"WOULD YOU BEAR ARMS FOR THE UNITED STATES IF IT WAS AT WAR WITH _____? THE ISRAEL HYPOTHETICAL

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A question that comes up time and again in investigations of security clearance applicants of Jewish background is: "Would you bear arms for the United States against Israel if the U.S. went to war with Israel". This type of question is not asked of applicants whose forebearers were from countries like England, France, Ireland or Germany, where, it is assumed by investigators, that there are not strong ethnic ties. It is also not asked of applicants from countries like Iraq, Iran or Afghanistan from which applicants have fled to escape torture, or political or religious persecution. Those applicants generally answer: "where do I sign up".

Although that type of question occasionally is asked of recent immigrants with families remaining in countries like South Korea, Turkey and Egypt, it is asked with regularity of American Jews, particularly naturalized U.S. citizens originally from Israel. Not only is the question "would you bear arms for the United States" asked of émigrés to the U.S. still having family in Israel, it is asked of Jews born in the United States who have no relatives in Israel. That question has been asked of Jewish applicants for security clearances 60 years of age, and Jewish applicants who have had triple by-pass heart surgery who would not be taken into any country's army even if they wanted to fight. It has been asked of American applicants of the Jewish faith, who have visited Israel only as children with their parents, and Jewish applicants who have never been to Israel. The one thing common to all the applicants to whom this question is put is their Jewish heritage.

The justification offered by the security agencies is that Jonathan Pollard, who gave classified information to Israel in the 1980's so it could protect itself from attack by Iran was an American Jew, and therefore, any American Jew may possibly do the same. While the Pollard case is a fact, so are the 125 other reported cases of convictions for espionage between 1947 and 2001 which involved espionage not only for the obvious players such as the Soviet Union and China, but also for other countries such as the Philippines, France, Ecuador, Greece, Saudi Arabia, Ghana and El Salvador.[2] Yet it is only Jewish Americans who have their loyalty impugned by being regularly asked if they would bear arms against a country with which they had some religious or ancestral affiliation.

What makes this inquiry even more unsupportable is that since the founding of the State of Israel in 1948, Israel and the United States have been the staunchest allies. Israel is the only country in the middle east that has consistently been a supporter of the United States and its policies, which every President since Harry S. Truman has recognized.

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[2] *Espionage by American Citizens Against the United States 1947-2001*. Defense Personnel Security Research Center, Technical Report No. 02-5, July 2002.

The Defense Office of Hearings and Appeals (DOHA), which is the agency that adjudicates security clearances on behalf of the Department of Defense, has finally and recently confronted this issue.[3] In a recent case, the Department of Defense proposed to deny the applicant, a naturalized American from Israel, a security clearance, because among other reasons, he stated that he: "would bear arms for the United States, but only if not contrary to Israel's interest or words to said effect"; and that he would "not bear arms for the United States against [his] native country or words to said effect".[4]

At the hearing on his clearance, the applicant testified that since becoming a U.S. citizen and even before then, he had invested everything he had in terms of time and money to support the U.S. government's defense needs. He said the form in which the hypothetical questions were put were designed to put people in the situation where, whatever he answered would not look reasonable. If he answered "yes, that he would fight against Israel while an Israeli citizen," he said it would look clearly disingenuous, and if he said "no," it would be held against him. The applicant testified that there is a common interest between Israel and the United States in terms of fighting terrorism; it is the same common enemy and common threat. He testified that he had been in the United States since 1973, coming here as a graduate student. Ever since, he said, he had done research for the Department of Defense and for other Departments of the United States government; everything he did was related to defense and space. His technical contributions to the defense effort were shown to be numerous and significant.

In the initial decision the Administrative Judge ruled against granting the applicant a security decision because he had:

> made several statements that question his allegiance to the United States by stating that he refuses to bear arms for the United States against Israel. Admittedly, several of the statements were made during the time that he was still an Israeli citizen. However, even at the hearing, he reiterated that his position had not changed, and that he would still not bear arms against Israel.[5]

The Administrative Judge held that these statements indicated "a divided loyalty that may be manipulated or induced to help Israel in a way that is not in the interest of the United States or make him vulnerable to pressure or coercion by a foreign interest." The Administrative Judge further held that "applicant's remarks show either a foreign preference for Israel, or lack of preference for the United States." The Administrative Judge held that even if the question was so hypothetical in nature, and would never conceivably be an actual situation, that was irrelevant.

The Administrative Judge noted that the applicant was at the time of the hearing 56 years of age, had held a security clearance for thirty years, and had "an impeccable record demonstrating responsibility, honesty, and trustworthiness, and no blemishes of any kind". Nevertheless, she continued, that "he has not shown a strong sense of loyalty to the United States or a preference according to applicable

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[3] DOHA ISCR Case No. 06-07293, Apr.16, 2008.

[4] The question was asked even before the applicant had become a naturalized American citizen. The statement the applicant made in November, 1978 was that: "I am a citizen of Israel and to that extent, I feel I owe my allegiance to Israel, as I was reared there and also because I have family in that country. . . . However, I also feel an allegiance toward the United States, as I intend to reside here permanently. . . . Although I owe an allegiance to Israel, this does not prevent me from pledging an unequivocal obligation to take no action contrary to the United States laws and regulations."

