearing. The Denial was sustained on appeal, the Appeal Board rejecting the applicant's request to have the case remanded so he could address the reason for the rejection.[25] The Appeal Board held that destroying a passport, placing it in escrow with the security department of the defense contractor or giving it to DOHA or another government department did not meet the requirements of the Money memo.

In the next Administrative Judge's decision granting a clearance to be appealed by the Government, the Appeal Board once again reversed.[26] In that case the applicant, an Israeli by birth, became a naturalized U.S. citizen but did not renounce his Israeli citizenship. He had immediate family who were citizens and residents of Israel, and a son who had dual U.S./Israeli citizenship. The applicant testified that while he would not want to take up arms for the U.S. against Israel in a hypothetical conflict, he could not conceive of the U.S. and Israel ever being adversaries of each other. He said he would not take up arms against the U.S. for Israel, and would defend U.S. interests whenever he was called upon. Applicant said only if Israel were not in a confrontation or conflict with the U.S. would he be willing to take up arms for Israel.

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and that credibility determinations are entitled to deference on appeal (Eg, ISCR 01-02677 at p. 4 (Oct. 17, 2002); ISCR No. 00-0713 at p. 3 Feb. 15, 2002)).

The Appeal Board has further held that an Administrative Judge's decision can be arbitrary and capricious if it: does not examine relevant evidence; fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; does not consider relevant 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 is so implausible that it cannot be ascribed to a mere difference of opinion. (ISCR Case No. 00-0317 at p. 5, n. 9 (March 29, 2001)).

[24] ISCR No. 01-01295 (Sept. 9, 2001) (Braeman, AJ).

[25] ISCR No. 01-01295 (Dec. 13, 2001).

[26] ISCR Case No. 00-0317 (Oct. 31, 2001) (Wesley, AJ).

The Administrative Judge found that although applicant hedged on his willingness to take up arms for the U.S. against his native Israel, that was not enough to create an indicia of preference for his birth country. He wrote, "Americans are steeped in their ethnic roots with countries other than the U.S. and can be expected to harbor varying degrees of pride for the countries of their parents. Love of ethnic roots is not, by itself, a disqualifying preference . . .." The Administrative Judge noted that Israel is not considered historically to be a hostile country and "has a considerable history of stable, democratic institutions and no corresponding history of exerting pressure or influence to compromise the security interests of the U.S." The Administrative Judge found that applicant's immediate family members in Israel were neither agents of a foreign power nor in a position to be exploited.

The Appeal Board reversed, holding that given applicant's statements that he would be willing to bear arms for Israel, it was arbitrary and capricious for the Administrative Judge not to apply the disqualifying condition.[27] It stated:

> The willingness to bear arms for a country is strong evidence of a profound, deeply personal commitment to the interests and welfare of that country. A person who is willing to bear arms for a country may be willing to perform other acts (which do not entail risking life and limb) to advance the interests of that country. Accordingly, the willingness to bear arms for a foreign country raises serious security concerns.

This willingness to bear arms, the Appeal Board held,

> indicated a profound, deeply personal commitment to the interests and welfare of the foreign country and could place a person in a serious quandary if the country wished access to U.S. classified information that it believes would be necessary or desirable for its national security, but which the United States declined to share with the foreign country.

The Appeal Board ruled the Government need not take the risk of waiting to see how a person with access to classified information would act if faced with such a quandary at some future time. It further held that the Judge's failure to take this into consideration was "particularly troubling," given the applicant's statement that he would want to be neutral if the United States were ever to find itself in conflict with Israel. Such equivocal preferences, it said, with respect to the United States or a foreign country raises serious security concerns. The Appeal Board further criticized the Administrative Judge for failing to consider the applicant's potential vulnerability to noncoercive means of influence through his family members. This, it held, must be subject to greater scrutiny once the applicant has expressed a preference for the foreign country.

The Appeal Board rejected the Administrative Judge's assumption that Israel did not pose a serious security risk because it was a country friendly to the U.S. It held that such a view ignores

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[27] ISCR Case No. 00-0317 (Mar. 29, 2002).

the historic reality that relations between nations can shift, and that even friendly nations can have profound disagreements with the United States over matters which they view as important to their vital interests or national security. It noted that "not all cases of espionage against the United States have involved nations that were hostile to the United States."

The next Administrative Judge's decision granting a clearance to be reversed concerned an applicant who had previously held dual U.S.-Israeli citizenship, but who had surrendered her Israeli passport and renounced her Israeli citizenship.[28] The applicant had a sister, brother-in-law, mother-in-law and a niece living in Israel. When asked how she would react if her family members were ever threatened, she stated she did not know what she would do. The Administrative Judge held that "not knowing does not mean she would choose to go against the U.S." He found that the applicant's uncertainty was not unique to relatives living abroad, as he could see such a threat occurring to anyone living anywhere.

The Appeal Board once again reversed.[29] It held that even though applicant's family members were not agents of Israel, that was not dispositive of whether they were in a position to be exploited. It rejected applicant's argument that the government's position was predicated on a hypothetical situation, one involving a possible Israeli threat to exploit her family members in Israel. The Board held that it was entirely appropriate for the Department Counsel to argue the possibility of vulnerability of coercion, and that the Government need not wait until a person actually mishandles or fails to safeguard classification before it can deny or revoke access.

What apparently influenced the Appeal Board's decision was applicant's acknowledgment that she was unsure of what she would do if her family members were threatened. The Appeal Board, without explanation, said simply that the applicant has "a heavy burden of persuasion to demonstrate that she is not at risk of being vulnerable to her family ties in Israel," and that given the evidence in that case, the Administrative Judge was "arbitrary and capricious" in the ruling in applicant's favor.

Administrative Judge Braeman was again reversed in another Israel decision in which she granted a clearance.[30] Applicant had married four times, and his past and present wives were dual citizens of the U.S. and Israel, the U.K. and Poland. His children and step-children were dual citizens of the U.S., Israel, Poland and France. He also had not renounced his Israeli citizenship or relinquished his Israeli passport until shortly before the hearing when he learned that having them was a problem. The Administrative judge ruled in favor of the applicant because "there was a dearth of evidence concerning whether the relatives were in a position to be exploited."

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[28] ISCR Case No. 01-17496 (May 14, 2002) (Heiney, AJ).

[29] ISCR Case No. 01-17496 (Oct. 28, 2002).

[30] ISCR No. 03-11765 (Oct. 14, 2004) (Braeman, AJ) This case cannot be found using the DOHA web page search engine, but was found by using its yearly listing. See f.n. 3, above.

The Appeal Board again reversed, holding that the Administrative Judge had erred in putting the burden of proof on the government to show that there was a likelihood of foreign influence, rather than on the applicant to show that there was not.[31] However, the Appeal Board did reject the Department Counsel's argument that consideration should *not* be given to applicant's renunciation of his Israeli citizenship and cancellation of his passport simply because it had not occurred until shortly before the hearing. It held that there is no time element imputed to the requirements of the "Money Memorandum," which is silent on when an applicant must surrender a foreign passport.

The Appeal Board once again, in this case, used its over-arching fact-finding powers to hold that the "application of the Adjudicative Guidelines is not left to the "unfettered discretion" of the Administrative Judges, but rather requires the exercise of sound judgment within the parameters set by the Directive."[32] (Although all of the Appeal Board judges had previously been DOHA administrative Judges, they appear to believe that their promotion has given them greater sound judgment than they had before.)

Five years after its first affirmance of a favorable Israel decision, the Appeal Board finally affirmed another favorable decision. In that case the applicant was a fifty-seven year old retired U.S. Air Force Lieutenant Colonel who had been highly decorated during his combat career. While in the Air Force he was in charge of military sales to Israel. Upon his retirement, and with the approval of the U.S. Air Force, he obtained employment with the Israeli Ministry of Defense to provide the Israelis with advice on managing their foreign military sales program. As part of that employment the applicant had extensive contacts with the Israeli Mission and attended embassy parties. Subsequently, he began employment with a private pro-Israel organization whose mission was to strengthen relations between the U.S. and Israel. He served as the Director of Defense Policy for that organization and lobbied Congress on behalf of the organization for a provision that was later enacted into U.S. law. One of applicant's character witnesses was the former Director of the Defense Security Service. The Administrative Judge held that the work that applicant did for Israel after he retired was activity sanctioned by the United States, and although it was on behalf of the Israelis, it was in furtherance of strategic U.S. interests and in the best interest of the United States. Because of the applicant's outstanding military record and the outstanding military record of his witnesses, under the totality of the circumstances, the Administrative Judge ruled in his favor.[33]

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

[32] The Appeal Board has frequently stated that an Administrative Judge does not have "unfettered discretion", while never defining what that is. Eg., ISCR Case No. 01-27371, at p. 2 (Feb. 19, 2003); ISCR Case No. 02-29608, at p. 3 (Dec. 17, 2003); ISCR Case No. 03-02486 at p. 3 (Aug. 31, 2004).

