CAN YOU CLEAR ME NOW? WEIGHING FOREIGN INFLUENCE FACTORS IN SECURITY CLEARANCE INVESTIGATIONS

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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CAN YOU CLEAR ME NOW? WEIGHING FOREIGN INFLUENCE FACTORS IN SECURITY CLEARANCE INVESTIGATIONS

THURSDAY, JULY 13, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis (chairman of the committee) presiding.

Present: Representatives Davis of Virginia, Gutknecht, Platts, Duncan, Dent, Foxx, Waxman, Maloney, Cummings, Kucinich, Watson, Van Hollen, Higgins, and Norton.

Staff present: Larry Halloran, deputy staff director/communications director; Patrick Lyden, parliamentarian; Rob White, press secretary; Andrea LeBlanc, deputy director of communications; Brien Beattie, professional staff member; Teresa Austin, chief clerk; Michael Galindo, deputy clerk; Kristin Amerling, minority general counsel; Michael McCarthy, minority counsel; Andrew Su, minority professional staff member; Earley Green, minority chief clerk; and Jean Gosa, minority assistant clerk.

Chairman TOM DAVIS. Committee will come to order. Before beginning the hearing, I want to dispense with some quick committee business. I thank the gentlewoman from Florida, Ileana Ros-Lehtinen, for graciously agreeing to step down from the subcommittee on energy and resources so that our newest committee member, Brian Bilbray, can have a seat on that subcommittee. And with that, I would ask unanimous consent that Mrs. Ros-Lehtinen be removed from the subcommittee on energy and resources and Mr. Bilbray be assigned to the subcommittee on energy and resources and federalism and the Census. Is there objection? Without objection, so ordered.

Now, on with the hearing.

Today we continue the committee's oversight of efforts to modernize and streamline the security clearance process, a slow cumbersome and fragmented system out of sync with current national security needs. Today we focus on one key aspect of that process, implementation of new standards to weigh the significance of foreign preferences or foreign influences on the trustworthiness of security clearance applicants.

Consistent assessment of those factors across all clearance granting agencies is one important aspect of the broader effort to upgrade and standardize the security clearance process. An increas-

ingly globalized economic and political environment, our Nation depends on immigrants for a wide range of functions, including some of the most high tech and sensitive factors in government work.

Naturalized citizens from every continent have come here and been successful in businesses that support U.S. troops in every theater around the globe. Others provide language expertise that is absolutely critical in our efforts to thwart the next terrorist plot against the American people.

This is the kind of work that requires a security clearance, and the ability to distinguish loyal naturalized citizens from those who might pose a security risk is an essential part of getting that work done quickly and effectively. Cold war standards and practices that broadly at times automatically denied clearances to those with extensive foreign contacts have to be refined to meet the new realities. Toward that end, the President's national security advisor on September 29, 2005 issued a revised set of parameters designed to guide decisionmaking by security clearance adjudicators from across government. The revised guidelines give needed flexibility to clearance grantors in evaluating risks posed by foreign contacts and considering factors that minimize or mitigate the risks.

Standard uniforms apply to adjudicative guidelines are one element of the larger effort to centralize and unify the process so clearances granted by one agency will be honored by others.

Achieving that clearance reciprocity is mandated by the provisions of the 2004 Intelligence Reform Act authored by this committee. It appears some departments, including the Department of Defense, have been slow to embrace the new standards.

I look forward to hearing from or distinguished first panel today about efforts to implement the revised guidelines. At a time when we need unique technological and cultural language expertise of the foreign born, increased security concerns have made it harder than ever for some with family and business interests abroad to qualify for a clearance. That paradox is compounded by a still broken investigative and adjudicative system plagued by delays and backlogs.

So we asked our second panel of witnesses to discuss foreign influence factors in the context of the end to end clearance process. In May, we heard testimony about a complete meltdown at the defense security service, which briefly stopped processing contractor clearance applications all together. As that incident illustrated, previous efforts to fix security clearance process have produced what can only be charitably characterized as mixed results. Delays persist, and agencies still don't trust clearances granted by others.

A numbers of agencies, including some in the intelligence community have chosen to avoid the lengthy delays and inefficiencies of an OPM DSS system still addicted to paper and shoe leather. Instead, they deal directly with the same contractors hired by OPM, but allow them to use more modern Web-based investigative tools. That approach appears to achieve significant savings of time and money.

I look forward to hearing today's recommendations for process improvement in the handling of foreign influence factors in the overall security clearance system. Again, I want to welcome all our

witnesses today at this hearing on a critically important national security issue.

I ask unanimous consent that recent correspondence between the committee and the Department of Defense regarding implementation of the adjudicative guidelines be inserted into the hearing record. And hearing no objection, so ordered.

And I ask further unanimous consent that the hearing record include a statement and exhibit submitted by Sheldon I. Cohen, an attorney who represents clearance applicants and who has analyzed the clearance appeals process. Without objection so ordered.

[The prepared statement of Chairman Tom Davis follows:]

Chairman Tom Davis
Opening Statement
Government Reform Committee Hearing
"Can You Clear Me Now? Weighing 'Foreign Influence' Factors in Security Clearance Investigations"
Thursday, July 13, 2006
9:30 a.m.
Room 2154 Rayburn House Office Building

Good morning and welcome. This hearing continues the Committee's oversight of efforts to modernize and streamline the security clearance process, a slow, cumbersome and fragmented system out of sync with current national security needs. Today we focus on one key aspect of that process: implementation of new standards to weigh the significance of foreign preferences or foreign influences on the trustworthiness of security clearance applicants. Consistent assessment of those factors across all clearance-granting agencies is one important aspect of the broader effort to update and standardize the security clearance process.

In an increasingly globalized economic and political environment, our nation depends on immigrants for a wide range of functions, including some of the most high-tech and sensitive sectors of government work. Naturalized citizens from every continent have come here and been successful in businesses that support U.S. troops in every theater around the globe. Others provide language expertise that is absolutely critical in our efforts to thwart the next terrorist plot against the American people. This is the kind of work that requires a security clearance, and the ability to distinguish loyal naturalized citizens from those who might pose a security risk is an essential part of getting that work done quickly and effectively.

Cold War standards and practices that broadly, at times automatically, denied clearances to those with extensive foreign contacts need to be refined to meet new realities. Toward that end, the President's National Security Advisor on December 29, 2005 issued a revised set of parameters designed to guide decision making by security clearance adjudicators across government. The revised guidelines give needed flexibility to clearance grantors in evaluating risks posed by foreign contacts and in considering factors that minimize or mitigate those risks.

Standard, uniformly applied adjudicative guidelines are one element of the larger effort to centralize and unify the process so clearances granted by one agency will be honored by others. Achieving that clearance reciprocity is mandated by provisions of the 2004 Intelligence Reform Act authored by this Committee. But it appears some departments, including the Department of Defense, have been slow to embrace the new standards. I look forward to hearing from our distinguished first panel today about efforts to implement the revised guidelines.

At a time when we need the unique technological, cultural and language expertise of the foreign-born, increased security concerns have made it harder than ever for some with family and business interests abroad to qualify for a clearance. That paradox is compounded by a still-broken investigative and adjudicative system plagued by delays and backlogs.

So we asked our second panel of witnesses to discuss foreign influence factors in the context of the end-to-end clearance process. In May, we heard testimony about a complete meltdown at the Defense Security Service, which briefly stopped processing contractor clearance applications altogether. As that incident illustrated, previous efforts to fix the security clearance process have produced what can only be charitably characterized as mixed results. Delays persist. And agencies still to not trust clearances granted by others.

A number of agencies, including some in the Intelligence Community, have chosen to avoid the lengthy delays and inefficiencies of an OPM-DSS system still addicted to paper and shoe leather. Instead, they deal directly with the same contractors hired by OPM, but allow them to use more modern, web-based investigative tools. That approach appears to achieve significant savings of time and money. I look forward to hearing industry's recommendations for process improvement in the handling of foreign influence factors and in the overall security clearance system.

Again, I want to welcome all our witnesses to today's hearing on a critically important national security issue.

Chairman TOM DAVIS. I would now recognize our distinguished ranking member, Mr. Waxman, for his opening statement.

Mr. WAXMAN. Mr. Chairman, I am glad we are holding another hearing on problems with the security clearance process. Earlier this year, we heard from national security whistleblowers whose clearances had been revoked in retaliation for reporting illegal activities occurring in their agencies. Six weeks ago, we heard about the problems caused when the Defense Department stopped processing clearance applications because they ran out of money.

And today's hearing highlights yet another serious problem, the arbitrary and inconsistent weighing of ties to foreign nations when determining whether to grant or deny clearances.

In making security clearance decisions, the first priority must be maintaining our national security. Yet some of our most talented citizens who are willing to place their knowledge of foreign cultures and languages at the service of the United States often have family and other connections to foreign nations.

Disqualifying such individuals and losing the valuable analysis and information they could provide may pose more of a risk to our national security than the theoretical security risk posed by their connection to foreign relatives.

Protecting national security requires us to strike the right balance and calls for a consistent transparent process.

The process in place now is anything but consistent. According to attorneys who handle security clearance cases, cases where applicants have similar ties to the same countries of origin reach different results without apparent rhyme or reason.

The administrative judges who hear appeals nearly always rule in favor of the government, and their decisions are not reviewable by the independent judiciary.

And ties to some countries are subject to heightened scrutiny without any rational process for assessing the true risks.

I am especially concerned about how ties to Israel are considered. In several cases that have been brought to my attention, government investigators have moved to revoke clearances of persons who have held high level clearances for years, even decade, because they have family or religious ties to Israel. Why these long standing connections which were fully disclosed to the government years ago suddenly cause the government to revoke clearances is unclear. It's similarly unclear why ties to some U.S. allies like Israel are disqualifying while ties to other allies like Great Britain or Canada are not.

And the problem is not just limited to Israel. Ties to other U.S. allies like South Korea also face heightened security.

What is most disturbing is that there seems to be no more formal process to consider input from the State Department or the intelligence community in weighing the risks posed by ties to particular nations.

Rather, the decision appears to be left to the whim of each administrative judge to decide whether a foreign country is a friend or foe without regard to official U.S. foreign policy.

I hope that today's hearing will guide us in what action Congress can take to inject some consistency and reason into the security clearance process.

Chairman Davis and I have been working together on these issues. After our previous hearing that revealed retaliation against national security whistleblowers, we introduced a bill that would restrict the arbitrary revocation of clearances, and it passed out of this committee on unanimous bipartisan vote, though it has not yet been allowed to go on the full House for a vote. I hope we can also work together to fix the problems identified in today's hearing.

I would like to thank the witnesses testifying today. I look forward to hearing about the progress that has been made in addressing the issues raised at our prior hearings and a full discussion of the problem that remain. Thank you.

[The prepared statement of Hon. Henry A. Waxman follows:]

Statement of Rep. Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
Hearing on "Can You Clear Me Now? Weighing Foreign Influence Factors in Security Clearance Investigations"

July 13, 2006

Mr. Chairman, I am glad we are holding another hearing on problems with the security clearance process. Earlier this year, we heard from national security whistleblowers whose clearances had been revoked in retaliation for reporting illegal activities occurring in their agencies. Six weeks ago, we heard about the problems caused when the Defense Department stopped processing clearance applications because it ran out of money. Today's hearing highlights yet another serious problem – the arbitrary and inconsistent weighing of ties to foreign nations when determining whether to grant or deny clearances.

In making security clearance decisions, the first priority must be maintaining our national security. Yet some of our most talented citizens, who are willing to place their knowledge of foreign cultures and languages at the service of the United States, often have family and other connections to foreign nations. Disqualifying such individuals – and losing the valuable analysis and information they could provide – may pose more of a risk to our national security than the theoretical security risk posed by their connection to foreign relatives.

Protecting national security requires us to strike the right balance – and calls for a consistent, transparent process. The process in place now is anything but consistent. According to attorneys who handle security clearance cases, cases where applicants have similar ties to the same countries of origin reach different results, without apparent rhyme or reason. The administrative judges who hear appeals nearly always rule in favor of the government, and their decisions are not reviewable by the independent judiciary. And ties to some countries are subject to heightened scrutiny, without any rational process for assessing the true risks.

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And the problem is not just limited to Israel. Ties to other U.S. allies, like South Korea, also face heightened scrutiny.

What is most disturbing is that there seems to be no formal process to consider input from the State Department, or the intelligence community, in weighing the risks posed by ties to particular nations. Rather, the decision appears to be left to the whim of each administrative judge to decide whether a foreign country is friend or foe, without regard to official U.S. foreign policy.

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I'd like to thank the witnesses testifying today. I look forward to hearing about the progress that has been made in addressing the issues raised at our prior hearings, and a full discussion of the problems that remain.

Chairman TOM DAVIS. Mr. Waxman, thank you very much.

Members will have 7 days to submit opening statements for the record. We now recognize our first panel.