[5] DOHA ISCR Case No. 06-07293, Nov. 27, 2007.

guidelines." For that reason, the Administrative Judge found that applicant's "loyalties appear to be divided between Israel and the United States and the Applicant is at risk of foreign influence."

On appeal to the DOHA Appeal Board of the Administrative Judge's initial decision, the applicant argued that the Board had previously ruled that an answer to what an applicant might do under a hypothetical set of circumstances was not entitled to much weight unless there was record evidence that the applicant has acted in a similar manner in the past under similar circumstances.[6] He noted that the Appeal Board had also held that as a matter of common sense, a person's stated intention to engage in future conduct that is identical or similar to the person's past conduct is entitled to be give more weight than a person's stated intention to engage in future conduct of a kind that the person never before engaged in.[7] The applicant argued that since the assumed facts underlying the hypothetical had never occurred, little or no weight should have been given to the question or to the answer, and the Administrative Judge's reliance on them in reaching her conclusion was an abuse of her discretion. He argued that there were no facts or data to support the hypothetical the applicant was required to answer, so, there could be no answer based on reality.

The applicant further argued that the Administrative Judge had completely disregarded his unblemished thirty year record of holding a security clearance, had ignored the absence of any fact indicating he had or would give a preference to Israel over his obligation to protect classified information, and had ignored the utter absence of any fact to support the hypothetical. He further argued that there were no facts in the record, and no facts that ever existed upon which the hypothetical question was based. He stated that Israel and the United States have been the staunchest allies since Israel was founded sixty years ago, that the United States was the first country to recognize the state of Israel and that has consistently supported it, both politically and with military and economic aid, from its founding to the present time.[8] The applicant argued that there was no historical fact to support a hypothesis that Israel and the United States would ever engage in war against each other, or to support a hypothesis that the United States would call upon an applicant 56 years of age, well past the age of conscription, to bear arms against Israel.

The applicant further argued that the hypothetical question, whether he would bear arms against Israel, did not support any inference that he would disclose classified information to Israel if Israel sought such information from him, or that he would voluntarily disclose classified information, if he perceived that Israel was in danger from another country. He argued that the question posed during the investigation was simply a trap; if he answered no, he would be accused of disloyalty; and if he answered yes, he would be viewed as dishonest and disingenuous.

In his appeal the applicant argued that a legitimate question going to the issue of whether applicant would disclose classified information, based on experience and reality would be: "What would you do if you were approached by the Israeli government to disclose classified information"; or "what would you do if you felt Israel was threatened and endangered by a foreign power?" The proper answer and, in fact, the one applicant gave, was that he would report the approach or bring his concerns to the proper security authorities. He said to do otherwise would simply lead to further attempts at extortion or

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[6] ISCR Case no. 99-0511 (Dec. 19, 2000) at p.11; ISCR Case No. 02-26826 (Nov. 23, 2003) at p.4; ISCR Case No. 02-02892 (June 28, 2004) at p.3.

[7] ISCR Case No. 99-0532 (Feb. 27, 2001) at p.6.

[8] *See,* Eg. Congressional Research Service, Report for Congress, U.S. Foreign Aid to Israel, January 2, 2008

coercion. The applicant recognized that only governments have the resources to deal with outside threats. The DOHA Appeal Board reversed the Administrative Judge, noting that the Judge had relied extensively on applicant's negative response to the hypothetical question as to his willingness to bear arms for the United States against Israel[9]. It stated:

> as a general rule, an applicant's stated intention of what he might do in the future under a hypothetical set of circumstances is entitled to limited weight unless there is record evidence that the applicant has acted in a similar manner in the past under comparable circumstances. See e.g., ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 9, 2007). The likelihood or not of the hypothetical ever occurring may further affect the weight to be assigned.[10]

Thus, for the first time the DOHA Appeal Board constrained the use of the hypothetical, "would you bear arms against Israel (or any other foreign country) if it were in a war with the United States". While not disallowing the question completely, it required consideration of two factors that are most unlikely to occur, that the applicant has acted in a similar manner before, and the likelihood of the hypothetical ever occurring in the future.

The decision of the DOHA Appeal Board is binding only on security clearance determinations affecting employees of contractors with the Department of Defense who hold "collateral", i.e., Confidential, Secret or Top Secret clearances. It does not bind any other government agency, nor does it affect security clearances of government employees, even those of the Department of Defense, or military personnel. It does not control clearances for access to Sensitive Compartmented Information (SCI) (i.e. intelligence information) or atomic energy clearances controlled by the Department of Energy. Nevertheless, the decision of the DOHA Appeal Board affects a vast body of people working on defense contracts, the bulk of which are with DoD.

Since DOHA and the Department of Energy are the only agencies in the Defense community that publish their security decisions, with DOHA publishing the far greater number, its decisions are influential on what the other agencies do. While other agencies are still reportedly asking the hypothetical, "what if the United States went to war with Israel . . .", hopefully they will see the logic of the DOHA Appeal Board and follow its example.

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9 DOHA ISCR Case No. 06-07293, Apr. 16, 2008

10 Id, at 2, f.n. 4.