[33] ISCR Case No. 03-11096 (May 14, 2004)(Lazzaro, AJ).

On appeal, Department Counsel argued that there was a "foreign financial interest" when applicant was paid by an American company which had military sales to Israel.[34] The Board rejected this argument as well as Department Counsel's remaining argument that the decision was not supported by a totality of the evidence. The Appeal Board considered the "totality" argument as simply asking it to make a *de novo* review of the evidence which it declined to do. Comparing this case with the other Israel cases with similar facts which the Appeal Board reversed, one can only conclude that the applicant's outstanding war record as a highly decorated Air Force Officer made the difference.

The remaining fourteen cases concerning Israeli contacts that were appealed, were all denials of a security clearance by the Administrative Judge.[35] All denials were affirmed. Five cases were, predictably, denied because they involved other disqualifying factors in addition to Israel connections. In one of those cases, the applicant had significant business connections with foreign companies involving defense related technology, raising the issue of outside employment under Guideline L.[36] In that case, the Appeal Board agreed that applicant's development of the technology, while unclassified, could have defense uses, and that it was possible that applicant's contacts in Israel who had formerly been high-level members of the Israeli military were agents of Israel.[37]

In another case, the applicant was found to have falsified his security clearance application by failing to disclose that he had dual citizenship and a dual passport, and failing to list all of his foreign travel. While the Administrative Judge found in favor of the applicant on Foreign Preference, he found that the applicant had intentionally falsified his security clearance application and found against him for personal misconduct under Guideline E.[38] The Appeal Board affirmed.[39]

In another case which was appealed, the Administrative Judge found that the applicant, who was born and educated in Israel, had worked for a defense laboratory run by the Israeli Ministry of

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

[35] ISCR Case Nos. 01-06266 (Sept. 23, 2002); 01-02452 (Nov. 21, 2002); 01-01295 (Dec. 13, 2002); 02-00305 (Feb. 12, 2003); 01-22606 (June 30, 2003); 02-04344 (Sept. 15, 2003); 02-06928 (Sept. 17, 2003); 01-22693 (Sept. 22, 2003); 01-10349 (Feb 15, 2005); 02-12760 (Feb. 18, 2005); 03-04090 (Mar. 3, 2005); 02-24942 (Mar. 3, 2005); 02-17178 (Apr. 5, 2005); and 03-10390 (Apr. 12, 2005).

[36] ISCR Case No. 01-06266 (Apr. 15, 2002)(Matchinski, AJ).

[37] ISCR Case No. 01-06266 (Sept. 23, 2002).

[38] ISCR Case No. 02-04344 (May 29, 2003)(Anderson, AJ).

[39] ISCR Case No. 02-04344 (Sept. 15, 2003).

Defense.[40] When traveling outside of Israel he was expected to collect information and technology to bring back to the laboratory. After being educated in the U.S. he went back to Israel where he was offered a job which he declined after concluding he was being recruited by an Israeli intelligence organization. Applicant's mother and sister-in-law were residents and citizens of Israel. Since coming to the U.S. in 1989, applicant had been regularly contacted by members of Israeli intelligence serving at the Israeli Embassy asking about any contacts who might be trying to obtain information about his work for the defense laboratory in Israel. Applicant cooperated with these visits because he did not want anything to happen to his mother in Israel, but testified that he told the Israeli intelligence people that he would no longer permit those contacts. He said he permitted these contacts because he felt bound not to disclose classified information obtained while working for the Israeli defense laboratory. He did not disclose to the U.S. Government the nature of his classified work for Israel.

Although applicant renounced his Israeli citizenship and surrendered his Israeli passport, he had earlier used his Israeli passport to travel to the U.S. after acquiring U.S. citizenship. The Administrative Judge held that Israel, although a strategic partner with the U.S., frequently pursues foreign policy objectives contrary to U.S. interests, has multiple active and effective intelligence services that target U.S. intelligence and economic information, and operates against the citizens in the U.S. The AJ held that he was not convinced that the applicant was not an Israeli intelligence officer.

On appeal the Appeal Board affirmed the initial decision, rejecting the applicant's arguments that the record evidence did not support the AJ's findings and that the AJ was biased.[41] The Board did find that the AJ drew improper inferences because there was no evidence to support the inference that applicant was a security risk because he was not given a "clean bill of health" after a counterintelligence investigation. The Board further held that the AJ committed "clear error" in stating that he was not satisfied that applicant was not an Israeli intelligence officer, because: (a) there was no allegation in the Statement of Reasons that he was then or in the past ever an Israeli intelligence agent; (b) the government produced no evidence to support such a finding, and; (c) the applicant was not obligated to present evidence disproving an allegation that was not made against him in the SOR. Nevertheless, the Appeal Board affirmed the AJ's decision because it held there was sufficient other evidence to support it.

The remaining seven clearance denials appealed by the applicants were all limited to Foreign Influence-Foreign Preference considerations. All were affirmed by the Appeal Board. In the first of these cases the applicant was a dual citizen of Israel and the United States.[42] Although born in the United States, his family had moved to Israel when he was two years old and he was raised and

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[40] ISCR Case No. 01-10349 (July 4, 2004)(Metz, AJ).

[41] ISCR Case No. 01-10349 (Feb. 15, 2005).

[42] ISCR Case No. 02-00305 (Aug. 8, 2002) (Anderson, AJ).

educated there. While still a citizen of the United States, he voted in Israeli elections, served in the Israeli Air Force and held a Secret security clearance issued by the Israeli government. The applicant married an Israeli citizen, and he and his wife owned an apartment in Israel worth about $170,000 which they rented out. He had used his Israeli passport to enter and exit Israel during his travels there. His father, mother, brother, and in-laws were all citizens and residents of Israel and he maintained close contacts with his family. The Administrative Judge concluded that applicant's foreign contacts had a direct and negative impact on his suitability to hold a clearance, and that his significant assets in Israel were also a factor.

On appeal, the applicant argued that the Administrative Judge failed to consider or give sufficient weight to the evidence, or to give due consideration to applicant's surrendering his Israeli passport two weeks before the Hearing. He said that it went "well beyond the realm of absurd" for him to sever all contact with his parents. The Appeal Board rejected these arguments and affirmed the Administrative Judge's decision.[43]

The Appeal Board's next affirmance of a denial involved an applicant who was a dual U.S./Israeli citizen who, although born in the U.S., was raised in Israel from the age of one to the age of twenty-eight.[44] He had substantial inherited property in Israel, his mother and sister were dual citizens, and his in-laws still lived in Israel. He used his Israeli passport after having been issued a U.S. passport to enter and exit Israel because he believed that Israeli law required it. At the time of the hearing, he no longer had the Israeli passport. The applicant stated he would be willing to bear arms for Israel if there were to be some "terrible holocaust," but would not bear arms simply if Israel were in a war. He stated he would never take up arms against the U.S. and would take up arms for the U.S. against Israel if that should ever occur. The Administrative Judge found that applicant's contacts could not be considered casual or infrequent, and found against him.

On appeal, given the evidence in the record, the Appeal Board found that it was reasonable for the Administrative Judge to conclude that applicant's ties with his immediate family members in Israel raised security concerns which the applicant failed to mitigate.[45] It held that applicant's past use of an Israeli passport did not become irrelevant simply because he surrendered it four days prior to the hearing. The board held that past use could be considered for its security significance to show past and present ties with Israel. The Appeal Board further held that applicant's stated intention to renounce his Israeli citizenship after resolution of the inheritance issues garnered little or no weight, since "a promise or offer to take action in the future does not constitute evidence of reform, rehabilitation or changed circumstances."

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[43] ISCR Case No. 02-00305 (Feb. 12, 2003).

[44] ISCR Case No. 01-22606 (Jan. 29, 2003)(Heiney, AJ).

[45] ISCR Case No. 01-22606 (June 30, 2003).

In the third affirmance by the Appeal Board, the applicant, who was born in the United States, had moved to Israel in 1976 with his wife and two young children.[46] Thereafter, he became an Israeli citizen, served in the Israeli armed forces and worked for fourteen years at an Israeli defense contractor that had a relationship with the Israeli government. Upon retirement he returned to the United States where he lived since. Applicant's father and sister both continued to live in Israel. The Administrative Judge ruled that, although applicant's return to the United States in 1996 might have established that he had a clear and unequivocal preference to the United States, his continuing ties to Israel in the form of his Israeli citizenship and a "not so insignificant" pension from the Israeli defense contractor, left unclear his preference.