You know we like to swear you in, if you would just raise your right hand, our first panel is Mr. Robert Andrews the Deputy Under Secretary for Defense Counterintelligence and Security, U.S. Department of Defense and Mr. J. William Leonard, the Director of Information Security and Oversight Office, National Archives and Records Administration. Raise your right hands.

[Witnesses sworn.]

Chairman TOM DAVIS. Thank you, please be seated. Your entire statement is part of the record. You will have a light in front of you. It turns green when you start, it will go orange in 4 minutes, it is red at 5. If you can try to keep your comments so we can get on the questions. We can put men on the moon. There are so many things this country can do but the security backlog continues to grow and it's hurting us. Our ability to get things done as from Mr. Waxman noted, and it's costing taxpayers a lot more money. I know people now with security clearances who don't have the skills, but they have the clearance so they are hired for the clearance and then they are trained and it's so inefficient and the taxpayers end up footing the bill. So I think you understand the problem.

Mr. Andrews, we will start with you, thank you for being with us,

STATEMENTS OF ROBERT ANDREWS, DEPUTY UNDER SECRETARY, DEFENSE COUNTERINTELLIGENCE AND SECURITY, U.S. DEPARTMENT OF DEFENSE; AND J. WILLIAM LEONARD, DIRECTOR, INFORMATION SECURITY AND OVERSIGHT OFFICE, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

STATEMENT OF ROBERT ANDREWS

Mr. ANDREWS. Good morning, sir. I am Bob Andrews, the Deputy Under Secretary of Defense for Counterintelligence and Security.

My office is responsible for implementing personnel security policy.

I know that this hearing focuses on the impact of foreign influence in security clearance investigations, but I do want to point out that there are other factors that go into the decision about a person's suitability to handle classified information.

But before I address that issue, I would like to share a few highlights on the status of the defense security service since my last appearance before this committee.

First, Congress approved our reprogramming request for $80 million. DSS has developed a spend plan for these funds to ensure we can continue to process clearances, and this plan ensures industry clearances through the end of the year.

Second, we have asked the DOD inspector general in conjunction with the OPM inspector general to conduct an audit of the investigation billing process. That audit is ongoing.

Third, we are conducting a baseline review of our automation systems to ensure they are meeting our needs and the needs of industry now and in the future.

Fourth, we have teamed with the information technology association of America on a pilot project to process clearances with greater efficiency.

And fifth, I am very confident in our new DSS leaders and their ability to strengthen the organization.

Now, back to the topic of the hearing, and let me give you some background.

There are approximately 3.2 million cleared personnel in government. Of that total, nearly 2.5 million are in DOD.

On an annual basis, DOD may handle over 600,000 clearance actions.

Security clearance process begins when a senior official determines that an individual requires access to classified information. The individual completes a questionnaire and it's submitted for investigation.

When the investigation is completed, results are sent to an adjudication facility. The Department of Defense has 9 facilities, adjudication facilities or CAFs. These are staffed by over 400 trained adjudicators. To ensure we have as much consistency as possible among the 9 facilities, my office chairs an oversight and policy review board made up of representatives from each CAF.

The adjudicator reviews the completed investigation and makes a determination whether or not to grant, deny or revoke access to classified information.

The adjudicative process examines a person's background to determine whether or not the that person's access to classified information poses a risk to national security.

I want to emphasize two points. First, that we make each decision on a case-by-case basis; and second, that we consider mitigating issues and circumstances as an integral part of the clearance process.

If the adjudicator decides to deny or revoke a process based on information review, the individual is afforded due process through the right of appeal.

The President, in 1997, issued the first guidelines used by adjudicators. This last December, as you pointed out, Mr. Chairman, the President issued a revised set of guidelines.

There are 13 of these guidelines which the adjudicator considers, the results of security investigation.

Two of these guidelines deal with foreign influence.

Now an investigation that turns up dual citizenship or close associations in foreign countries will trigger a closer examination to determine whether that individual has a foreign preference or allegiance.

I cannot, too strongly, emphasize that access to national security information is decided on a case-by-case basis based on a reasonable assessment of the risks to national security.

There are no automatic denials based on country.

An individual's religious affiliation plays no part in security clearance process.

We simply do not do that.

In the matter of foreign passports, I would further note that in August 2000, DOD issued a clarifying guidance concerning cases involving individuals' possession or use of a foreign passport.

Revised guidelines we are now implementing state that the possession of a current passport, current foreign passport may—I want to emphasize "may"—be a disqualifying position. The guidelines provide, however, that an individual can sufficiently mitigate the risk of national security by doing one of two things, voluntarily choose to surrender the passport or obtain official approval for its use from the appropriate agency of the U.S. Government.

The Department has taken several steps toward implementing the revised adjudicative guidelines, including the development of training coordination of new guidelines with the adjudication facilities to ensure a common and consistent understanding.

In the interest of time, I will elaborate on these steps during our question-and-answer period.

Mr. Chairman, we are making every effort to ensure the determinations of access to classified information are adjudicated fairly and balance the interest of the individual with the need to protect our national security interest.

Mr. Chairman, this concludes my statement.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Andrews follows:]

STATEMENT OF

MR. ROBERT ANDREWS

DEPUTY UNDER SECRETARY OF DEFENSE
FOR COUNTERINTELLIGENCE AND SECURITY

BEFORE THE
COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

ON

"CAN YOU CLEAR ME NOW?:
WEIGHING 'FOREIGN INFLUENCE' FACTORS
IN SECURITY CLEARANCE INVESTIGATIONS"

JULY 13, 2006

Good morning, Mr. Chairman. I'm Bob Andrews, the Deputy Under Secretary of Defense for Counterintelligence and Security. My office is responsible for implementing personnel security policy. This includes the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the President. I understand that this hearing focuses on the impact of foreign influence in security clearance investigations. I note at the outset of this hearing that "foreign influence" is but one factor in making a decision on whether a person is eligible for access to Classified National Security Information.

Some background – There are approximately 3.2 million cleared personnel within the government. Of that total, roughly 2.5 million are within DoD. On an annual basis, DoD may process over 600,000 clearance actions.

In managing such a large security program, the Department complies with executive orders, presidential issuances, and all applicable law to ensure that determining eligibility for access to classified information is uniform, efficient, effective, and timely.

The security clearance process begins with a determination by a senior official that an individual requires access to classified information for the performance of his or her duties. The individual completes a security questionnaire, and it is submitted for investigation. Upon completion of the investigation, the results are sent to an adjudication facility. The Department has nine central adjudication facilities - or CAFs. These are staffed by over 400 trained adjudicators. The adjudicator reviews the completed investigation and

makes a determination whether or not to grant, deny, or revoke access to classified information.

To ensure we have as much consistency as reasonable among the nine CAFs, my office chairs a policy review board made up of representatives from each CAF.

The adjudicative process examines a person's background to determine whether or not that person's access to classified information poses an unacceptable risk to the national security.

We predicate access to classified information on the individual meeting the adjudication guidelines. We make adjudication decisions based on the "whole person" concept. We consider reliable information about the person - past and present, favorable and unfavorable. We then determine each adjudication decision on a case-by-case basis.

I want to emphasize that we consider mitigating issues and circumstances as integral aspects of the clearance process.

If the adjudicator decides to deny or revoke a clearance based on the information reviewed, the individual is afforded due process through the right of appeal.

For military and civilian personnel: this process provides the individual with:

- a written explanation detailing why the clearance may be denied or revoked

- an opportunity to reply in writing
- an opportunity to appear personally and present evidence
- the right to be represented by counsel
- a written notice of the final decision, and
- an opportunity to appeal the decision to an agency panel.

For contractor personnel: The process for employees of government contractors is somewhat different, though very similar. Contractor employees are afforded an opportunity to question individuals who have provided information adverse to the employee whose clearance is at issue and an opportunity to bring witnesses to develop their case.

The adjudicative guidelines were first issued by the President in March 1997; and a revised set of guidelines have been re-issued in December 2005. DoD applies adjudicative guidelines to every case.

It is inevitable that application of certain criteria in the adjudicative guidelines may result in the loss or denial of access to classified information where there is evidence of foreign preference or allegiance. A person having dual citizenship, a foreign passport, or close associations in foreign countries could be at risk of being determined to have a foreign preference or allegiance. Each determination to grant access to national security information is decided on a case-by-case basis after the DoD adjudicators assess the risks to national security.

The guidelines that we follow do not identify any particular country to consider in making a negative determination of eligibility for clearance. There are no automatic denials based on country. Additionally, an individual's religious

affiliation plays no part in the security clearance process. That's simply not the operating procedures.

On the matter of foreign passports, I would further note that in August 2000, DoD issued clarifying guidance concerning cases involving an individual's possession or use of a foreign passport. The revised adjudicative guideline we are now implementing states that the "possession of a current foreign passport" may be a disqualifying condition. The only accepted mitigating factor is approval from the United States Government for the individual to continue to possess or use the foreign passport. As a result of the fair and consistent application of the guideline, an individual could sufficiently mitigate the risk to national security by doing one of the following two things: (1) voluntarily choose to surrender the passport, or (2) obtain official approval for its use from the appropriate agency of the United States Government. Again, mitigation of the risk of foreign preference is decided on a case-by-case basis.

The Department is in the process of implementing the revised Adjudicative Guidelines issued by the President this past December and will issue the new guidelines to all adjudicators. Toward this end, DoD has:

- developed a training program to address the changes in the guidelines. Of specific importance to the new training program are the revised factors to address changes in the security environment, including intelligence and terrorist threats, the global economy, and an increasingly diverse society;

- coordinated the guidelines internally with the CAFs to ensure common understanding of new terminology used in the guidelines;

- incorporated the Smith amendment into the DoD issuance of the revised guidelines (Note: The Smith amendment imposes additional security requirements only for DoD concerning the guidelines on criminal conduct, drug involvement, and psychological conditions); and

- begun updating the Adjudicator's Desktop Reference and the adjudication module in the Joint Personnel Adjudication System.

Once DoD is assured that the adjudicators are trained, we will transition the case determinations to the criteria in the revised guidelines. At that time, all instances in which the Department seeks to revoke or deny a clearance will be checked against the new adjudication guidelines to ensure that the decision is consistent with the new guidelines.

Mr. Chairman, we are making every effort to ensure that determinations of access to classified information are adjudicated fairly and balance the interests of the individual with the need to protect our national security interests.

Mr. Chairman, this concludes my statement.

Chairman TOM DAVIS. Mr. Leonard.

STATEMENT OF J. WILLIAM LEONARD

Mr. LEONARD. Thank you, Mr. Chairman, Mr. Waxman, I want to thank you for holding this hearing on efforts to improve personnel security process. The classification system and its ability to restrict the dissemination of information, the unauthorized disclosure of which could result in harm to our Nation and its citizens represents a fundamental national security tool at the disposal of the government and its leaders to provide for the common defense.

The protocols governing access to classified information are established by Executive Order 12968. Pursuant to this order, such access shall be granted only to, "individuals who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicate loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion and willingness and ability to abide by regulations governing the use, handling and protection of classified information."

In order to ensure consistent eligibility determinations from agency to agency, this Executive order required the issuance of investigative standards and adjudicative guidelines. Revisions to the adjudicative guidelines were approved by the President in December 2005 for immediate implementation. These revisions represented the result of an interagency process which recommended that all of the basic considerations for approving access to classified information be retained.

However, based upon the changing national security environment, it was recommended that the criteria be elaborated both in terms of the actions that could raise security concerns and the factors that could mitigate such concerns. It should be noted that a number of the revisions included in the adjudicative guidelines were intended to address a concern expressed by this committee and others with regard to personnel security applicants with certain foreign connections.

Specifically, a number of per se criteria such as the use of a foreign passport or voting in a foreign election that previously rendered an applicant ineligible for a security clearance have been modified to take into account additional factors that could mitigate such issues under certain circumstances. These and other changes were implemented, in part, in recognition of the increasing globalized environment in which our national security concerns must be addressed.

The revised adjudicative guidelines are intended to provide sufficient flexibility to accommodate this reality without compromising national security.

In addition to the above, Executive Order 12968 contains two fundamental principles, reciprocity of access eligibility determinations and the authority of agency heads or designated senior agency officials to grant exceptions to eligibility criteria in order to further substantial national security interests, two imperatives that contain inherent tension but are not necessarily incompatible.

While reciprocity of access eligibility determinations require strict adherence to investigative standards and adjudicative criteria, classification and personnel security policy clearly recognizes that it may be in the national interest to grant access to classified information to limited individuals who are otherwise not authorized or eligible for access.

Executive Order 12968, in particular, recognizes the authority of an agency head to waive requirements for granting access to classified information to further substantial national interests.

An example of this is the frequent challenge many agencies confront today in developing and maintaining cadres of cleared linguists in many specialty languages. The key is that each time a waiver of exception is granted, it should be an informed judgment which takes into account the advantage to the national interest that may accrue, as well as the potential increase in risk to national security information.

Such latitude, of course, could come at a price and included in that price could be reciprocal recognition of security clearances. As such, what is required is proactive management and oversight by individual agencies in order to achieve reciprocity by ensuring strict adherence to the standards in the vast majority of cases, while at the same time, allowing sufficient latitude to meet unique national security demands in other areas.

In order to enforce the imperative reciprocity while recognizing the need to allow latitude in addressing other national security demands, a number of initiatives have been started under the direction of the Security Clearance Oversight Group, led by the Office of Management and Budget.

I have detailed some of these initiatives in my written testimony.

In closing, I want to emphasize the ongoing interagency efforts that are currently underway in order to strengthen the processes relating to determining eligibility for access to classified information. Included in these is a need to focus on leveraging technology to the point that through greater reliance on automated data bases, we can diminish dependence on the current half century-old process of conducting field investigative work.

Research and pilot efforts to this end are currently underway in a number of such agencies. These efforts will ensure continuing process and improvements even after the current statutory case completion goals are achieved.

Again, I thank you for inviting me here today, Mr. Chairman. I would be happy to answer any questions that you or Mr. Waxman may have.

[The prepared statement of Mr. Leonard follows:]

Formal Statement
J. William Leonard
Director, Information Security Oversight Office
National Archives and Records Administration
Before the Committee on Government Reform
U.S. House of Representatives
July 13, 2006

Chairman Davis, Mr. Waxman, and members of the committee, I wish to thank you for holding this hearing on efforts to improve the personnel security process as well as for inviting me to testify today.

By section 5.2 of Executive Order (E.O.) 12958, as amended, "Classified National Security Information," the President established the organization I direct, the Information Security Oversight Office, often called "ISOO." We are within the National Archives and Records Administration and by law and Executive order (44 U.S.C. 2102 and sec. 5.2(b) of E.O. 12958) are supervised by the Archivist of the United States, who appoints the Director, ISOO with the approval of the President. Under Executive Orders 12958 and 12829 (which established the National Industrial Security Program) and applicable Presidential guidance, the ISOO has substantial responsibilities with respect to classification of information by agencies within the Executive branch.

The classification system and its ability to restrict the dissemination of information, the unauthorized disclosure of which could result in harm to our nation and its citizens represents a fundamental national security tool at the disposal of the Government and its leaders to provide for the "common defence." The protocols governing access to classified national security information are established by E.O. 12968, "Access to Classified Information." Pursuant to section 3.1 of this order, such access shall be granted only to "individuals who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information". The order goes on to state that eligibility "shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security".
In order to ensure consistent eligibility determinations from agency to agency, E.O. 12968 required the issuance of investigative standards and adjudicative guidelines. These standards and guidelines were originally issued in 1997; the investigative standards were modified in December 2004 and the adjudicative guidelines were modified in December 2005.
The December 2005 revisions to the adjudicative guidelines were approved by the President for immediate implementation. They represented the results of an interagency process, which recommended that all of the basic considerations for approving access to classified information -- allegiance to the United States, foreign influence, drug and

alcohol abuse, criminal behavior, psychological instability, and so forth, be retained. However, in each case, based upon the changing national security environment, it was recommended that the criteria be elaborated, both in terms of the actions that could raise security concerns and the factors that could mitigate such concerns.
It should be noted that a number of the revisions included in the adjudicative guidelines were intended to address a concern expressed by this Committee and others with regard to personnel security applicants with certain foreign connections. Specifically, a number of "per se" criteria, such as use of a foreign passport or voting in a foreign election, that previously rendered an applicant ineligible for a security clearance have been modified to take into account additional factors that could mitigate such issues under certain circumstances. These and other changes were implemented, in part, in recognition of the increasing globalized environment in which our national security concerns must be addressed. The revised adjudicative guidelines are intended to provide sufficient flexibility to accommodate this reality without compromising national security.
In addition to the above, E.O. 12968 contains two fundamental principles – reciprocity of access eligibility determinations and the authority of agency heads or designated senior agency officials to grant exceptions to eligibility criteria in order to further substantial national security interests – two imperatives that contain inherent tension but are not necessarily incompatible.

On the one hand, reciprocity of access eligibility determinations requires strict adherence to investigative standards and adjudicative criteria. E.O. 12968 is very clear when it states "background investigations and eligibility determinations conducted under (the) order shall be mutually and reciprocally accepted by all agencies." The imperative of reciprocity has been further emphasized by Title III of Public Law 108-458, "The Intelligence Reform and Terrorism Prevention Act of 2004" as well as Executive Order 13381, "Strengthening Processes Relating to Determining Eligibility for Access to Classified National Security Information."

On the other hand, classification and personnel security policy clearly recognizes that it may be in the national interest to grant access to classified information to individuals who are otherwise not authorized or eligible for access. For example, E.O. 12958 includes provisions that allow agency heads or designees, in an emergency, when necessary to respond to an imminent threat to life or in defense of the homeland, to authorize the disclosure of classified information to an individual or individuals who are otherwise not eligible for access. Likewise, E.O. 12968 recognizes the authority of an agency head to waive requirements for granting access to classified information to further substantial national security interests. Examples of the latter include the frequent challenge many agencies confront today in developing and maintaining cadres of cleared linguists in many specialty languages. Oftentimes, native speakers of some of these languages may have foreign connections which otherwise would make them ineligible for a security clearance. However, many agencies avail themselves of the latitude allowed in the Order and grant exceptions and waivers to clearance eligibility criteria in order to avail themselves of a critical national security skill which otherwise may be in short supply. In fact, it is not an uncommon occurrence for intelligence community agencies to grant a waiver to the requirement that prohibits granting access to sensitive compartmented

information to individuals with non-U.S. citizen immediate family or non-U.S. citizen cohabitants. The key, however, is that each time a waiver or exception is granted, it should be an informed judgment, which takes into account the advantage to the national interest that may accrue at the same time the risk to national security information that may increase.

Such latitude, of course, comes at a price, and included in that price can be reciprocal recognition of security clearances. Reciprocity guidelines clearly state that if the existing access eligibility determination is based upon a waiver or deviation, or if access is otherwise subject to conditions, reciprocal recognition of security clearances between agencies is not required. However, with more than 3 million active access eligibility determinations in effect, reciprocity standards are written in order to address the most common conditions and situations. Americans have every right to expect that an access eligibility determination made on their behalf by one Executive branch agency will be reciprocally and immediately recognized by all other agencies provided it was not granted under a waiver, deviation or condition. As such, what is required is proactive management and oversight by individual agencies in order to achieve reciprocity by ensuring strict adherence to standards in the vast majority of cases while at the same time allowing sufficient latitude to meet unique national security demands in other areas.

In order to foster the imperative of reciprocity while recognizing the need to allow latitude in addressing other national security demands, a number of initiatives have recently been undertaken under the direction of the Security Clearance Oversight Group led by the Office of Management and Budget (OMB). First, an interagency group known as the "Collaboration Forum" has been established to allow professional adjudicators from all Executive branch agencies to collaborate on common issues. It is designed to increase familiarity with processes, procedures and issues confronted by individual agencies, and build confidence in each other's adjudicative decisions. Included in this are the circumstances under which agencies grant waivers and exceptions to eligibility criteria, to include in the area of foreign preference, in order to meet other national security demands. The forum has held several meetings to date and substantive issues, to include potential policy issues, have been identified for resolution.

In addition, under the auspices of the Collaboration Forum, and under the leadership of the Director of National Intelligence's (DNI) Special Security Center (SSC), a Personnel Security Reciprocity Review Program has been initiated. This program was undertaken in recognition of the fact that reciprocity depends on consistency of adjudicative decision-making across the government. Under the Personnel Security Reciprocity Review Program, teams from the DNI's SSC, augmented at times by representatives from other agencies, will visit and review most Executive branch adjudicative facilities by the end of the calendar year. Visits are documented and action items are identified and assigned to appropriate individuals and/or agencies along with meaningful milestones for completion. The overall objective of the reviews is to identify inconsistencies in application of policy and to provide a mechanism (through the Collaboration Forum, the Security Clearance Oversight Group, or the Information Security and Records Access

Policy Coordination Committee of the National Security Council) for resolution. To date, more than half a dozen reviews have taken place.

In closing, I want to emphasize the ongoing interagency efforts that are currently underway in order to strengthen the processes relating to determining eligibility for access to classified national security information. Included in these is the need to focus on leveraging technology to the point that we can diminish reliance on the current half-century-old process of conducting field investigative work through greater reliance on automated use of databases. Research and pilot efforts to this end are currently underway in a number of agencies. These efforts will ensure continuing process improvements; even after the current statutory case completion goals are achieved.

Again, I thank you for inviting me here today, Mr. Chairman, and I would be happy to answer any questions that you or the subcommittee might have at this time.

Chairman TOM DAVIS. Thank you. I am going to start questioning on our side with Mr. Duncan.

Mr. DUNCAN. Well, thank you very much, Mr. Chairman, and I have just a couple questions. No. 1, I am told by staff that this 190,000 backlog while that sounds very high 2 or 3 years ago it was much higher, is that correct? That it reached 300,000 at one point?

Mr. ANDREWS. It was yes, sir, it was very high.

Mr. DUNCAN. And what is the, lowest it's been in, say, the last 5 years?

Mr. ANDREWS. Mr. Duncan, I can't give you that answer right now. I could provide it for you for the record. I think it would be of great interest to have that.

Mr. DUNCAN. Let me ask you this: The title of this hearing is, "Can You Clear Me Now?" weighing foreign influence factors in security clearance investigations.

Do either one of you feel there is undue foreign influence in these investigations at this time?

Mr. ANDREWS. I don't, sir.

Mr. LEONARD. Mr. Duncan, I mentioned in my prepared, my oral remarks that, the President recently approved revisions to the adjudicative guidelines since December of last year. A significant part of those revisions to the guidelines was actually to provide greater flexibility with regard to clearing individuals who may have foreign connections. And again, this is in recognition of the increasing globalized environment that we operate in, not only as a government, but as a Nation, but as our industry as well, too. So there is greater flexibility today than there was just 6 months ago with respect to the adjudicative criteria.

Mr. DUNCAN. Well, I also understand that there is some concern about whether those revised guidelines are being applied, and specifically, there was at least one report that said that the Department of Defense Office of General Counsel has possibly instructed, given instructions not to apply those revised guidelines. Is that correct in any way?

Mr. ANDREWS. No, sir that is not correct.

Mr. DUNCAN. So that is not happening?

Mr. ANDREWS. No. We are pushing as fast as we can to implement those guidelines, sir.

Mr. DUNCAN. When you say pushing as fast as you can, does that mean some of they have implemented or all of them or none of them?

Mr. ANDREWS. We are in the process of implementing them now, sir.

We have been—there are 4 factors that we are working on right now, first is training our adjudicators. As I mentioned, we have over 400 adjudicators, and a training program for them we have the Department of Defense is implementing or accommodating the Smith amendment into the guidelines which we have to do which no other department has to do.

And, we are making certain that our automated desk reference, the on-line system that adjudicators use is up and running. We have a target date of full implementation by first of September, sir.

Mr. DUNCAN. Well, I am also old told that part of the impetus for this hearing is the Legal Times, a major legal publication, highlighted a case in which a Korean American defense contractor had what are described as tremendous difficulties obtaining his security clearance. And he went through, went through the whole system, the whole process and an administrative law judge ruled in his favor.

Are you familiar with that case and is that just an unusual case, or what is the ordinary situation? How long does it take in an average type case to get these clearances? Or is there such a thing?

Mr. ANDREWS. I am not familiar with that case, sir. I will have to research it.

Mr. DUNCAN. Well, what, is there an average length of time that this process is taking or does it just vary widely from case to case?

Mr. ANDREWS. It's going to vary, Mr. Duncan. Generally, the secret and top secret clearances, top secret clearances may take over as long as a year. And they shouldn't.

Mr. LEONARD. If I could add to that, Mr. Duncan, one of the things that this committee was responsible for was some statutory timeframes, one of which is the adjudication process, and if I recall correctly, 80 percent of all clearances are required to be adjudicated within 30 days by a certain date.

That recognizes that, you know, 20 percent of the cases will be the complex cases. So the simple cases should be able to be adjudicated in 30 days, those with issues they will take longer periods of time.

Mr. DUNCAN. Is that requirement fairly accurate? As far as those percentages?

Mr. LEONARD. Agencies are not at those goals yet but they are making process toward getting there.

Chairman TOM DAVIS. Let me just, before I recognize Mr. Waxman, pursue, Mr. Andrews, you are not familiar with a case of the Korean American defense contractor who went through the adjudication system at DOHA, the administrative law judge ruled in his favor, and then the Department of Defense appealed the decision, which then went to a three-judge appeals panel, which also ruled in the contractor's favor, and again, DOD threatened to appeal the case.

Finally the contractor received the clearance, but it seems in this case, the bar was set extraordinarily high for someone whose only offense seemed to be that he had relatives in South Korea, which I might add, is a very strong ally of this country and North Korea to the north is a huge problem in the world.

If you are not familiar with the case, there is an article in The Legal Times. I would like you to come back and just find out where why the Department is so concerned in a case like this, why it so doggedly pursues appeals when the expert judges rule that no significant threat was posed by granting the clearance. There may be something we don't know about.