The Appeal Board affirmed, holding that although applicant's decision to keep his pension to secure his senior years was a personal one, nevertheless, the U.S. government could consider that as a factor in determining whether to grant a clearance.[47] The Appeal Board held that the Administrative Judge had decided the case correctly considering the totality of circumstances.

In the fourth case where the Appeal Board affirmed a denial of a clearance, the applicant had acquired his Israeli citizenship through his parents when they emigrated to Israel in 1948, although they returned to the United States after twelve years due to economic hardship.[48] The applicant became a naturalized citizen of the United States in 1969, but in 1981 obtained an Israeli passport which he used to return to Israel where he worked for the Israeli Ministry of Defense for a year. Applicant's brother, brother-in-law and sister-in-law were citizens of Israel residing in Israel. He had fifteen nieces and nephews and two children in Israel, and considered himself very close to his family in Israel. Because of Applicant's close family ties, clearance was denied by the Administrative Judge.

On appeal the applicant argued that there was a distinction between the State of Israel and Israel as the Holy Land.[49] The Appeal Board found that argument unpersuasive, holding that foreign influence is not limited to a consideration of influence which might be brought to bear by a foreign government, but also applies to situations that do not involve a foreign government. It held:

> The distinction between an applicant's feelings toward the government of a foreign [country] and the people and culture of a foreign country does not have much practical meaning or significance under Guideline B. The mere fact that applicant has expressed antipathy toward the [foreign country's] government is not dispositive under Guideline B. A person can be vulnerable to foreign influence without having

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[46] ISCR Case No. 02-06928 (June 25, 2003) (Testan, AJ).

[47] ISCR Case No. 02-06928 (Sept. 17, 2003).

[48] ISCR Case No. 01-22693 (Feb. 13, 2003) (Anderson, AJ).

[49] ISCR Case No. 01-22693 (Sept. 22, 2003).

any positive or favorable feelings toward the government of a particular foreign country.

The Appeal Board further held that although applicant was an Israeli citizen solely because of the citizenship of his parents, the Administrative Judge properly considered his exercise of the rights and privileges of citizenship when he used an Israeli passport as an adult, as well as his work for an Israeli defense contractor after becoming a naturalized U.S. citizen.

The next Appeal Board affirmance of a denial involved an applicant who was taken to Israel by his parents at age five, and who, after completing his compulsory Israeli military obligation, worked in the Israeli defense contracting industry where he had an Israeli Top Secret clearance.[50] His daughter, parents and in-laws were citizens of and resided in Israel. His spouse, although residing in the U.S., had not applied for U.S. citizenship.

The Appeal Board, after reviewing the evidence, rejected applicant's argument that the Administrative Judge's decision was arbitrary or capricious and that the Judge did not consider the facts consistent with the "whole person concept."[51] However, the Board held that the Administrate Judge erred when she drew adverse inferences from the applicant's statement that he would consider lobbying his congressman if U.S. policies towards Israel posed a threat to his relatives in Israel, but that the error did not warrant reversal or remand. The Board held that the exercise of the right under the First Amendment of the U.S. Constitution to petition congress does not raise a security concern.

The remaining eight cases contain essentially a repetition of the reasoning of the earlier ones.[52]

The Appeal Board has never explained how it distinguishes cases of applicants with family members living in a foreign country who do get a clearance, with those in the same situation who do not. It offers no explanation of its distinction between friendly and unfriendly foreign nations except to say that for unfriendly countries there is a "heavy" burden of persuasion.[53] The only conclusion to be drawn from reading the Appeal Board decisions is that there is no discernable logic as to why a clearance will be granted in one case but not another except that the Appeal Board will

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[50] ISCR Case No. 01-02452 (May 15, 2002) (Matchinski, AJ).

[51] ISCR Case No. 01-02452 (Nov. 21, 2002).

[52] ISCR Case Nos. 02-00305 (Feb. 12, 2003); 01-22606 (June 30, 2003); 02-04344 (Sept. 15, 2003); 01-10349 (Feb 15, 2005); 02-12760 (Feb. 18, 2005); 03-04090 (Mar. 3, 2005); 02-24942 (Mar. 3, 2005); 02-17178 (Apr. 5, 2005); 03-10390 (Apr. 12, 2005).

[53] ISCR Case No. 01-26893, at p. 10 (Oct. 16, 2002); ISCR Case No. 02-04768, at p. 3 (June 27, 2003).

affirm all denials and reverse all grants except if the case is so compelling, that it could not withstand public criticism for its decision.

## III. ADMINISTRATIVE JUDGE DECISIONS NOT APPEALED BY DEPARTMENT COUNSEL

Because the Appeal Board has affirmed all denials and reversed all but two grants of a clearance, the real decision making power lies in the hands of Department Counsel, the prosecutor in these cases.[54] If there is a favorable decision and Department Counsel appeals, the decision will

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[54] The lack of precedential value of one Administrative Judge's decision on another Administrative Judge has been discussed by the Appeal Board. In one case, the applicant argued that the Administrative Judge's decision was arbitrary, capricious and contrary to the law because it differed from decisions by other Administrative Judges which had granted clearances to applicants with ties to Israel. The Appeal Board's answer was that decisions of the Hearing Office Administrative Judges were not legally binding precedent on other Hearing Office Judges, or legally binding on the Appeal Board. It held that even if the Appeal Board concluded that the Administrative Judge's decision in that particular case was not consistent with decisions by his colleagues in other DOHA cases, that conclusion would not require the Appeal Board to hold the Judge's decision in that case to be arbitrary, capricious, or contrary to law. ISCR Case No. 01-22606, at p. 4-5 (Dec. 30, 2003).

Because the decisions of Hearing Office Judges are not considered legally binding precedents in other cases, the Appeal Board held, neither an Administrative Judge nor the Appeal Board was required to distinguish other Administrative Judge's decisions, or justify why they were not considered or to be persuasive authority. The Appeal Board has held that it has no obligation to insure consistency in Administrative Judge's decisions, even on identical facts or contradictory rulings concerning the same evidence in different cases. ISCR Case No. 02-00318 (Feb. 25, 2004).

In a recent Appeal Board decision involving an applicant from Pakistan, clearance had been denied by the Administrative Judge. On appeal, the applicant argued that there were other decisions granting clearances to applicants from Pakistan, and as well as other cases involving similar issues from other countries, and that to allow some, while denying others on the same facts was arbitrary and capricious. The Appeal Board held that applicant offered no cogent reason why the Board should follow one set of hearing office decisions over another. It rejected "applicant's assertion that the Board is obligated to ensure some level of consistency with respect to the conclusions of the Administrative Judges." The Appeal Board held that under DOD Directive 5220.6, it:

> did not have general supervisory jurisdiction over Hearing Office Judges. . . . Moreover the Board does not have jurisdiction or authority to review hearing office decisions that have not been appealed, and even when hearing office decisions are appealed, the Directive limits the Board to consideration of the

(continued...)

almost always be reversed. Of the 23 Administrative Judge decisions granting clearances, seven were appealed by Department Counsel and 16 were not. The 16 that were not appealed spanned from January 18, 1999 to January 31, 2006.[55] (Only six administrative judge decisions were prior to the September 11, 2001, attack on the World Trade Center.) It is important to examine the 16 favorable decisions to see what, if anything, distinguishes them from the eight favorable cases that Department Counsel *did* appeal. It is also important to compare these 16 cases to those initial denials that were not appealed to determine what facts were influential on the Administrative Judges' decisions.

### A. Decisions Granting Clearances Which Were Not Appealed by Department Counsel

Case No. 1.[56] In the first case decided before the "Money" Memorandum, the applicant, who was born in Israel and served mandatory military service there, emigrated to the United States in 1968, became naturalized in 1973, and subsequently traveled to Israel with his family on his U.S. passport. His elderly mother to whom he sent money monthly lived in Israel. On arriving in Israel, because he was an Israeli by birth, he was required to obtain an Israeli passport to leave the country which he later used on a number of occasions to enter and leave Israel. Though stating that he was willing to renounce his dual citizenship, the applicant subsequently maintained both dual citizenship and dual passports. Clearance was granted and not appealed. The remaining 14 cases were subsequent to September 11, 2001 and subsequent to the Money Memorandum which prohibited the holding of dual passports.

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[54](...continued)
material issues raised by the parties. . . . Accordingly, findings and conclusions in the Judge's decision that are not challenged on appeal are not proper subjects for review by the Board. In view of the foregoing, it is neither legally required under the Directive, nor practicable for the Board to undertake the task applicant asks it to assume. ISCR Case No. 02-29403, p. 6, f.n.14 (Dec. 14, 2004).