Mr. ANDREWS. We will come back to you, sir.

Chairman TOM DAVIS. We will do that. We will hold you to that. Mr. Waxman.

Mr. WAXMAN. I mentioned in my opening statement that I was concerned about how a sudden change to family ties to Israel are

being considered in the clearance process. And I would like to describe a few cases and ask about the policies that govern these types of cases. One engineer received a security clearance more than 7 years ago to work on a fighter jet project. He has lived in the United States for 25 years, but was born in Israel and has dual citizenship. All of this was fully disclosed when he first applied for a security clearance 7 years ago.

Earlier this year, the government moved to revoke his clearance citing his dual citizenship and the fact that his mother and siblings lived in Israel.

In two other separate but similar cases, long-time State Department employees had clearances revoked with officials citing concerns about travel to Israel in past years.

But it had been fully disclosed. And there have been more cases with similar circumstances, people have always had ties to Israel that were fully disclosed a year ago, who have maintained security clearances without any incident for years are suddenly having clearances revoked.

And according to several lawyers, government attorneys have cited the indictment of two employees from the American Israel Public Affairs Committee as a grounds for revoking clearances for people with family and religious ties to Israel.

Mr. Andrews what has prompted this sudden scrutiny of connections to Israel and are these reports about the AIPAC issue accurate?

Mr. ANDREWS. Mr. Waxman, I would like to ask that the individual cases that obviously concern you and other members of the committee, be sent to us for you know; for analysis. I can't sit here and tell you about each individual cases. I don't know the details.

Mr. WAXMAN. This is the first time that it's been brought to your attention that there have been increases in security clearance withdrawals on the grounds that there were ties to Israel by people who had security clearances?

Mr. ANDREWS. The first time it was brought to my attention, sir, was to—my attention was a letter from Mr. Dent of this committee, who sent to us an article out of Insight Magazine, in which claimed that the Department of Defense imposed loyalty tests on American Jews, and that is really the first.

Mr. WAXMAN. And did you respond to his letter?

Mr. ANDREWS. Yes, sir.

Mr. WAXMAN. Could we have a copy of that response, certainly, for the record, if you don't have it with you right now.

Mr. ANDREWS. I don't have it with me, and I know that Mr. Dent, probably, has a copy.

Chairman TOM DAVIS. Could you make a copy of that available to the committee? That would be great. Specifically this one.

Mr. WAXMAN. What was he told? Was he told it wasn't true? It looks like I do have a copy of the letter. It says this is a followup to our recent conversation concerning the accuracy of media reports, the allegation is untrue, as I promised, enclosing a copy of the standardized Federal adjudication guidelines, guidelines are not country specific, and then people get due process.

I am not reading it precisely, but that is generally the answer that I see, that it's not true, the allegations aren't true, and they

have a right to appeal and that it appears from this answer from you, that it's not a problem.

But did you check into it to see whether there was, in fact, a problem that brought about the concerns expressed by Congressman Dent?

Mr. ANDREWS. Yes, sir, I have.

Mr. WAXMAN. And you found it not to be true?

Mr. ANDREWS. I found it not to be true.

Mr. WAXMAN. I am going to give you the information that we have received.

Mr. ANDREWS. Please.

Mr. WAXMAN. Because I think it's more important that if we raise the issue, we get an investigation by you, not just a letter saying it's not true.

The AIPAC case, do you know of any reason why that should be invoked to deny people security clearances?

Mr. ANDREWS. I am not certain that it was invoked to deny security clearance.

Mr. WAXMAN. Was it invoked not to grant a security clearance?

Mr. ANDREWS. I am not certain that it was, sir.

Mr. WAXMAN. Do you know whether it has been involved at all in security clearance questions?

Mr. ANDREWS. I am certain it probably has.

Mr. WAXMAN. And why would it be?

Mr. ANDREWS. I think it would be involved, sir, as a indication that you have to look at ties and the relationships of each individual case, not on the basis of religion or country, but what was substantively happening in that case.

Mr. WAXMAN. You are talking about the case of the applicant? You are talking about the case of the applicant himself or you are talking about the AIPAC case?

Mr. ANDREWS. No, I am talking about the case of the applicant himself.

Mr. WAXMAN. Why would the AIPAC case that involves an indictment and trial that hasn't even yet been held on allegations that they did something improper affect another person who happens to have ties to Israel or was Jewish?

Mr. ANDREWS. I don't think it did.

Mr. WAXMAN. I thought you just said that you thought that it would be relevant.

Mr. ANDREWS. No. The issue of whether anybody's foreign relations and contacts have relevance in security clearance investigation, these are relevant things to talk about and important to think about.

Mr. WAXMAN. Well, if the ties to Israel which is one of our allies, why would it be relevant.

Mr. ANDREWS. The ties to any foreign country are relevant. We do not, Mr. Waxman, as I said before, have a list of good countries and bad countries.

Each case of a foreign relationship, whether it's with Israel or with Ireland, is looked at in a way to determine that the applicant is not going to be put in a position of getting pressure put on him or irresponsibly giving away national security information.

Mr. WAXMAN. So would that mean that anybody who has a foreign relative, close foreign relative, might be—should be denied a security clearance?

Mr. ANDREWS. No, it doesn't. It means that relationship will be examined and looked at to see if it poses a risk.

Mr. WAXMAN. Give me an example of a relationship that you think would raise a red flag.

Besides the two I's, Ireland and Israel, tell me examples you can think of that would raise a concern about a security clearance.

Mr. ANDREWS. I think I would be concerned if I were an adjudicator, and I don't like to play hypothetical questions, but I would have to be concerned if I were an adjudicator and opened the file and found out that Sheehan McFagus had relatives in the IRA.

Mr. WAXMAN. And how about in Israel? I don't know of examples of—I know someone in Israel. Give me an example of something that would raise a red flag.

Mr. ANDREWS. I think perhaps financial ties to an Israeli company that is competing for a U.S. Government contract. I mean, there are all kinds of things. All this does is illustrate my contention that it's a case-by-case basis, sir.

Mr. WAXMAN. But is there a consistent standard? I know my time has expired. Is there a case-by-case feeling?

Mr. ANDREWS. I know what you are reaching for, but you get into, this we get caught in this thing of consistency is the hobgoblin of small minds. We can't have a checklist for these adjudicators and say if this guy has X amount of dollars involved in a defense contract in Cairo, I mean, you just can't do that in the name of consistency.

In the name of consistency, though, sir, I think you are entitled to see some guidelines of these are the general baskets in which we put things and look at them when we make an individual decision.

But one size doesn't fit all, is what I am saying.

Mr. LEONARD. Can I contribute something just from an overall policy point of view, Mr. Waxman? The recent revisions to the adjudicative guidelines that the President approved in this particular area were intended, as I said, to increase flexibility and, in essence, what they want to focus on is there a situation where we can expect that an individual will have to choose between the interests of the United States and the interests of a foreign interest.

That is the focus. And even still, even if there is a possibility of that, the guidelines were further modified to provide a mitigation—and this goes to maybe some of the examples you cited—where there is every indication that the sense of loyalty to the foreign interests is minimal or that there are deep and long-standing relationships and loyalties to the United States that is expected to resolve any potential conflicts in the interests of the U.S. interest.

Those are two examples of how the policy, the guidelines have been specifically revised back in December, to try to address these issues and to provide greater flexibility and greater guidance and do away with the per ses.

Mr. WAXMAN. May we just get the guidelines for the record?

Chairman TOM DAVIS. Frankly, what Ralph Waldo Emerson said was a foolish consistency is a hobgoblin of small minds, not a con-

sistency. There is a difference there. And that is the difference that Mr. Waxman is trying to ask, is how is this carried out, Mr. Dent.

Mr. DENT. Thank you, Mr. Chairman I came in during Mr. Waxman's interrogation, and we had spoken yesterday, Mr. Andrews, Secretary Andrews, regarding just a blog site that was pointed out to me by some constituents who had said that the DOD, for whatever reasons, was denying clearance to American Jews who may have had ties to Israel. You and I had spoken, and you said that is really not the case and that there is no specific bias against American Jews, for example, when it comes to security clearances, we have no specific prohibition against any particular set of people in this country, as I understand it.

Mr. ANDREWS. Well, I think any religion, no.

Mr. DENT. The other question deals with a general issue, if somebody, for example, would adopt a child from another country, China or Russia, fairly common, seeks a security clearance, you would probably investigate that issue, would you not?

Mr. ANDREWS. I think it would be noted, Congressman, and in the case of the child himself or herself, obviously the citizenship of the child would be irrelevant in a case like that.

Mr. DENT. I have been told that is an issue, at least a point of tension.

Mr. ANDREWS. Well——

Mr. DENT. There is nothing wrong with it, I just want to point that out.

Mr. ANDREWS. It's a case of we want to know if we're going to give you access to classified information we want to know about your foreign contacts and your foreign trips, travels, relationships, in toto.

And if part of that is, I went to China, I went and adopted a child, that would be in there.

Mr. DENT. Another question, too, I guess as it related to the Israeli situation, and I just want to be able to get back to my constituents and allay them that there is not a specific bias or prohibition against Jewish Americans who may have ties or family or friends in Israel that seek security clearances, that they can go through the process and be treated like every other American. Is that a safe question?

Mr. ANDREWS. Yes, when I got the invitation to come down here, I asked some of our people, I said is it possible to build a profile of how we look at people by religion, and we don't. We don't do that.

So it's hard to find out who is Jewish, who is Irish, who has an Israeli background.

Mr. DENT. And I guess some other questions I have in response to the committee's June 14th inquiry about implementation of new guidelines, you said that before DOD can apply those guidelines to adjudication of clearances for contractors, DOD had to take appropriate actions to comply with the Administration Procedures Act.

You use that phrase twice. What are those appropriate actions and do they include formal rulemaking?

Mr. ANDREWS. I was talking about the Smith amendment that applies only to the Department of Defense, which sets up certain adjudication considerations that don't apply to other departments

of government. And, so that, we have had to work that in to our implementing those guidelines as well, so it's sort of a different kettle of fish for us. And as I mentioned before, of the 3.2 million people who have security clearances in America, 2.5 million of them belong to us. So it's a big job to do that.

Mr. DENT. And just one other thing too, with respect to that rulemaking, how long does that usually take, on the rulemaking side? You were talking about those appropriate actions, I asked you about the, does that include a formal rulemaking and how long about will that take ordinarily?

Mr. ANDREWS. About 30 days.

Mr. DENT. 30 days?

Mr. ANDREWS. Yes, sir.

Mr. DENT. And during that time, will DOD use one set of standards for government employees and another for contractors?

Mr. ANDREWS. No, we don't.

I will point out, however, that in the appeals process the government people, both military and civilian, do not have the—are not—cannot bring outside counsel in; however your civilian contractors can bring outside counsel in.

Mr. DENT. Thank you Mr. Andrews, and I did want to thank you for your letter you sent to me dated today the 12. I appreciate that.

Mr. ANDREWS. We are also including full copies of the adjudication guidelines too with that. That will be coming in.

Mr. DENT. Thank you very much, and Mr. Chairman, I yield back.

Chairman TOM DAVIS. Thank you. Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman and let me also thank the witnesses here today.

And I am interested in following up maybe beyond this hearing in terms of the criteria, I know we are going to get a list of the criteria, I do remember a number of years ago I had a constituent who was a Greek American who had a dual citizenship which is also permitted by Greece and ended up going through really a terrible process here. And I am interested I guess, I guess before looking at the guidelines, let's say you do have somebody who is a dual citizen, has dual citizenship. How do you determine, I mean, someone a dual citizenship obviously has connections to more than the United States. But that doesn't mean that they have any less of a loyalty to the United States. There are various reasons people would want to maintain a dual citizenship. I guess the question is, what factors would, in fact, disqualify you under those circumstances?

Mr. ANDREWS. Right now, the fact of dual citizenship is a disqualifier.

Mr. VAN HOLLEN. So if you choose you have to choose between——

Mr. ANDREWS. You have to choose your country, sir.

Mr. VAN HOLLEN. I understand that. But there are obviously advantages in terms of being able to hold another passport things like that, but the rule right now is you choose your citizen, period.

Mr. ANDREWS. On the passport issue, you can hold another passport provided the U.S. Government agency to whom you are going to go work, State Department, DOD or whatever, permits that.

Mr. VAN HOLLEN. In this case, if I recall correctly, they decided to drop their Greek citizenship, their—that portion of the dual citizenship.

Is that disqualifying if you had once held dual citizenship?

Mr. ANDREWS. If you give up your passport or you give up your dual citizenship in that other country——

Mr. VAN HOLLEN. You then become eligible.

Mr. ANDREWS. You are all right.

Mr. VAN HOLLEN. Just on the general issue of the backlog and security clearances and the recommendations that were made by the 9/11 Commission and others, and I'm sorry I missed your opening comments, but where are we on that? In other words, the recommendations I understood it was to try to have some kind of uniform standard policy, so we don't have multiple agencies with their own standards and none of them trusting the degree of competence of the others, it just seems to make sense as a national government to have these uniform standards. Where are we on that?

Mr. ANDREWS. Well, you have two real questions on that one is the backlog, which is sort of like the elephant that is always in the room when everybody meets on these issues. And I have to defer to my colleagues at OPM, because they are the keepers of the backlog.

In terms of consistency across the board, we are still working on that.

I don't think the issue of reciprocity is as big a problem as people make it out to be.

We do have, our NSA does have different investigative requirements for its people.

But I think that is probably very wise thing, given the sensitivity of what, some of the things they do.

Mr. LEONARD. If I can add something, one of the things I do have an opportunity to do is actually chair an interagency working group on reciprocity to focus on that one particular issue. And I can say we are making process. As a matter of fact, just within the past week, I believe, we have been able to narrow down to the bare minimum the authorized exceptions to reciprocity with respect to special access programs which has been one toughest nuts to crack.

The challenge is to get that guidance now down to the implementation level. The next several months will tell, in terms of how successful we are at that. But we have been making progress. I believe there is clear guidance now with respect to what is an authorized exception to reciprocity and what is not, and they have been narrowed. And we should see the, what I still think is an inordinate number of instances of non reciprocity to be reduced in the future but there is still a ways to go.

Mr. VAN HOLLEN. Mr. Andrews' response was he didn't see it to be that many obstacles in the way to this. Can you give us a timeline when you would be able to have, with the exception of NSA, Mr. Andrews mentioned may have a special status, can you give us a time line as to when you will complete that work?

Mr. LEONARD. Well, again, from a guidance point of view, the work is completed. What is left is the hard part, the implementation part. And that is then up to the agencies to get that down to the working level and make sure that they understand, they com-

prehend, they have access to, they have knowledge of and they understand the latest guidance. I would expect that should not take more than several months, a couple of months. That would be my expectation.

But then again, I don't have an agency that I am responsible for.

Mr. VAN HOLLEN. How are things going at DOD in terms of the implementing that, implementing the reciprocity agreements?

Mr. ANDREWS. Well, the new guidelines as I mentioned we are hoping to have those implemented by the first of September, the adjudication guidelines.

In terms of total reciprocity, sir, I think that you will probably always have something to work on and gnaw on. There will always be some cultural and organizational things that get in the way.

One of the things that impressed me coming back into government was when I was at CIA in the 70's, I had about five or six different badges for different parts of building out there at Langley, and I came back into government, and I have this one badge here that gets me into DIA, that gets me into CIA and, who knows where else? I certainly—they won't tell me. But it's one badge, one pin number, and to me that is the heart of success.

Mr. VAN HOLLEN. That is some progress. I think you would agree we have a ways to go.

Mr. ANDREWS. We do.

Mr. VAN HOLLEN. I thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you. That is it.

I have a few questions. In testimonies submitted for the record that we put in today by Sheldon Cohen, who is an attorney who represents clients before DOHA, he cites a study that he has just completed and he analyzes 898 appeals before the appeals board at DOHA between 2000 and 2006.

He found a statistically incredible slant in favor of government appeals.

Of appeals submitted by applicants, whose clearances were denied, less than 1 percent of the decisions were reversed; whereas in cases where DOD appealed in granting a clearance, it sees 74 percent were reversed.

He goes on to note that a foreign preference influence case where DOD appealed the granting of an appeal, 92 percent were reversed. Any thoughts on that?

Does that seem right to you?

Mr. ANDREWS. Sir, we will have to get back to you on that, on the analysis of that.

Chairman TOM DAVIS. Industry has expressed concern that since GAO criticized DOD for favorably adjudicating some cases where a minimal amount of investigative information was missing, the so-called closed pending cases, DOD no longer adjudicates any other such cases, but rather sends them back to OPM where they pile up and add to the backlog. OPM testified before this committee on May 17th that its backlog of closed pending cases has been growing, and at a time, stood at 70,000.

What is your understanding of what currently happens to investigative files where just a minimal amount of information is missing? Are they being adjudicated by DOD on a risk management basis, or are they just send them back pending approval.

Mr. ANDREWS. Sir, again it—I have to come back to you with an answer. It depends on what is missing.

Chairman TOM DAVIS. Minimal, we are talking minimal things. We are not talking about big major gaps. We are just talking about, I would like to get your impressions on the record and you can get back to me on this.

Mr. ANDREWS. Yes, sir, I will.

Chairman TOM DAVIS. I think it's important just to remind you I know from where you sit and other people sit. It's kind of a job, you want to make sure these applicants, all the I's are dotted and T's crossed, but for taxpayers, for industry, but particularly at the end of the day for taxpayers, what they are doing is they are paying a huge premium for people who have security clearances. And they are doing that because the backlog is so great that just the clearance itself adds a premium to their hiring.

And we end up paying for that.

And in other cases, just means the mission isn't going forward, and in some cases, these are vital missions and in some cases, that we are talking about in the contract area where there is some foreign country involved, it can be language interpreters, it can be people who, people who can listen in on conversations and aren't available, this can be very, very vital. So I want to stress how important this is that this backlog get cleared and that we walk into this with a can do attitude. When I hear reports which—you have, I think, alleviated our fears today, but when I hear reports that the DOD office of general counsel says don't apply these new guidelines and that is, by the way, is what DOHA chief administrative judge is reported to have said, that they had been specifically instructed not to apply the new guidelines, it gets disturbing because we want to do this in a can-do attitude, how can we get through this, if there are issues and you are not getting the tools you need, we need to move forward because at the end of the day, there is a huge frustration and the taxpayers end up picking up the tab.

Mr. Leonard, we let you off the hook, so I am going to ask you a couple of questions. In looking at the revised adjudicative guidelines that were issued by the NSC, it seems there is additional flexibility granted to government adjudicators might improve the quality of the clearance decisions being made. For example, the new regulations allow adjudicators to distinguish between foreign countries rather than just treating them as black boxes equal in threat.

In your reading of the revised guidelines, what has changed from the old version vis-a-vis foreign influence and preference?

Mr. LEONARD. Yes, Mr. Chairman, you are absolutely correct. Previously, there were some provisions in the old guidelines that were interpreted as a per se situation, possession of, a mere possession of a foreign passport could be per se a disqualifier, voting in a foreign election could be per se disqualifier. For all intents and purposes those per se language has been done away with, greater flexibility has been introduced. And as I mentioned before the key that we try to focus on in these guidelines with respect to foreign connections is, is there a basis to believe that this individual will be in a position where they will have to choose between the U.S. interests and a foreign interest? And but even in that case, there

is a further mitigator that allows that if, through a recognition, that their foreign connection is so minimal or the ties and loyalty and connections to the United States run so deep that there is every expectation that the individual will resolve the potential conflict in the U.S. interests, that is a mitigator for the foreign connection would allow issuance of a clearance.

Chairman TOM DAVIS. Now I understand the two passport issue, because you can't, if there is another passport you can't always account to where they have been to, and that raises other issues. They are resolvable, but it is obviously a red flag.

We will be hearing from the second panel more about industry's proposals for reengineering the entire clearance process. In particular, ITAA has proposed in its written testimony the implementation of a pilot program utilizing latest IT and industry best practices.

This program would involve feeding the same cases both into the pilot system and the existing OPM-DOD system in order to compare their effectiveness.

What recommendations can you make regarding such a reengineering of the clearance process? And are there any potential pitfalls in moving that direction, for example, reciprocity?

Mr. LEONARD. Definitely, Mr. Chairman, we need to, as I mentioned in my statement, move away from the half century old process of shoe leather on the ground, especially some of the dubious checks we do in the field such as neighborhood checks and things along those lines. Increased reliance on automation is the key. The challenge is at what point in time are we going to be there. I will give you just an anecdote.

My 23-year-old daughter just took advantage of going online to try to procure her first auto insurance policy, which is great, and the fact that you can sit at home on a weekend and apply for auto insurance is an advantage of technology. The challenge is she spent the rest of the weekend trying to disprove negatives that came up, and it highlights the unreliability of many of these data bases that are routinely accessed. That's the limitation.

As those data bases become more and more reliable and we can be more confident in false positives and things along those lines, I think we will be a long way to replacing the shoe leather.

Chairman TOM DAVIS. Which leads me to my next question. In the old adjudicative guidelines, applicants with family members living abroad were asked to prove the impossible; namely, that foreign family members who have never been before pressured by a hostile government as a means of obtaining classified information will never be pressured in the future.

Do the new standards change that standard of proof in this respect or are we like your daughter with insurance, trying to prove a negative.

Mr. LEONARD. Again, the adjudicative guidelines, the way I read them, is that these types of potential scenarios that you described need to be more than just an assertion. There needs to be some sort of demonstration of the potential for coercion and it cannot be a theoretical. So it would be highly situational. Not to say that would never be the situation, but again looking at the primary focus of the adjudicative guidelines, it should not be a frequent occurrence.

Chairman TOM DAVIS. Is it realistic to expect that the new guidelines will have any impact on the number of applicants with the foreign influence, preference issues, getting clearances if there is any more realistic burden of proof expectation?

Mr. LEONARD. Yes, I fully believe that with the new adjudicative guidelines individuals that may have been found ineligible for a security clearance under the prior guidelines would be found eligible today.

Chairman TOM DAVIS. We just push to you and move people through the process and all you need to do is make one mistake and we will have you up here. But right now the backlog is a huge problem.

Mr. LEONARD. Absolutely, sir. I am hard pressed to come up with anything. You know, security investigations and clearances are the one thing that permeates almost everything this government does from fighting wars, from doing intelligence, to getting the best technology from industry. It permeates everything, and I am hard pressed to come up with something that is analogous that is so ubiquitous.

Chairman TOM DAVIS. It is not as if there are not enough people in the pipeline that can do the job. That is the other thing, is that there are people to do this. It's not a scarcity of people. It is basically a failure of government to be able to put the resources in and get these out in a timely manner.

Mr. LEONARD. And it is also a failure to get a handle on requirements, and we add to those requirements every day not just in the classified national security arena, but investigations are now being done much more frequently for other purposes, for homeland security, for access to information systems that are purely unclassified, for hazardous materials truck drivers, for airport tarmac workers. The requirements are burgeoning and the inability to get a handle on these requirements and to project them and to manage them is making it exceedingly difficult to work that issue.

Chairman TOM DAVIS. Thank you. Mr. Waxman, do you have any questions?

Mr. WAXMAN. Yes, I do, Mr. Chairman. I want to go back to this discussion that we have all been touching upon. I know you treat each applicant on a case-by-case basis, as you should, but the problem seems to be that the risks posed by a particular nation are also handled on a case-by-case basis, which does not really make a lot of sense.

For example, in his written testimony Mr. Zaid, who is going to testify in the next panel, cites the example of one judge finding Pakistan to be a U.S. ally that presents little security risk, while another judge finding that Pakistan has terrorists links and was a high risk country.

Should administrative law judges have the authority to disregard the official U.S. foreign policy of the State Department and base decisions on their own impressions of a foreign country? The new guidelines for adjudication security clearances provide—that the President issued last December state that the adjudicators can and should consider the identity of the foreign country which the foreign contact or financial interest is located.

Mr. Leonard, explain to me how this works in reality. What additional guidelines or training are adjudicators given to help them consider the identity of the foreign country and what steps are being taken to ensure that these considerations are consistent across agencies.

Mr. LEONARD. Well, one of the things that the guidelines were also revised to take into account or to acknowledge is the fact that oftentimes the basis for a decision may be based upon classified intelligence and things along those lines. And I mention that from the point of view to indicate that decisions along those lines, again not getting into any of the specific cases but decisions along the lines of which you outline, should be based upon official intelligence, not based upon the impressions of a single adjudicator.

Mr. WAXMAN. Let's assume it's not based upon additional classified information. But look at the case of Pakistan. One judge says Pakistan is a terrorist country and the other says no, they are an ally of the United States.

Mr. LEONARD. That is my point. If those are the basis of decisions as opposed to individual situations with respect to an individual's background, you are absolutely right, they are required to be consistent decisions and should be based upon representation of issues emanating from the foreign interest, should be based upon official positions, again, not assumptions or impressions on the part of the individual adjudicator.

Mr. WAXMAN. Is there a way to use the appeals process to introduce more consistency? Even then different judges reach different decisions, but is there a way to develop consistent precedents that judges are bound to follow so there is another judge looking at it and they can——

Mr. LEONARD. That is one of the things—speaking as an outsider, that is one of the things that I admire about the DOD system, especially the DOHA system, is their system is highly transparent, more so than the rest of the government. And just about anybody can research precedence, can research cases and look for precedence, which quite frankly no other agencies do. And so from that point of view, that is a part of the DOD process quite frankly that I admire.