The Appeal Board confuses "supervisory jurisdiction" over Administrative Judges, with its own requirement that Administrative Judges follow the Appeal Board's decisions as precedent in future case. Its position that it has no obligation to insure consistency is, itself, inconsistent with its position that its rulings are binding precedent.

[55] ISCR Case No. 99-0062 (Sept. 15, 1999); ADP Case No. 01-17630 (Aug. 19, 2002); ISCR Case No. 01-23975 (Dec. 31, 2002); 02-09944 (Jan. 23, 2003); 01-16440 (Feb. 13, 2003); 02-27067 (Jul. 11, 2003); 02-30071 (Jul. 28, 2003); 02-04398 (Aug. 12, 2003); 01-17669 (Nov. 12, 2003); 02-18095 (Dec. 17, 2003); 02-24074 (Jan. 29, 2004); 02-11872 (Jan. 30, 2004); 02-14006 (Feb. 17, 2004); 02-30301 (Apr. 13, 2004); and 02-28320 (Mar.10, 2005).

[56] ISCR Case No. 99-0062 (Sept. 15, 1999) (Matchinski, AJ).

Case No. 2.[57] The next case involved an applicant who was born in Israel and had emigrated to the United States to pursue his post-graduate education. After becoming a U.S. citizen he used his Israeli passport when traveling to Israel which was required by the Government of Israel for persons holding Israeli citizenship. Applicant's mother, sister and uncle were citizens and residents of Israel with whom applicant maintained regular contact. He had four childhood friends in Israel with whom he had regular contact. None of his immediate or extended family had any connection with the Israeli government. The applicant had taken steps to renounce his Israeli citizenship but had not completed the process by the time of the hearing. Before the close of the hearing he documented his surrender of his passport to the Israeli embassy. He held no property or financial interest in Israel and had not accepted any benefits from Israel since becoming a U.S. citizen. Clearance was granted and not appealed.

Case No. 3.[58] Applicant, who was born in U.S., was the beneficiary of a trust that included real estate in Israel which, if sold, would net him approximately $200,000. This represented 18% of applicant's net worth. He had no other contacts with Israel. Although the Administrative Judge found that applicant's foreign financial interest was "substantial," and that "Israel is a nation that targets U.S. technology for espionage," the Judge found that the applicant's financial interest in Israel would not make him vulnerable to foreign influence and granted the clearance. The decision was not appealed.

Case No. 4.[59] Applicant was a dual citizen of the United Kingdom and the United States. His parents who were 78 and 80 years of age emigrated to Israel from England after they retired and lived in Israel. Applicant's sister also lived in Israel. Applicant obtained a U.K. passport after he became a U.S. citizen but later relinquished it. He occasionally visited his elderly parents and his sister in Israel. Applicant had two children born in the United States and made no effort to obtain Israeli citizenship for them. Clearance was granted and not appealed.

Case No. 5.[60] Applicant was a dual citizen of Israel and the United States. Although born in Cyprus, he was then taken to Israel by his parents when he was ten days old. Upon completing two years of college in Israel, he moved to the United States for better opportunities and completed his education in this country. After becoming a United States citizen, applicant traveled to Israel using his Israeli passport five times, stating that he only used it as a necessity to gain entry to Israel. He renewed the Israeli passport again after it expired, however after being informed of the "Money Memorandum," he surrendered it to his employer's security department where it was locked in a safe. The passport had expired and was no longer valid. Applicant's renunciation of his Israeli

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[57] ADP Case No. 01-17630 (Aug. 19, 2002) (Wesley, AJ).

[58] ISCR Case No. 01-23975 (Dec. 31, 2002) (Young, AJ).

[59] ISCR Case No. 02-09944 (Jan. 23, 2003) (Matchinski, AJ).

[60] ISCR Case No. 01-16440 (Feb. 13, 2003) (Anderson, AJ).

citizenship was pending. His wife, also a dual citizen, had a sister, several cousins and an aunt in Israel with whom she had little contact. Applicant maintained casual contact with several childhood friends in Israel with whom he exchanged emails once a month. Clearance was granted and not appealed.

Case No. 6.[61] Applicant, who was born in Israel, completed college there and then entered the Israel military where he served for five years. Thereafter, he moved to the United States to attend graduate school and subsequently became a U.S. citizen. He had a sister who resided in Israel but did not work for the Israeli government. He also had a small retirement account in Israel of less than $5,000. The applicant had submitted all of the required paperwork to renounce his Israeli citizenship and had returned his Israeli passport. He also had a brother who was a citizen of the U.K. The Administrative Judge found that there was no evidence that any of the immediate family members were connected with the Israel or U.K. military or intelligence services, and that "it is highly unlikely that Israel or the U.K., close allies of the United States, would risk threatening their relationships with the United States by exploiting their private citizens for the purpose of forcing a United States citizen to betray the United States." The Judge further held that the applicant, "through his actions and deeds, made it clear that he is grateful to have been given the opportunity to become a United States citizen and that the United States is his home." Clearance was granted and not appealed.

Case No. 7.[62] The applicant, born in Israel, served in the Israeli Army prior to emigrating to the United States and becoming a U.S. citizen. On the several occasions when he visited Israel he was required to use his Israeli passport to enter Israel because Israel still considered him to be a dual national. However by the time of the hearing, he had surrendered his Israeli passport to the Israeli consulate and had taken steps to begin the renunciation of his citizenship. Applicant's brother was a citizen and resident of Israel who was employed as bus driver. Applicant owned an apartment jointly with his brother, his half-interest being worth about $50,000, which he intended to transfer to his brother. His net worth in the United States was over $1 million. The Administrative Judge found the applicant's financial interest in Israel to be minimal, that the brother was not connected with the government, and that there was no evidence that the brother's presence in Israel could be exploited. The Judge also found that "it would be unlikely that the applicant would ever consider any such attempt at exploitation. The applicant would reject any such pressure to violate U.S. security interests." Clearance was granted and not appealed.

Case No. 8.[63] Applicant was a citizen of Morocco of Jewish ancestry who received his secondary school education in Israel. He had relatives in France, Columbia, Hong Kong, and Spain. His graduate studies at a preeminent technological university in Israel were sponsored by a public Israeli aeronautics firm. Applicant's only contact with Israel at the time of the hearing was his

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[61] ISCR Case No. 02-27067 (July 11, 2003) (Testan, AJ).

[62] ISCR Case No. 02-30071 (July 28, 2003) (Cefola, AJ).

[63] ISCR Case No. 02-04398 (Aug. 12, 2003) (Matchinski, AJ).

elderly grandmother living there who had emigrated from Morocco because it had become increasingly inhospitable for its Jewish citizens. The grandmother lived in a retirement home and had never worked in Israel. Applicant spoke to her about once every three months and had visited her in the two years prior to the hearing. Applicant renounced his Moroccan citizenship. U.S. government officials testified that he had made substantial contributions to the U.S. interests. Clearance was granted and not appealed.

Case No. 9.[64] Applicant, a 69-year old engineer, was born and educated in the United States, had worked for the same defense contractor since 1972, served on active duty in the U.S. Navy from 1956 to 1959 and on inactive duty from 1959 to 1964, and had held a security clearance since 1972. His daughter, who was born in the U.S., moved with her husband to Israel in 1981 where she then lived with their five children. She was a psychologist employed in a government military hospital. Applicant's first grandson was then performing compulsory military duty in the Israeli Navy. His son-in-law had become a judge in Israel which required him to relinquish his U.S. citizenship. Applicant testified that any threat to his daughter would make him grieve, but that was true no matter where his daughter lived. He said any parent would respond in such a way, but that had not affected his loyalty to the United States in the past twenty years that his daughter's family had lived in Israel. The Administrative Judge found that although none of applicant's family were agents of Israel, they were all in position to be influenced by Israel. He further found that "applicant's emotional ties were to the land and not to the Israeli government." He found that although applicant said that a threat to his daughter was of concern and he would grieve, because applicant had a long record since 1972 of holding a clearance without any security violations, and because his family had been in Israel since 1981, the Judge's "predictive judgment" was that applicant would execute his security responsibilities in the future as he had since 1972, by reporting any coercive or noncoercive foreign influence. Applicant's long record of holding a security clearance and his service in the U.S. military without any blemish appeared to sway the balance in his favor. Clearance was granted and not appealed.

Case No. 10.[65] Applicant who was born in the United States, traveled to Israel at age of nineteen and stayed there for five years. During that period he became an Israeli citizen and served in the Israeli military. He later returned to the United States with his Israeli-born wife who by then had acquired dual U.S.-Israeli citizenship. Applicant's wife's parents and siblings still resided in and were citizens of Israel, although none had any connection with the Israeli government. Applicant had no contact with his in-laws except to answer the phone when they called his wife. He had renounced his dual Israeli citizenship and returned his Israeli passport. The Administrative Judge concluded that applicant had limited emotional attachment to his wife's family members in Israel. Because applicant had renounced his Israeli citizenship, returned his Israeli passport, and had subsequently come to the United States and raised a family, the judge found that overcame any

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[64] ISCR Case No. 01-17669 (Nov. 12, 2003) (Mason, AJ).