Mr. WAXMAN. Let me give you a factual situation just to get your judgment on it because we talk about a preference for another country. Let's assume there is an American citizen, Jewish, daughter moved to Israel, living in Israel permanently, has dual citizenship, married to an Israeli who serves in the Israeli Army in a high position and she works for a number of Israeli corporations trying to advance their interests. Would we assume that the father should be looked at with greater care or maybe even denied a security clearance because he may have more concern about the benefit of his children?

Mr. LEONARD. Obviously, again from other theoretical point of view that is an issue that would be examined. Should we assume anything as a result of those examinations? I would say not. And in fact I would point out that again the two key issues that should be the basis of a decision would be is there a basis to expect that individual would be in a position where they would have to choose between the U.S. interests and a foreign interest and even if that

is the case, is there enough evidence in terms of long-standing ties and loyalty and commitment and everything else that there is every expectation that if the individual was given such a conflict that they would invariably decide in the U.S.'s interests, then that clearance should be granted.

Mr. WAXMAN. Well, the son-in-law could be captured, held hostage by Lebanon or the Palestinians, Hamas group as a military person.

Mr. LEONARD. My son is in the U.S. military. He served in Iraq. He could be captured as well, too.

Mr. WAXMAN. You would be annoyed if you were turned down for a security clearance then?

Mr. LEONARD. Interestingly enough——

Mr. WAXMAN. But that is not a foreign preference. But you see what I am talking about. We are getting reports from people who say why are we being singled out because of longstanding ties to Israel, family ties or religious ties or whatever, especially when we have people who have already had security clearances and they haven't abused it. If you've got somebody who abuses a security clearance something ought to be done about it. I have been trying to get the chairman to pay some attention to the fact that Karl Rove had a security clearance and violated it by disclosing information about a CIA agent and yet he maintains a security clearance. That is a case where a clearance ought to be revoked. But if somebody has done something wrong, they should not have their security clearance revoked because they suddenly found out information that had already been disclosed.

Mr. LEONARD. With respect to people who have had long-standing clearances, I would point out that is particularly one of the revisions to the guidelines where it was changed to indicate that the individual has such deep and long-standing relationships and loyalties in the United States that the individual can be expected to resolve any conflicts in the interest or favor of the United States.

Clearly if someone has a long-standing history of a security clearance already, that's exactly why that provision in the adjudicative guidelines was modified to allow that flexibility.

Chairman TOM DAVIS. Mr. Van Hollen.

Mr. VAN HOLLEN. Just a quick followup to one of the responses to Mr. Waxman's question on this consistency issue because I think it is important for the process and the integrity of the process for people to have some idea of what the guidelines are. Obviously each case is different and has to be weighed on its own facts.

You mention the DOHA process as being one that actually provided greater transparency. In every case do you have to have a written decision that sets forth the basis for a particular finding across the board? In other words, does the person who is denied get a written decision?

Mr. LEONARD. As a minimum the individual needs to be provided a statement of reasons which outlines the reasons why they have been deemed ineligible and an opportunity to reply to that statement. The extent to which the individual can reply, that's what varies from agency to agency. And again I defer to Bob about the DOHA, but they are much more elaborate than most other agencies.

Mr. VAN HOLLEN. But across every agency there is a written explanation they can respond to?

Mr. LEONARD. Yes.

Chairman TOM DAVIS. Thank you very much. Why don't we take a 2-minute recess and we will call our next panel. Mr. Andrews, Mr. Leonard, thank you.

[Recess.]

Chairman TOM DAVIS. We move now to our second distinguished panel. We have Mr. Mark Zaid, esq., managing partner at Krieger & Zaid law firm. We have Mr. Doug Wagoner, the chairman of the Intelligence Subcommittee, Information Technology Association of America, on behalf of the Security Clearance Coalition. We have Mr. Walter Nagurny, the director of the Industrial Security Office, EDS U.S. Government Solutions. Thank you all. Thank you for your patience in getting through the first panel. It's our policy that we swear you in before you testify. Please rise and raise your right hands.

[Witnesses sworn.]

Chairman TOM DAVIS. Mr. Zaid, you know the rules. We have gone through the first panel. Your entire statement is in the record. We appreciate your being here. Go ahead.

STATEMENTS OF MARK S. ZAID, ESQ., MANAGING PARTNER, KRIEGER & ZAID; DOUG WAGONER, CHAIRMAN, INTELLIGENCE SUBCOMMITTEE, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ON BEHALF OF THE SECURITY CLEARANCE COALITION; AND WALTER S. NAGURNY, DIRECTOR, INDUSTRIAL SECURITY OFFICE, EDS U.S. GOVERNMENT SOLUTIONS

STATEMENT OF MARK S. ZAID, ESQ.

Mr. ZAID. Good morning, Mr. Chairman, members of the committee. It is a pleasure to testify here today on such an important topic. I have been handling cases involving national security now for more than a decade, represented nearly 100 individuals in security clearance cases before numerous Federal agencies.

This is a period in our history when our country desperately needs individuals with foreign language expertise and intimate experience with other cultures to assist in the war against terror. The logical population from which to recruit individuals are those Americans citizens with foreign backgrounds. Yet our agencies are losing the ability to utilize numerous loyal Americans simply because they brazenly admitted to affection from their parents residing overseas, dared to telephone their siblings back in the home country, or through no action of their own hold dual citizenship.

The disqualifying conditions of foreign influence and foreign preference especially are often arbitrarily and inconsistently applied. Whether the country involved be ally, such as Israel or the United Kingdom, or an enemy and hostile, such as Iran or China, there is typically little rhyme or reason why a clearance is denied or granted.

In recent years it has become common for the Department of Defense to revoke an individual's clearance after having held one for years or even decades. Oftentimes these individuals have never

misled or lied about their foreign relatives or origins, but DOD has suddenly decided that the person poses a risk that never previously existed before.

At the CIA individuals have wasted months through the application training process only to eventually be informed that their foreign background, which had neither changed nor been hidden from the outset, prevented the granting of the clearance.

Though my testimony is more critical than positive, I do wish to highlight that there are many shining examples of how some agencies and individuals employed therein implement their security clearance programs. Indeed, I would rate DOHA as one of the better, if not best, venues for challenging a denial or revocation.

Executive Order 12968, issued by President Clinton in 1995, created the current framework. In response, adjudicative guidelines were issued in March 1997 in order to establish a common set of standards. These were revised last December and in the cover memo from Mr. Hadley they were to be implemented immediately. As far as I know, DOD is the only agency not to have done so. This posture is, disappointingly, not surprising.

It was not until April 1999 after publication in the Federal Register, a useless act, that DOD adopted the March 1997 guidelines, and actual application only commenced beginning July 1, 1999. Thus we might not see until 2008 that DOD implements the 2005 guidelines notwithstanding what we heard earlier, and that is unacceptable.

Only DOD likely knows how many revocation denials have been based on foreign influence or preference concerns, but the number has increased in the last few years. For decisions posted on DOHA's Web site this year alone approximately 25 percent involved foreign influence.

How significant an impact can there be between the application of the old and new guidelines? Let me focus on foreign influence, and I'll address foreign preference during the Q and A if desired.

Under the 1997 guidelines one of the more common disqualifying conditions is whether an individual or his family member may be potentially vulnerable to coercion, exploitation or pressure by a foreign power. To mitigate this concern, one can seek to prove the contrary, yet it is virtually impossible for any individual to truly affirmatively prove a negative and to demonstrate that a foreign relative or contact is not in some way possibly subject to exploitation by a foreign power.

Another available mitigating factor is that contact and correspondence with the foreign citizen are casual and infrequent. Unfortunately, the terms have no standardized definition or application.

Consider one case in particular I had in 2004 where I unsuccessfully represented a defense contractor originally from Pakistan. This is the case Congressman Waxman referenced. My client provided unrefuted testimony that he had infrequent contact with his siblings three to four times a year. Although the judge ruled that there was nothing in the record to indicate that the family members were agents of a foreign power, she concluded that there is no evidence to show that he is not in a position to be exploited that would force him to choose between the two countries and be dis-

loyal to the United States. Yet, at the same time the judge also concluded that can there was nothing in the applicant's testimony or demeanor that suggested he was not a loyal American and credit to his adopted country.

What was behind the judge's rationale? She believed that "Pakistan is on the front lines in the war against international and regional terrorism and despite the efforts of its government there are individuals and groups within Pakistan who have acted and continue to act in a hostile manner to U.S. Security interests."

Beyond the fact that in today's world this description fits dozens of countries, including even the United States itself, it was completely inconsistent with factual findings reached in numerous other DOHA cases and contrary to the official position of this administration. For example, just 3 months after 9/11 another DOHA judge had held Pakistan is not a country hostile to the security interests of the United States, but a country whose political institutions, while not democratic at present, are specifically aligned with our own traditions, which include the rule of law to absolve the applicant of any foreseeable security risk.

Under the 2005 guidelines I have no doubt that my client would have had a much greater chance of attaining a security clearance. Even a casual comparison between the 1997 and 2005 guidelines should leave a reader with the notion that the revisions are more relaxed and flexible. They fit a moralistic environment. They legitimately raise the bar or, more precisely, perhaps set a more appropriate bar for the government to revoke or deny a clearance based on foreign influence or preference.

The most frequently cited disqualifying condition now requires a heightened risk of exploitation, inducement, manipulation, pressure or coercion. And the country is taking into account the nature of the relationships and the fact that it has to be unlikely the individual will be placed in such a position to choose between their native country or country where their relatives might live. If DOD denies a security clearance based on application of the 1997 guidelines when a favorable result could have been attained under the 2005 guidelines, then DOD will have harmed the national security interests of the United States.

I won't talk about the appeal process, Mr. Chairman. You referenced my colleague Sheldon Cohen's conclusions. They are quite damming regarding the appeal process. With respect to foreign connection since 2000 the Appeal Board has affirmed all 144 of applicants' appeals of decisions that denied a clearance and reversed all but four of the appeals granting a clearance.

In my testimony I submitted 15 recommendations for consideration. Let me just take 30 seconds to highlight a few. I would suggest that Congress, one, require DOD to adopt the new guidelines immediately; two, consider removing DOHA's ability to appeal favorable decisions unless a more balanced framework can be instituted. Other than the Department of Energy they are the only agency that can appeal a favorable decision.

Three, task GAO to conduct a thorough assessment of the security clearance appeal process as it is implemented throughout the Federal Government. There are numerous GAO investigative reports, but they deal primarily with DOD.

Three, create an administrative hearing system similar to that of DOHA and the Energy Department across the board at all Federal agencies. And the final two, either create an independent body outside of the involved Federal agency to adjudicate final appellate challenges, or grant the Federal judiciary statutory jurisdiction to review substantive clearance decisions.

Again, I thank you for the opportunity to appear before you, and I will be very happy to answer any questions or work with you or your staff.

[The prepared statement of Mr. Zaid follows:]

FORMAL WRITTEN TESTIMONY OF MARK S. ZAID, ESQUIRE*

DELIVERED BEFORE THE
COMMITTEE ON GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

Can You Clear Me Now?:
Weighing "Foreign Influence" Factors in Security Clearance Investigations

THURSDAY, JULY 13, 2006

Good afternoon Mr. Chairman, Members of the Committee, it is with pleasure that I testify today before this distinguished Committee on such an important topic that relates to the national security interests of the United States.

The timing for this hearing could not be better. This is a period in our history when our country desperately needs individuals with foreign language expertise and intimate experience with other cultures to assist in the U.S. Government's ongoing fight in the war against terror. The logical population from which to recruit individuals up to the task are those American citizens, whether native or naturalized, with foreign ties or backgrounds. Yet our agencies are losing the ability to utilize hundreds, if not thousands, of loyal Americans simply because they brazenly admitted to affection for their parents residing overseas, dared to telephone their siblings back in the home country or – through no action of their own – hold dual citizenship. As a result, rather than be permitted to contribute to our national security interests they are punished with a red scarlet letter associated with the denial or revocation of a security clearance that can prevent the start of an important career path if not destroy an existing one.

The disqualifying conditions of "Foreign Influence" and "Foreign Preference", as the terms are known in the industry, are often applied arbitrarily and inconsistently throughout the U.S. Government and more disturbingly even within the same agency to deny or revoke a security clearance. In recent years, in fact, it has become somewhat common for the Department of Defense (DoD) to seek to revoke a clearance based on Foreign Influence or Preference of those who have been in a possession of a clearance for years, even decades. Oftentimes these individuals have never misled or lied to the government about their foreign relatives or origins, but nevertheless out of the blue DoD has decided that the person poses a risk that never previously existed before.[1]

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* Managing Partner, Krieger & Zaid, PLLC, 1920 N Street, N.W., Suite 300, Washington, D.C. 20006. Tel. No. 202-454-2809. E-mail: ZaidMS@aol.com. A short biography is attached at Exhibit "1". Some portions of this testimony were originally presented to the House Government Reform Committee's Subcommittee on National Security, Emerging Threats, and International Relations at a hearing entitled "*National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation*" held on February 14, 2006. In that testimony, a copy of which can be accessed at *http://reform.house.gov/UploadedFiles/Zaid%20Congressional%20Testimony%20-%20Security%20Clearance2.pdf*, I discussed numerous problems within the security clearance system throughout the federal government and identified several areas where Congress can play an enhanced role particularly to correct the problems. The views expressed herein reflect the opinion of only myself and should not be attributed or ascribed to any organization with which I may be affiliated.