[65] ISCR Case No. 02-18095 (Dec. 17, 2003) (Mogul, AJ).

concern of dual loyalty resulting from of his going to Israel when he was twenty-one years old. Clearance was granted and not appealed.

Case No. 11.[66] Applicant was born in Israel and after fulfilling his required military service came to the United States, became naturalized, married a U.S. citizen and raised a family in the U.S. He used his Israeli passport when traveling to Israel after becoming a U.S. citizen. In order to qualify for a security clearance, applicant renounced his Israeli citizenship and gave up his Israeli passport. Applicant's mother and nine siblings were residents of Israel. One sibling was an office worker for the Israeli government, but his mother and the other eight siblings did not work for the Israeli government and were not agents of the government. The Administrative Judge found that the jobs of the siblings "did not place them in a position to be exploited by a foreign power in a way that could force applicant to choose between [them] and the U.S." Although applicant continued to use his Israeli passport after receiving his U.S. citizenship, those concerns were mitigated because "applicant did not know his possession and use of his Israeli passport would have a negative impact on his application for security clearance." Because his mother was 69 years of age, and had always been a housewife raising children, the Administrative Judge found that common sense indicated "that she is not in a position to be exploited by a foreign power to force applicant to choose between his loyalty to his mother and his loyalty to the U.S." Influential in this case was applicant's "sound ties to the U.S.," including raising his family and renouncing his Israeli citizenship. Clearance was granted and not appealed.

Case No. 12.[67] Applicant was born and raised in the United States. In 1974 at the age of twenty he traveled to Israel, volunteered on a communal settlement, and began studying religion at a Jewish institute of higher learning. In May 1976, he returned to the U.S. to marry. Both he and his wife went to Israel in 1976 and until 1986 resided in Israel and voted in elections. As a result of living there, he was registered for the military service but never served. He returned to the United States to avoid the possibility of having to serve in the Israeli Army. Applicant renounced his Israeli citizenship and returned his Israeli passport. He has no relatives living in Israel, although his wife and children remained dual citizens of U.S. and Israel. Clearance was granted and not appealed.

Case No. 13.[68] Applicant was born in the U.S. His parents, who were retired, and his brother, sister and sister-in-law were dual citizens of the United States residing in Israel but were not connected with the government or were agents of Israel. Applicant maintained regular contact with his parents, but had irregular contacts with his siblings. He had made a number of trips to Israel for business or pleasure. Applicant's brother, sister and sister-in-law all worked in private industry in Israel. The AJ found that applicant's siblings were not "in a position to be taken advantage of in a way that forces applicant to choose between them and the U.S." Applicant had strong ties to the U.S.,

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[66] ISCR Case No. 02-24074 (Jan. 29, 2004) (Mason, AJ).

[67] ISCR Case No. 02-11872 (Jan. 30, 2004) (Heiney, AJ).

[68] ISCR Case No. 02-14006 (Feb. 17, 2004) (Mason, AJ).

both he and his wife were native born U.S. citizens and they had four children born in the U.S. Applicant obtained all of his education and training primarily in the U.S. except for ten months in Israel. He had worked for the same U.S. defense contractor for more than twenty-three years and had held a security clearance for more than twenty years. Applicant has no property in Israel. Clearance was granted and not appealed.

Case No. 14.[69] Applicant, who was born and educated in the United States, moved to Israel intending to stay for only two years to complete his higher education. He met his wife in Israel, married and remained there for ten years, working and voting in Israel. After ten years, applicant returned with his family to the United States. He applied to have his Israeli citizenship revoked and surrendered his Israeli passport. Applicant's father-in-law, sister-in-law and brother-in-law were residents and citizens of Israel. He had little or no contact with them. None were agents of, or associated with the Israeli government. Applicant's remaining assets in Israel were in the process of being sold, after which he would have no financial interest there. The AJ found that although applicant had family in Israel, "he indicates that he has no ties of affection or obligation to anyone in Israel, thus he has no foreign ties or contacts who could potentially influence him." Clearance was granted and not appealed.

Case No. 15.[70] Applicant, who was born in the U.S., was taken to Israel by his parents at the age of seven and acquired dual Israeli citizenship by operation of law. He returned to the U.S. with his parents and completed high school here but later returned to Israel to complete his military obligation to avoid criminal prosecution had he failed to do so. Upon completion of his military duty applicant returned to the U.S., completed his education and married a native born U.S. citizen. The first time applicant returned to Israel he used his U.S. passport but was told that in the future he would have to enter Israel on an Israeli passport. He returned to Israel a number of times thereafter for vacation and to visit his family using his Israeli passport. Following his interview with the Defense Security Service, and on the advise of his legal counsel, he cut up his Israeli passport and returned it to the Israeli embassy notifying the Embassy that he irrevocably revoked his Israeli citizenship. Applicant's parents and sister lived in the U.S. but he had a brother living in Israel who did not want to leave so long as his spouse's parents who also lived there were alive. His brother worked for a private investment firm and was still in the Israel Reserves. Applicant stood to inherit a one-third of an apartment valued at from $200 thousand to $250 thousand which his brother lived in. Clearance was granted and not appealed.

Case No. 16.[71] Applicant was born, raised and educated in the United States. After completing his education he worked for the U.S. Navy and later the U.S. Army in a civilian capacity for 10 years holding a security clearance during that time. Applicant met his wife, an Israeli citizen,

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[69] ISCR Case No. 02-30301 (Apr. 13, 2004) (Anderson, AJ).

[70] ISCR Case No. 02-28320 (Mar. 10, 2005) (Matchinski, AJ).

[71] ISCR Case No. 04-11605 (Jan. 31. 2006) (Marshall, AJ).

while she was visiting in the United States. After they married they made annual trips to Israel to visit his wife's family and family friends.

Because applicant's wife wanted to be near her family, in 1998 applicant obtained a job with an Israeli company and he and his family moved to Israel and he and the children became Israeli citizens. After two years his company transferred his job back to the United States and the family returned deciding that it would be better for the children to live in the U.S. permanently given that the Israeli peace process was not going well. Prior to the hearing applicant renounced his Israeli citizenship and returned his Israeli passport to the Embassy of Israel. Applicant and his family continued to make annual trips to Israel to visit with his in-laws. Clearance was granted and not appealed.

### B. Decisions Denying Clearances Which Not Appealed by the Applicant.

There were ten cases decided between January 18, 1999 and January 12, 2005 in which clearances were denied and not appealed. These were examined to determine what, if anything, differentiated them from the cases where clearances were granted and not appealed.

Case No. 1.[72] Applicant and his family were deported to Israel in 1951 from a hostile middle eastern country. Later he emigrated to Canada and then to the U.S. where he has lived with his wife and children for the preceding ten years. He declined to renounce his Israeli citizenship because he was entitled to pension benefits. He also declined to give up his Israeli passport, which he renewed periodically, because it facilitated his travel to Israel to visit his elderly mother and handicapped brother. (This case was prior to the Money Memorandum which requires relinquishment of a foreign passport). In response the question of a possible war between the United States and Israel, applicant said that he would not bear arms against his mother, brother and sister. The AJ found that in viewing the totality of the evidence, the applicant "indicated some ambivalence about his commitment to the U.S. and what is his own best interests as a seeker of a security clearance."

Case No. 2.[73] Applicant, a native born Israeli, was unwilling to renounce his dual citizenship or to turn in his Israeli passport.

Case No. 3.[74] Applicant, a retired U.S. federal government employee, had his security clearance suspended and later revoked while he was a senior level government director in foreign military sales. It was alleged that he had repeatedly showed bias and favoritism toward Israel in his official involvement with Israeli foreign military purchases, and that he had given favorable treatment

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[72] ISCR Case No. 99-0527 (Jan. 18, 1999) (Sax, AJ).

[73] ISCR Case No. 01-00908 (Jan. 31, 2002) (Erck, AJ).

[74] ISCR Case No. 01-10301 (Apr. 8, 2002) (Smith, AJ).

to Israel while representing the United States in the area of foreign military sales. Applicant's denial of having received the notice of the earlier revocation of his clearance was disbelieved by the AJ. Clearance was denied because it had been previously revoked on the grounds that applicant had willingly served the interests of another government by being its advocate in foreign military sales.

Case No. 4.[75] Applicant was born and raised in Israel and moved to the United States at age twenty-one. After becoming a United States citizen she renewed her Israeli passport which she declined to return because she felt she needed it to enter and leave Israel to avoid paying the Israeli exit tax. Applicant had a mother, brother and two sisters who were citizens and residents of Israel, although none worked for the Israeli government or were agents of the government. Clearance was denied because the AJ held that applicant failed to show that her family ties did not create a potential for influence and compromise of classified information and, also based on the Money Memorandum, because applicant would not relinquish her Israeli passport.

Case No. 5.[76] Applicant who was born in Israel, lived in the United States for forty years. After becoming a U.S. citizen he renewed his Israeli passport several times and used it to enter and exit Israel on numerous occasions. He did not want to renounce his Israeli citizenship. In his statement he said he "had emotional and religious allegiance to Israel." He testified that his allegiance was "mainly to the United States." Although the applicant's Israeli passport had expired after he was advised of the Money Memorandum, the AJ held that that did not rule out his future renewal of his Israeli passport.

Case No. 6.[77] Applicant, a naturalized U.S. citizen, declined to renounce his dual citizenship or to give up his Israeli passport. He had close family members in Israel and had substantial business with the Israeli government and military. The Administrative Judge held that while his relationships did not affect his right to hold U.S. citizenship, they were "too extensive and material to ignore when considering him for access to classified information."

Case No. 7.[78] Applicant, a naturalized U.S. citizen, had a brother and sister who were citizens and residents of Israel; his brother was a computer technician and his sister was a housewife. The Administrative Judge found that "The Israeli government is actively engaged in military and industrial espionage in the United States. An Israeli citizen working in the U.S. who has access to proprietary information is likely to be a target of such espionage." (The AJ cited two government exhibits to support his statement but did not describe what they were). The AJ further held, with respect to applicant's brother and sister, that "despite the fact that Israel is actively engaged in espionage against

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[75] ISCR Case No. 01-16247 (Apr. 12, 2002) (Anderson, AJ).

[76] ISCR Case No. 01-13693 (Dec. 20, 2002) (Testan, AJ).

[77] ISCR Case No. 01-22696 (Jul. 25, 2003) (Sax, AJ).

[78] ISCR Case No. 02-27647 (Sept. 15, 2003) (Wilmeth, AJ).

the United States, it has a democratic form of government. There is no evidence that Israel would exploit its own citizens in an effort to further the goals of its espionage." Thus, the applicant's immediate family concern was mitigated. Although applicant had applied to renounce his Israeli citizenship, he still maintained his Israeli passport which he had used continuously for the twenty-five years that he had been a U.S. citizen. His continued possession of his Israeli passport was the reason his clearance was denied.

Case No. 8.[79] Applicant immigrated from Russia and became a U.S. citizen in 1983. He developed two contacts in Israel and contacts with two Russian Jews in an effort to develop a private business venture of trading in computer equipment. Applicant admitted to making false statements on a business visa application regarding his contacts. He also gave incomplete and inaccurate information on his Security Clearance Applicant (SF-86) and in three subsequent interviews concerning his job, passport and foreign friends and reasons. The Administrative Judge ruled that applicant's withholding of information and his omissions appeared to be knowing, willful and deliberate, and found against him under Guidelines B, E and J for falsification of statements.

Case No. 9.[80] Applicant, of Druze heritage, although born in the U.S., was taken to Lebanon by his parents and received his early education there. His father continued to reside in Lebanon, his mother having moved back to the U.S. Applicant returned to the U.S., finished high school and then served in the U.S. Air force for 13 years during which he held a Top Secret, SCI clearance for much of that period. He has a older sister who is a U.S. citizen who met a Lebanese poet while on a visit to her parents, married him and now lives in Lebanon. He also had a younger sister living in the U.S., and a brother who moved to Israel, converted to Judaism, married an Israeli woman and was a staunch Zionist. Applicant had no direct contact with his brother for about six years. His wife's parents continued to reside in Lebanon. Applicant stood to inherit a small house in Lebanon worth about $20,000. Although applicant's financial interest was not substantial, the Judge concluded that owning a house in Lebanon still had significance in evaluating the case.

Although the main concern in this case was Lebanon, there was also concern with the brother's contacts in Israel. The Administrative Judge found with respect to Israel, that "Israel is known to target for collection U.S. classified information." The AJ, although not asked by Department Counsel to take administrative notice, justified his going outside of the administrative record for support of these statements by saying "these facts are known to this agency through its cumulative expertise in deciding security-clearances [sic] cases involving foreign influence or foreign preference," (citing ISCR Case No. 99-00452, at page 4 (Mar. 21, 2000)).[81]

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[79] ISCR Case No. 01-19372 (Apr. 26, 2004) (Ablard, AJ).

[80] ISCR Case No. 02-12840 (Jun. 15, 2004) (Young, AJ).

[81] This ruling is contrary to the requirement that a case must be decided only on record evidence, and is also not supported by the Appeal Board's decision in ISCR Case No. 99-

(continued...)

Case No. 10.[82] Applicant was born in Jerusalem, received his college education in the U.S., and became a naturalized U.S. citizen. His parents, who were born in Israel, resided in the U.S. His father has been a U.S. citizen for 30 years and his mother has applied for U.S. citizenship. Applicant has six siblings, three of whom resided in the U.S. and the other three of whom resided in Israel. Applicant had two Palestinian aunts who resided in Israel but he did not consider them family members. The AJ noted that "Israel has a generally good human rights record. However, there have been problems with respect to its treatment of its Arab citizens, especially in the occupied territories." The AJ held that a country's human rights record is relevant in assessing whether a family member is vulnerable to government coercion if the foreign government has an authoritarian government, a family member is associated with or dependent on the government, or the country is known to conduct intelligence operations against the U.S. After reciting these conditions, the AJ made no finding that Israel fit in any of these categories. He ruled, however, that the applicant had not presented any evidence about the family member's occupations, social positions, political positions or other factors that would shed light on their vulnerability and accordingly, ruled against him. Although not stated explicitly in the opinion, is it apparent that the applicant was of Palestinian Arab background rather than Jewish, which in this case the administrative judge apparently believed, made him vulnerable to Israeli government influence.

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[81](...continued)
0452 (Mar. 21, 2000). That case affirmed Chief Judge Gales' 2002 decision approving a security clearance while the applicant still held an Israeli passport. Judge Gales had relied on a 1983 DoD memorandum in finding that the use of a foreign passport for personal convenience was permissible and, therefore, it did not having any security significance. (The Appeal Board's affirmance was also the reason that the "Money' Memorandum was subsequently issued.) (See f.n. 11 above). In that case, the Appeal Board, in dictum, stated; "As a general rule the parties are entitled to know what information an Administrative Judge is relying on in making a decision. There are some narrow exceptions to this general rule; official administrative notice, and matters known to an agency through its cumulative expertise." *Id.* at p. 3. The Appeal Board held in that case that it was arbitrary, capricious and contrary to law for Judge Gales to justify his decision based on the 1983 memorandum because that memorandum was not publicly available.

The only later Appeal Board case referring to that decision modified that dictum. In the later case, The Appeal Board approved the Administrative Judge's acceptance of the Money Memorandum as legally binding on him. The Board distinguished the earlier case because Judge Gales had relied on the 1983 DoD memorandum which was not made known or available to the applicant or Department Counsel before issuing his decision.

[82] ISCR Case No. 02-29871 (Jan. 12, 2005) (Foreman, AJ).

## IV. DOCUMENTARY EVIDENCE USED BY DEPARTMENT COUNSEL TO PROVE FOREIGN PREFERENCE AND FOREIGN INFLUENCE

The Appeal Board has relieved the government of the burden of presenting *any* evidence to support a finding that Israel, or any foreign country, has actually coerced anyone to disclose confidential information. It reasons that the government does not have to wait for this to happen.[83] The Appeal Board has held that the burden of proof is not on the government to show that there *is* likelihood of foreign influence, but on the applicant to show that there is not.[84] This transfer of the burden of proof requires the applicant to prove that something will not happen in the future, that has never happened in the past, clearly an impossibility. Despite the government being in a much better position to know whether a foreign country has in the past, or is likely in the future to exert such influence, the argument of impossibility of proof was twice presented to the Appeal Board and twice rejected by it.[85] As a consequence, the government has never offered, or has had to offer, any direct or circumstantial evidence of coercion, or an actual case of coercion. Accordingly, it presents its case by "innuendo" evidence offering government documents concerning unrelated activities.[86] It argues that Israel is not to be trusted. Occasionally such evidence is rejected by an Administrative Judge, but generally it is accepted for "whatever value it has." The "innuendo" documents and arguments Department Counsel offers in Israel cases and the counter exhibits offered by applicants are discussed below.