[1] One example is a former Air Force OSI contractor/State Department linguist who had his clearance suspended in the wake of 9/11 based on the filing of false allegations against him. Given the fact the contractor was of Middle Eastern origin and the climate at the time, he was perceived as Muslim and treated as a potential terrorist. He is, however, a Lebanese Christian who had fought with the Israelis and our covert forces during the Lebanese Civil War in the early 1980s. To this day agencies of the U.S. Government refuse to grant him a "permanent" security clearance for work in the territorial United States though they routinely seek to utilize his expertise on

I have had several cases involving the Central Intelligence Agency (CIA) where individuals wasted months through the application/training process only to eventually be informed that their foreign background/connections, which had neither changed nor been hidden from the outset, prevented their being granted a clearance. This included instances where the applicant repeatedly questioned whether their foreign background would pose a problem. CIA recruiters continually stated it would not, but CIA security later concluded otherwise.

The premise for this hearing, at least to the extent I view my role, is two-fold: first, to understand why the Department of Defense has intentionally refused to immediately adopt and implement revised Adjudicative Guidelines that were issued by the President last December and the impact of that decision; second, to explore how to address a legitimate concern that federal agencies are losing potentially valuable resources by denying or revoking security clearances of loyal and trustworthy individuals who have ties to foreign countries.

I have been handling cases involving national security claims (which has included my authorized access to classified information up to the TS/SCI level) for more than a decade, and I have represented nearly 100 individuals in security clearance cases before numerous federal agencies. Just last month I co-taught a DC Bar Continuing Legal Education class on defending adverse security clearance decisions. Additionally, my firm has represented hundreds of federal employees and contractors within the Intelligence and Military Communities regarding matters that touch directly upon national security and clearance issues.

The experience I bring before you today is crucial to understanding exactly how the security clearance environment operates for unlike our legal system precedent plays little to no role. Indeed, only two agencies – the Department of Defense's Office of Hearings and Appeals (DOHA) and Department of Energy (DOE) – even publish decisions in security clearance cases that are available to the public, and these are at best incomplete in offering a portrait of the system.[2]

With respect to the private sector most of what we know about security clearance decisions comes from the anecdotal experience of those, such as myself, who handle these types of cases.[3] Of course, anecdotal experience has its own drawbacks because it is limited to

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classified short-term projects in dangerous foreign environments when it suits their interests. This has included protecting former U.S. Iraqi Civilian Administrator Paul Bremer in the initial months of the war. Most recently, after promises from senior officials, the CIA denied this individual a security clearance based on Foreign Influence. The case is currently on appeal, but few appeals succeed with the CIA.

[2] The DoD/DOHA issues its opinions at *http://www.defenselink.mil/dodgc/doha/industrial/* while the DOE's decisions can be found at *http://www.oha.doe.gov/persec2.asp.*

[3] There are few indepth government reports that analyse the specific challenge process or the substance of revocation/denial decisions. The General Accounting Office (GAO) has issued several reports and provided testimony pertaining to DoD's security clearance program over the last few years. *See e.g.* GAO-06-748T, *DoD Personnel Clearances: New Concerns Slow Processing of Clearances for Industrial Personnel* (May 17, 2006); GAO-06-233T, *DoD Personnel Clearances: Government Plan Addresses Some Longstanding Problems with DoD's Program, But Concerns Remain,* (Nov. 9, 2005); GAO-05-842T, *DoD Personnel Clearances: Some Progress Has Been Made but Hurdles Remain to Overcome the Challenges That Led to GAO's High-Risk Designation* (June 28, 2005); GAO-04-632, *DoD Personnel Clearances: Additional Steps Can Be Taken to Reduce Backlogs and Delays in Determining Security Clearance Eligibility for Industrial Personnel* (May 26, 2004); GAO-04-344, *DoD Personnel Clearances: DoD Needs to Overcome Impediments to Eliminating Backlog and Determining Its Size* (Feb. 9, 2004); GAO-01-465, *DoD Personnel: More Consistency Needed in Determining Eligibility for Top Secret Security Clearances* (Apr. 18, 2001); GAO-00-246, *DoD Personnel:*

specific cases and the experiences of those relaying their knowledge. My experiences, therefore, may or may not be similar to those of my colleagues. Nevertheless, having studied this issue and conversed with colleagues who often routinely handle these types of cases, I am confident I can provide this Committee with a realistic and accurate depiction of the current circumstances, at least from a private practitioner's viewpoint.

I should note that in many of the revocation/denial cases "Foreign Influence" or "Foreign Preference" are typically not the only disqualifying conditions asserted against the individual. The proverbial security clearance "kitchen sink" is often thrown at an individual in a Statement of Reasons as justification for the proposed adverse action. Thus even were the Foreign Influence or Preference concerns favorably resolved it may not alleviate the specific agency's concerns, and at times it may be difficult to even discern which disqualifying condition is actually the paramount reason for the proposed or finalized denial/revocation.

Moreover, it is generally the case that the potentially derogatory or disqualifying information originated directly, and usually voluntarily, from the individual either through the filing of the customary security paperwork[4] or a follow-up investigative interview with the subject. It is seldom, though by no means would it be significantly surprising, that the information is obtained through an independent background investigation or third-party sources.

Though my testimony can possibly be construed as more critical of the process than positive, I do wish to highlight at the outset that there are many shining examples of how some agencies, and the individuals who are employed therein, implement their security clearance programs. My testimony today is in no way designed to ignore or minimize the excellent contributions many make to the system.

Indeed, I would rate DOHA, whose activities will be widely discussed today in a critical light, as one of the better, if not, best venue for challenging security clearance denials or revocations. I have particularly found DOHA's staff attorneys and judges to be highly professional and competent. Of course, that is not to say that there are not significant shortcomings to correct within DOHA and other agencies. It is necessary to present the darker side of the process that continues to increasingly spread throughout the system in order to bring about necessary change.

INTRODUCTION

DoD and its entities are responsible for the majority of all active personnel security clearances. Clearances can permit access to a range of information from Confidential to Top Secret code-words so high that even the names of the compartments are themselves classified. More than 2 million people alone have security clearances that permit access to Secret

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More Accurate Estimate of Overdue Security Clearance Reinvestigations Is Needed (Sept. 20, 2000); GAO-00-215, *DoD Personnel: More Actions Needed to Address Backlog of Security Clearance Reinvestigations* (Aug. 24, 2000); GAO-00-12, *DoD Personnel: Inadequate Personnel Security Investigations Pose National Security Risks* (Oct. 27, 1999). Other than DoD, the GAO reports are much older. *See* GAO-93-14, *Administrative Due Process: Denials and Revocations of Security Clearances and Access to Special Programs* (May 5, 1993).

[4] Such as the SF-86, a copy of which can be found at *http://www.usaid.gov/procurement_bus_opp/procurement/forms/SF-86/sf-86.pdf.*

information.[5] According to a 2001 GAO report, DoD alone was rendering approximately "200,000 decisions annually to grant, deny, or revoke security clearances for its civilian, military, and contractor personnel."[6]

DOHA is the largest component of the Defense Legal Services Agency and part of the DoD Office of General Counsel. As noted on its website, it:

> provides hearings and issues decisions in personnel security clearance cases for contractor personnel doing classified work for all DoD components and 20 other Federal Agencies and Departments; conducts personal appearances and issues decisions in security clearance cases for DoD civilian employees and military personnel; settles claims for uniformed service pay and allowances, and claims of transportation carriers for amounts deducted from them for loss or damage; conducts hearings and issues decisions in cases involving claims for DoD School Activity benefits, and TRICARE/CHAMPUS payment for medical services; and functions as a central clearing house for DoD alternative dispute resolution activities and as a source of third party neutrals for such activities.[7]

"In implementing the federal adjudicative guidelines, DoD Regulation 5200.2R, *Department of Defense Personnel Security Program*, January 1987, sets forth the policies and procedures for granting DoD military, civilian, and contractor personnel access to classified information. The policies and procedures for granting industrial personnel security clearances are also contained in DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, April 20, 1999."[8]

BRIEF LEGAL ANALYSIS SURROUNDING CHALLENGES TO ADVERSE DECISIONS

Following World War II, various presidents have issued a series of Executive Orders designed to protect sensitive information and to ensure its proper classification throughout the Executive Branch.[9] Those afforded the luxury of a security clearance are typically required to undergo a background investigation that varies according to the degree of adverse effect the applicant could potentially have on the national security, i.e., the higher the level of clearance that is to be granted the greater the potential threat to national security and the risks that must be assessed.[10]

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[5] Report on the Commission of Protecting and Reducing Government Secrecy, S. Doc. 105-2, 103rd Cong. (1997).

[6] GAO-01-465, *DoD Personnel* at 3.

[7] *http://www.defenselink.mil/dodgc/doha.*

[8] GAO-01-465, *DoD Personnel* at 10 fn 1.

[9] *See e.g.*, Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1979); Exec. Order No. 12356, § 4.1(a), 3 C.F.R. 174 (1983); Exec. Order No. 12968, 60 Fed.Reg. 19,825 (1995).

[10] *See* Exec. Order No. 10450, § 3, 3 C.F.R. 937 (1949-1953 Comp.).

Except in very, very limited circumstances, most courts hold the view that there does not exist any right to judicial review of any aspect of a substantive security clearance determination.[11] This perception came about from a decision of the U.S. Supreme Court in the landmark case of *Department of Navy v. Egan.*[12] Since this decision time and time again federal courts have declined to address substantive clearance decisions.[13] Denial of relief is primarily based on the false premise that the courts lack appropriate jurisdiction or knowledge to adjudicate or review the merits of any security clearance determination. Indeed, it makes little sense to conclude that Article I judges, who render security clearance determinations daily, are somehow better suited to do so than Article III judges who do not even require security clearances simply due to the nature of their status.

In *Egan* the Court ruled that "[i]t should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"[14] The Court also noted that "a clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States." "The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'"[15]

To those who believe their clearance determinations were inappropriately or even vindictively pursued, the Court condemned any realistic chance of judicial oversight when it opined that:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the

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[11] The primary exceptions are challenges to procedural due process violations (i.e., failure of an agency to afford certain administrative rights or abide by applicable regulations) or an allegation of a Constitutional violation (virtually impossible to prove). *See e.g., Webster v. Doe*, 486 U.S. 592 (1988); *Service v. Dulles*, 354 U.S. 363, 373 (1957); *Stehney v. Perry*, 101 F.3d 925 (3rd Cir. 1996); *Hill v. Dep't. of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988).

[12] 484 U.S. 518 (1988).

[13] The cases could be listed ad naseum. *See generally Bennett v. Chertoff*, 425 F.3d 999 (D.C.Cir. 2005); *Ryan v. Reno*, 168 F.3d 520 (D.C.Cir. 1999); *Stehney*, 101 F.3d at 932; *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

[14] *Egan*, 484 U.S. at 528.

[15] *Id.* at 528-529 (internal citations omitted).

> potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Thus, unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.[16]

However, the *Egan* case dealt specifically solely with whether or not the Merit System Protection Board had statutory jurisdiction to handle a clearance challenge. The true value of *Egan* should never have expanded beyond that limitation but it did and thousands of individuals have suffered as a result. Thus, now is the time for Congress to meet the Judiciary's challenge head-on. In order for any legitimate oversight to exist in the realm of security clearances, Congress must take action.

GENERAL EXPLANATION OF SECURITY CLEARANCE APPEAL PROCESS

Executive Order 12968, issued by President Clinton in 1995, created the current framework for the granting, denial or revocation of security clearances. Section 5.2 sets forth the minimum requirements an agency must provide for denials or revocations of eligibility for access. Applicants and employees who are determined to not meet the standards for access to classified information established in Section 3.1 of the Order shall be:

> (1) provided as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit;
> (2) provided within 30 days, upon request and to the extent the documents would be provided if requested under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (3 U.S.C. 552a), as applicable, any documents, records, and reports upon which a denial or revocation is based;
> (3) informed of their right to be represented by counsel or other representative at their own expense; to request any documents, records, and reports as described in section 5.2(a)(2) upon which a denial or revocation is based; and to request the entire investigative file, as permitted by the national security and other applicable law, which, if requested, shall be promptly provided prior to the time set for a written reply;
> (4) provided a reasonable opportunity to reply in writing to, and to request a review of, the determination;
> (5) provided written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal;
> (6) provided an opportunity to appeal in writing to a high level panel, appointed by the agency head, which shall be comprised of at least three

[16] *Id.* at 530 (internal citations omitted, emphasis added).

> members, two of whom shall be selected from outside the security field. Decisions of the panel shall be in writing, and final except as provided in subsection (b) of this section; and
> (7) provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudicative or other authority, other than the investigating entity, as determined by the agency head. A written summary or recording of such appearance shall be made part of the applicant's or employee's security record, unless such appearance occurs in the presence of the appeals panel described in subsection (a)(6) of this section.