1. United States Department of State: *Consular Information Sheet: Israel, the West Bank and Gaza,* June 7, 2005 (9 pages)

This document addresses the relationship of Israel to the Palestinian community in the West bank and Gaza. The government offers it a "background" but makes no other claim of relevance to any of the issues in either Guideline C, Foreign Preference, or Guideline B, Foreign Influence cases.

2. U.S. Department of State Publication: *Background Note: Israel,* September 2004

Like the first document, the government offers it as "background" but makes no other claim of relevance.

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[83] ISCR Case No. 01-17496 (Oct. 28, 2002).

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

[85] ISCR Case No. 02-00318 (Feb. 25, 2004) (reversing a favorable AJ decision); ISCR Case No. 02-26978 (Sept. 21, 2005) (again rejecting the "impossibility" argument after a request for reconsideration).

[86] This technique is not limited to Israel cases but is used with similar documents for all foreign countries with Foreign Influence - Foreign Preference issues.

3. United States Department of State: *Israel and the Occupied Territories Country Report on Human Rights Practices - 2004*, February 28, 2005

Israel is portrayed on every page of this document as a respecter of human rights. When an Israeli is accused of violating another person's rights, the Report shows that he or she is vigorously prosecuted under the law. The terrorism and violence discussed in the document is by Palestinian terrorist organizations which the Report describes as dragging Arab citizens from hospitals and jails and killing them. Nevertheless, the government offers this document to support its argument that the Israeli government is likely to coerce its citizens to exert influence on their American relatives.

4. United States Department of State: *Travel Warning: Israel, the West Bank and Gaza,* June 29, 2005

This document discusses terrorist attacks against Israel by Palestinian terrorists. It warns readers to use caution in Israel and to stay out of Gaza. When published in June 2005, it predicted violence by Israelis during the evacuation of settlements from Gaza, but subsequent events proved this prediction to be unfounded, as the evacuation was carried out peacefully and without violence. The document is irrelevant to the issues of whether Israel is likely to coerce its citizens to pressure their American relatives to disclose secrets, or to whether an applicant would have a preference for Israel.

5. National Counterintelligence Center, Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for the year 2000.

The government repeatedly offers the report for the Year 2000, but never offers the subsequent reports for the years, 2001, 2002, 2003 or 2004. Applicant's objection to this document was sustained by Administrative Judge Thomas C. Graham in ISCR Case No. 03-21190 and was not admitted because the government had not offered the subsequent reports for years 2001, 2002, 2003 or 2004.

The year 2000 report, at pages 2 and 3, distinguishes between economic espionage and the open and legal collection of information. The only country cited as having engaged in industrial espionage is Taiwan (at page 8). The Report includes an Appendix (fourth from the last page) which is described as a "survey" of "almost a dozen [unnamed] fortune 500 companies," giving a "distillation of their views concerning the foreign collectors of information." Israel is among a list of six countries cited as the "most active collectors." The Appendix does not distinguish whether Israel is engaging in "industrial espionage," as defined in the Report, or is simply a lawful collector of open information which the report also discusses.

The survey information reported in the Appendix is hearsay upon hearsay, as it is a "distillation" of "less than a dozen" unnamed non-governmental sources. It has no relevance to, nor is probative of, whether any applicant would be likely to disclose classified information, or whether Israel has or would ever apply pressure on any family member in Israel to coerce classified information from an American relative. Applicant's counter-exhibits to the year 2000 Report are discussed below in Applicant's Rebuttable Evidence.

6. Defense Personnel Security Research Center Technical Report 05-10, *Technical, Social, and Economic Trends That Are Increasing U.S. Vulnerability to Insider Espionage*, May 2005

This 42 page document is a literature review containing no original data. Its "trends" are simply a statistical overview of society which, when applied to any individual case, is no more probative or relevant than taking a DNA sample of a newborn and trying to determine whether it should be imprisoned for being likely to commit a crime as an adult. Any conclusions in the document are triple hearsay since it simply a compilation of a literature search.

The document contains only one reference to Israel, which is to the case of Jonathan Pollard who was convicted of providing classified documents to Israel (on page 18). The document is objectionable if Department Counsel's purpose is to demonstrate that a person who is Jewish who has family ties to Israel, is not to be trusted with classified information. In one Israel case in which Department Counsel intended to use this document, it was withdrawn after the applicant objected. That is not to say that Department Counsel will not offer it in the future.

7. Congressional Research Service, *Issue Brief for Congress: Israeli-United States Relations,* March 16, 2005 (18 pages)

This document is objectionable because it is, arguably, not a "public record" and thus not entitled to administrative notice. Federal Rule of Evidence 803(8)requires that a document, to be considered under the public record exception to the hearsay rule, must set forth "(a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . .." This document does not report on the activities of the Congressional Research Service, nor does it contain anything to indicate that the CRS has a duty to file reports on U.S. - Israel relations. The document does not cite any authorities for its data or conclusions, and does not identify the status or qualifications of the author, other than as employee of the CRS. The document is, arguably, only the opinion of the author.

The CRS Issue Brief raises straw arguments against Israel only to later reject them. It states that Israel signed a contract in 1996 to sell an Airborne Radar Warning System (AWAC)to China, but later notes that none were delivered after the U.S. objected and the sale was cancelled (at page 10). The document cites two 1985 court cases, those of Jonathan Pollard, and of another person who was convicted of illegally exporting electronic switches to Israel (at page 14). In view of the solid U.S.-Israel relations from 1947 to the present, both cases are arguably aberrations in that long standing relationship.[87]

The CRS Issue Brief is a recitation of unsubstantiated, disputed facts. For that reason it is not entitled to administrative notice. Federal Rule of Evidence 201 (b) requires that "a judicially noticed

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[87] See, *"Bush Says U.S. Would Defend Israel Militarily*," Washington Post, page A.18, Feb. 2, 2006.

fact must be one not subject to reasonable dispute in that it is either: (l) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Issue Brief does not cite the sources of its statements and conclusions, as required by Rule 201(b) many of which are disputed, and contentious. The document is no more than the opinion of its author.

8. OPSEC Operations Security Intelligence Threat Handbook, Section 5, Economic Intelligence Collection Directed Against the United States.

Department Counsel often offers only Part 3, titled "Adversary Foreign Intelligence Operations," of this document. This 1998 document is not entitled to administrative notice because, by its own description, it is not an official publication of the United States Government. It was prepared by Booz Allen Hamilton, a private company, under contract to the government, as stated in its Introduction. The Introduction further states that the contents "are not necessarily the views of or endorsed by any Government agency." The document contains no original data or research, but cites other books and documents, many written years earlier, of no known reliability as the source of its information. Objections to this document were sustained by Administrative Judge Young in ISCR Case No. 03-04132 (Feb 17, 2004), and by Administrative Judge Crean in ISCR Case No. 03-24209 (Dec. 8, 2004).

9. DoD Annual Report to Congress on The Military Power of the Peoples' Republic of China, 2005.

The only mention of Israel in this voluminous document is found on page 24 where it states: "Although Israel began the process of canceling the PHALCON program in China in 2000, Beijing continues to pursue an AWAC's variant built on an IL-76 airframe. The Israelis transferred HARPY UAV'S to China in 2001 and conducted maintenance on HARPY PARTS during 2003-2004." The Report continues however, on the same page that:

> China receives assistance from other nations too. For example, in 2001, China bought British Spey MK-202 engines to install on the FB-7 fighter bomber until a licensed produced version could be manufactured. Italy and France may be assisting China with a new medium lift helicopter. Over the last thirty years, China also has benefitted from the sale of munitions and dual use technology from France, Germany, Italy *and the United States*. (Emphasis added). (at page 24).

According to DoD, not only are our closest allies supplying China with weapons, but so is the U.S. Since, according to this Report, Israel is acting no differently than this country and our western allies, the Report is irrelevant and not probative of the issues of whether anyone in the U.S. would be likely to pass defense secrets to Israel.

The Report's statement concerning Israel's sale of the PHALCON AWAC system is rebutted by the Congressional Research Service Report on Israel-United States relations another government

document offered by Department Counsel(document No. 7, above), which states that the sale was cancelled and no PHALCONS were delivered at the request of United States.

10. Superseding Indictment, Criminal Case No. 1:05CR225 United States District Court, Eastern District of Virginia, August 2005 Term.

11. Guilty plea, Criminal Case No. 1:05CR225 United States District Court, Eastern District of Virginia, August 2005 Term.

These documents are the indictment in the case of Lawrence Franklin, Steven Rosen and Keith Weissman, now pending, for allegedly conspiring to transfer classified information to an unnamed foreign country, (which is generally known to be Israel), and the guilty plea of Franklin, a government employee, to one of the charges. Rosen and Weissman, two employees of a private lobbying organization at the time of the events alleged, are vigorously contesting the indictment. On January 19, 2006 their attorneys filed a 59 page motion to dismiss the indictment.[88] Nowhere in the indictment is it alleged that any foreign nation or foreign official contacted Franklin or took any steps to seek the information. There is also no allegation that Franklin is Jewish or has any family ties in Israel.

## V. APPLICANT'S REBUTTAL EVIDENCE

In rebuttal to the government's exhibits, particularly numbers 6 and 7 above which single out the Pollard case, the following documents have been offered in applicants' cases to demonstrate that simply being Jewish, or traveling to Israel, or having distant family in Israel is not a reason to deny a clearance. Acceptance of some of these documents in evidence has met with limited success. That is not to say that offering these exhibits should not be tried again, as each administrative judge tends to look at the evidence somewhat differently than the others.

Documents demonstrating Jewish-American patriotism:

Letter from the National Museum of American Jewish Military History, Oct. 28, 2004 (2 pages)

Website: Florida Atlantic University, website "*American Jewish Heroes*" (23 pages)

Pamphlet: "*The Hall of Heroes, American Jewish Recipients of the Medal of Honor, Distinguished Service Cross, Navy Cross and Air Force Medal*," National Museum of American Jewish History. (62 pages)

Website: U.S. Army and Fox News: Korean War Hero received medal, Sept. 23, 2005 (5 pages)

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[88] The Motion to Dismiss may be found at the website of the Federation of American Scientists: www.fas.org/sgp/jud/rosen011906.pdf.

"*Send for Haym Salomon,"* Borden Publishing Co., 1976 (96 pages)

Documents demonstrating United States Policy towards Israel:

U.S. Department of State website including: Remarks of President George W. Bush; Secretary State of Colin L. Powell; and Ambassador Cofer Black regarding U.S. relations with Israel (17 pages).

White House Press Reports and Releases regarding U.S.-Israel Relations, 2001-2005 (45 pages)

Congressional Research Service, Issue Brief for Congress, Israel: U.S. Foreign Assistance, Mar. 7, 2005 (17 pages)

Congressional Research Service, Report for Congress, U.S. Foreign Assistance to the Middle East: Historical Background, Recent Trends, and the FY 2006 Request, Feb. 17, 2005 (30 pages)

Congressional Research Service Brief for Congress: The Middle East Peace Talks, Apr. 12, 2005 (19 pages)

Washington Post: *"Bush Says U.S. Would Defend Israel Militarily,*" page A.18*,* Feb. 2, 2006.

Documents demonstrating that travel to Israel is not indicative of dual loyalty to the U.S.:
Website: The Holy Land Christian Ecumenical Foundation, (6 pages) Oct. 16, 2005

Website: International Christian Zionist Center (2 pages) Oct. 6, 2005

Website: The Christian Science Monitor (5 pages) Oct. 6, 2005

Website: Christian Information Center (2 pages) Oct. 15, 2004

Website: Gospel.net (3 pages) Oct. 15, 2004

Website: Holy Land Tours (3 pages) Oct. 15, 2004

Website: Pilgrim Tours (8 pages) Oct. 15, 2004

Website: Zola's Tours (10 pages) Oct. 15, 2004

Documents rebutting the National Counterintelligence Center's Year 2000 Report:
National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2001 (12 pages)

This Report does not mention Israel, but lists espionage cases involving China and Pakistan;

National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2002 (17 pages)

This Report states that there were 75 countries involved in one or more suspicious events but does not mention Israel (at page 10).

National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2003 (13 pages)

This Report states that 90 countries involved in one or more suspicious events, but does not mention of Israel (at page 2).

National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2004 (27 pages)

This Report states that there were 100 countries involved in one or more suspicious events but does not mention Israel (at page 3).

Documents demonstrating that for the one Pollard case, there have been dozens of non-Jewish spies caught and convicted in the last fifty years.

National Counterintelligence Center, *A Counterintelligence Reader*, Vol. 3, Chapters 3 and 4, (1998) (228 pages)

Documents demonstrating that the indictment of Rosen and Weissman is not well founded. Letter from Senator Daniel Patrick Moynihan, Sept. 29, 1998, (2 pages), (found at: *Secrecy News*, Federation of American Scientists Secrecy Newsletter Project on Government Secrecy, Volume 2005, Issue No. 98, October 19, 2005: www.fas.org) (5 pages)

Press Release: The Reporters Committee for Freedom of the Press, Oct. 13, 2005, (found at: *Secrecy News*, Federation of American Scientists Secrecy Newsletter Project on Government Secrecy, Volume 2005, Issue No. 98, October 19, 2005: www.fas.org. (1 page)

Memorandum of Law in Support of Defendants Steven J. Rosen's And Keith Weissman's Motion to Dismiss the Superseding Indictment, Cr. No. 1:05CR225, U.S. District Court for the Eastern District of Virginia, Filed Jan. 19, 2006.(59 pages)
(Found at: http//www.fas.org/sgp/jud/rosen011906.pdf)

Documents demonstrating that OPSEC Operations Threat Handbook (Government Number 8, above) is not a government document.

Operations Security Intelligence Threat Handbook, *Introduction*, 3 pages, May 1998.

## VI. CONCLUSIONS

The Appeal Board has never explained how it differentiates cases of applicants who have family members living in Israel (or any foreign country) who get a clearance, from similar applicants who do not get a clearance. The Appeal Board's decisions offer no discernable logic why a clearance will be granted in one case but not another. The only conclusion that can be drawn is that the Appeal Board will affirm all denials and reverse all grants of clearance, except if the case is so compelling that it could not withstand public criticism for its decision.

There seems to be a mostly clear, but not a definitive line between the Administrative Judges' decisions granting clearances with those denying them. Denial of clearance will be assured if an applicant refuses to relinquish an Israeli passport, or if there is any type of perceived falsification. Prior involvement with the Israeli defense industry or any contact with Israeli security will probably cause denial. If there are immediate family members or in-laws living in Israel, even if they are not connected with the government, the decision can go either way.

In no case where a clearance was granted and not appealed, was there any discussion of the applicant's willingness to bear arms for Israel in a conflict with another country, or any question asking the applicant to choose between Israel and the United States in the event of an armed conflict between the two countries. These types of questions only appear in the later cases where there were decisions granting a clearance which Department Counsel appealed. In all such cases, the Appeal Board reversed the grant of a clearance. Considering the Appeal Board's rulings in the Israel cases that were appealed, it is safe to predict that had Department Counsel appealed any of the other favorable decisions, they also would have been reversed by the Appeal Board.

An inquiry to DOHA for any written guidelines on how Foreign Preference-Foreign Influence cases are adjudicated have been answered, "there is no country list." [89] Even giving deference to the "whole person concept," and the "common sense determination" called for in the Security Clearance Guidelines, one is left with a sense of arbitrariness and unpredictability. If Department Counsel has

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[89] In response to a FOIA request for policies concerning adjudications where the applicant has family ties in other countries, documents were provided which stat that: "There is no country list. However, the President has designated Iraq, Iran, and North Korea as belonging to an axis of evil; the State Department publishes the names of countries that sponsor terrorism; the ADR references the names of several other countries including traditional allies known from open sources to target the United States for collection of intelligence; and the Commerce Department provides information as to the risks faced by American business in various counties which could have a bearing on assessing how it would treat relatives of U.S. citizens to gain access to classified information." Letter and enclosures from C.Y Talbot, Deputy, DoD Directorate for Freedom of Information and Security Review, April 6, 2004 (in the files of the Author.)

been personally offended during a hearing, or if there is animosity between Department Counsel and the applicant or his or her lawyer, or if the Administrative Judge simply had a bad day, would such factors influence the outcome of a case or the decision to appeal? One never knows, because of the apparent arbitrariness.

What then distinguishes the facts of one case where a clearance is granted and appealed by the government from another not appealed by the government? The answer appears to be nothing. In several cases, the applicant had a distinguished U.S. military record before retiring and applying for a civilian clearance. In other cases the applicant had made significant contributions to nation's defense over a long period of time before his or her clearance was questioned. In most cases, however, neither of these distinguishing elements was present.

Applying the standards announced by the Appeal Board, there would appear to be no case in which any applicant who had immediate family or in-laws living in Israel, or who had ever used an Israeli passport while a U.S. citizen, would be granted a security clearance. Yet the record shows that many clearances are granted in such cases, and that the government does not appeal about half of them.

After review of such an extensive body of case law one would expect there to be some predictability, but there is none. If DOHA would provide its policies in deciding and appealing these cases, if indeed there are such policies, applicants and their counsel would have some idea of the likelihood of obtaining a clearance more than simply a roll of the dice. In the end this could save substantial litigation effort and expense for both sides.

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