Significant discretionary exceptions exist throughout the implementation of the above minimum standards as well as elsewhere within the relevant Sections. Within the Order itself, for example, subsection (c) while noting that agencies may "provide additional review proceedings beyond those required by subsection (a) of this section. This section does not require additional proceedings, however, and creates no procedural or substantive rights." Moreover, subsection (d) permits an agency to certify that if "a procedure set forth in this section cannot be made available in a particular case without damaging the national security interests of the United States by revealing classified information, the particular procedure shall not be made available. This certification shall be conclusive."

Finally, not surprisingly, Section 7.2 (e) notes that "[t]his Executive order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Agency implementation of the Executive Order varies significantly throughout the federal government and inconsistencies exist even within the same agency.[17]

In response to Executive Order 12968, Adjudicative Guidelines were issued in March 1997, in order to establish "a common set of personnel security investigative standards and adjudicative guidelines for determining eligibility for access to classified information."[18] These guidelines pertain to all U.S. government civilian and military personnel, consultants,

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[17] For example, since October 2000, hundreds of individuals have had their security clearance revoked due to the enactment of the Smith Amendment, 10 U.S.C. § 986. This Act prohibits the Department of Defense from granting or renewing a security clearance to anyone who was convicted of a crime and sentenced to more than a year in jail. It applies to those who are employees of the Department of Defense, a member of Armed Forces on active or inactive status, or an employee of a defense contractor. As my colleague Sheldon Cohen has noted, "the Smith Amendment has been handled differently not only among the military departments, but even within the Office of the Secretary of Defense, notably regarding the effect of a pardon. The Defense Office of Hearings and Appeals (DOHA) which handles contractor employee cases, has ruled that a pardon does *not* eliminate Smith Amendment consideration. On the other hand, the Washington Headquarters Services, Clearance Appeals Board which reviews clearances for government employees *does* consider that a state pardon removes the case from Smith Amendment sanction." *See* Cohen, Sheldon, "Smith Amendment Update" (May 2004)(emphasis original), available at *http://www.fas.org/sgp/eprint/smithamend2.pdf*. Frankly, the manner in which agencies established even the basic framework for the appeal process varies across the board. Some agencies grant personal appearances as the initial level of appeal, others permit written submissions. Some agencies hold appeal panels for the individual to appear before, but some offer panels where the identities of the deciding officials are not even known. Some agencies allow hearings with live witnesses before an administrative judge, whereas others only the petitioner can appear before a judge. The list of differences and variances goes on and on.

[18] GAO-01-465, *DoD Personnel* at 11.

contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information.[19] "They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information (SCI) and special access programs (SAPs) and are to be used by government departments and agencies in all final clearance determinations."[20] The intended policy was to foster "consistent application of the federal guidelines to facilitate reciprocity among federal agencies...."[21]

As the 1997 Guidelines made perfectly clear:

> the adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:
>
> a. The nature, extent, and seriousness of the conduct;
> b. The circumstances surrounding the conduct, to include knowledgeable participation;
> c. The frequency and recency of the conduct;
> d. The individual's age and maturity at the time of the conduct;
> e. The voluntariness of participation;
> f. The presence or absence of rehabilitation and other pertinent behavioral changes;
> g. The motivation for the conduct;
> h. The potential for pressure, coercion, exploitation, or duress; and
> i. The likelihood of continuation or recurrence.
>
> Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person.*[22]

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[19] "The guidelines are based on the collective advice and expertise of a broad cross section of senior representatives from 10 federal agencies and the results of studies of prior espionage cases." *Id.* at 11-12. A similar effort led to the issuance of the 2005 guidelines.

[20] *http://www.dss.mil/nf/adr/adjguid/adjguidF.htm.*

[21] GAO-01-465, *DoD Personnel* at 11.

[22] *Id.* (emphasis added).

The adjudication process is based on the whole person concept and security clearance decisions are not to be made in a vacuum. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. The conduct in question could have taken place completely outside the context of work, years prior or include actions that have previously been favorably adjudicated. An adjudicator is being called upon to assess unpredictable future behavior.

Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future.

On December 29, 2005, the President of the United States, through his National Security Advisor, Stephen Hadley, issued a new set of Adjudicative Guidelines to govern security clearance revocations or denials.[23] Mr. Hadley's cover memorandum notes that the Guidelines were to be "implemented immediately."

In both the 1997 and 2005 Guidelines thirteen adjudicative categories exist that can be addressed individually or collectively where deemed appropriate to deny or revoke an individual's security clearance.[24] Each has a non-exhaustive list of disqualifying circumstances that can raise security concerns and conditions that conceivably can mitigate security concerns. The revised Guidelines significantly modified portions of the previous version mostly, if not entirely, in favor of the individual clearance holder or prospective holder. This is especially true with respect to Guideline B: Foreign Influence and Guideline C: Foreign Preference concerns.

A copy of the 2005 version of Guideline B and C are reproduced at Exhibit "2". A side by side listing of the 1997 and 2005 versions in order to allow comparison of the modifications can be found at Exhibit "3".

Obtaining a favorable resolution to a security clearance appeal is primarily based on demonstrating that mitigating circumstances exist rather than necessarily refuting the allegations against the individual. As an extreme example, it is possible that someone who committed murder can be granted a security clearance. As mitigation the individual could show that the incident occurred years earlier when he was a minor, and that he has acted as an exemplary citizen ever since. Or, more commonly, the case would be where an individual

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[23] A copy of the new Guidelines and cover memorandum can be found at the website for the Information Security Oversight Office (ISOO) at *http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf.* ISOO is a component of the National Archives and Records Administration (NARA) and receives its policy and program guidance from the National Security Council (NSC).

[24] They are Guideline A: Allegiance to the United States; Guideline B: Foreign influence; Guideline C: Foreign preference; Guideline D: Sexual behavior; Guideline E: Personal conduct; Guideline F: Financial considerations; Guideline G: Alcohol consumption; Guideline H: Drug involvement; Guideline I: Emotional, Mental, and Personality Disorders; Guideline J: Criminal conduct; Guideline K: Security violations; Guideline L: Outside activities; and Guideline M: Misuse of information technology systems.

who was arrested for a DUI would need to demonstrate why that incident was the exception rather than the norm.

THE DEPARTMENT OF DEFENSE'S WILFULL FAILURE TO ADOPT AND IMPLEMENT THE NEW ADJUDICATIVE GUIDELINES

Notwithstanding the President's simple instructions to immediately implement the new Guidelines, not every agency has interpreted Mr. Hadley's cover memorandum in the same manner. The majority of agencies have appropriately followed the implementation instructions and are currently applying the new Guidelines.[25] However, DoD, and its numerous entities (including NSA, DOHA, DSS, NRO and each military department), has failed to do so. In fact, as far as I know, DoD is the only agency not to have formally done so.

Apparently, as I have been told, DoD believes the Guidelines must be subject to a notice and comment period. Whatever the reason, the hold-up lies apparently with the DoD's Office of General Counsel. DoD's current posture is disappointedly not surprising. It was not until April 20, 1999, after publication in the Federal Register (a useless act given these were issued by the President), that DoD adopted the March 1997 Guidelines. And actual application only commenced with SORs issued after July 1, 1999. Thus, it might not be until early 2008 before DoD implements the 2005 Guidelines. That is unacceptable.

Notwithstanding the DoD position, I now argue in all of my DOHA cases that the new Guidelines, as a matter of law and policy, must be applied. Although DoD supposedly previously instructed its adjudication facilities to follow the 1997 guidelines even before they were issued by the President, that does not appear to be the case this time around. In recent oral arguments involving two Foreign Influence cases, one DOHA Administrative Judge appeared unaware that new Guidelines had even been issued. And DOHA's Chief Administrative Judge explicitly agreed that the new Guidelines should be in effect but noted that DOHA had been specifically instructed by DoD not to apply the 2005 Guidelines.

It serves no purpose to speculate as to DoD's intent or motive in taking this current posture. I do know from conversations with officials at the Defense Intelligence Agency, National Security Agency and DOHA, each an entity that of course must abide by DoD policy, that they are as much in the dark about the process as we all seem to be. There is simply no reasonable excuse for DoD's deliberate conduct and inaction. Given DoD's significant involvement in security clearance adjudication, DoD's wilful failure to utilize the new guidelines is negatively impacting hundreds, if not thousands, of individuals. As a result, if an individual is denied a security clearance based on application of the old guidelines when a favorable result would have been attained under the new guidelines the DoD will have harmed the national security interests of the United States.

Should DoD continue its present course of inaction to implement the revised guidelines, I do foresee the possibility of litigation to challenge this omission.

[25] I have specifically personally confirmed that the Departments of Energy, Homeland Security and Justice, Central Intelligence Agency, and the Transportation Security Administration have implemented the new guidelines.

THE INTERPRETATION OF THE FOREIGN INFLUENCE AND FOREIGN PREFERENCE GUIDELINES BY DOHA

Until such time DoD, Congress or the President states otherwise, DoD and its entities will continue to apply the 1997 guidelines. What, then, can individuals possibly expect if they find themselves facing Foreign Influence or Foreign Preference concerns? How significant an impact can there be between application of the old and new guidelines?

It is unfortunate that the Committee was unable to hear today from some individuals who have personally suffered the loss or denial of a security clearance based on the 1997 Guidelines. In preparation for this hearing I spoke with several of my clients to inquire of their interest in participating. Quite frankly, many of those who you would otherwise desire to hear from today are too intimidated by their fear that if they came forward to criticize the process they would be subjected to retaliation with respect to their current or future security clearance eligibility. The Committee is already familiar with one of my client, Chan Moon's, experiences with DOHA. Mr. Moon, who is originally from South Korea, finally acquired his security clearance after a multi-year battle over Foreign Influence and other issues. In light of the fact that the Government had appealed the initial favorable decision, as discussed more fully below, it was a rare victory that was achieved.[26]

Only DoD likely knows how many revocation/denials of security clearances have been based on either Foreign Influence or Foreign Preference concerns but the number has certainly increased during the last few years. For example, as of today, approximately 714 DOHA administrative hearing citations, not including appeals, have been posted on DOHA's Website for 2006 (for the period January through June, but even this list is incomplete and many of the more recent decisions appear inaccessible). Approximately 178 decisions (25%) involved Foreign Influence.[27] The countries at issue involved those most would expect to see such as Iran, People's Republic of China, Taiwan, Afghanistan, Israel but also included New Zealand, France, Italy and Canada, to name just a few. Foreign Preference cases were significantly fewer, but still accounted for more than 50 cases.

Even a casual comparison glance between the 1997 and 2005 Adjudicative Guidelines should leave a reader with the notion that the revisions are more relaxed and flexible towards permitting favorable security clearance adjudication. To the trained eye, and with the understanding of prior application, the new Guidelines will likely make a world of difference in many cases. That means DoD's failure to utilize the new Guidelines will preclude otherwise eligible individuals from attaining a clearance, and no doubt may have already done so.

There are significant varying inconsistencies among the agencies in rendering security clearance decisions, especially in Foreign Influence cases. These inconsistencies extend intra-agency as well and DOHA is not immune. With over 30 administrative judges handling cases, there is a great deal of variance. Of course, this is no different than with any lower court.[28] But when inconsistent rulings are rendered in the judicial system usually there is some degree

[26] *See DOD Contractor Lays His Cards on the Table: Acquiring a security clearance proves tougher for contractors with foreign ties*, Legal Times, June 26, 2006.

[27] A listing of DOHA cases from 1996-2006 can be found at *http://www.defenselink.mil/dodgc/doha/industrial.*

[28] Decisions by DOHA Administrative Judges are not legally binding precedent. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges).

of balance or established policy eventually crafted by a higher appellate court. Yet no such thing exists with DOHA as its Appeal Board rarely seeks to ensure consistency in this realm. For example, there are certain specific terms within the guidelines that are loosely thrown about by Administrative Judges. These terms have definable meanings, and while there certainly needs to be case-by-case evaluations of specific circumstances, there must be some semblance of rationality, and there is not, underlying the application of the terms.[29]

While 100% consistency is likely never possible given the human factors involved in adjudicating clearance decisions, there should be concerted efforts to ensure minimum variance in determining who is or is not a security risk based on similar facts and circumstances, especially under identical guidelines. Not surprisingly, the inconsistencies occur on both sides of the "fence," whether that is a failure to properly adjudicate the existence of disqualifying information or too strict application of the adjudicative guidelines. For example a sampling of DoD cases reviewed by the GAO in or around 2000-2001 found that 10% contained foreign influence disqualifying factors that were not properly considered.[30] This included the failure of DoD adjudicators to record mitigating information for individuals who had "spouses, parents, children, and other relatives who were born in foreign countries, such as the former East Germany, South Korea, and Syria with no proof of U.S. citizenship."[31]

Foreign Influence Cases

While it may be true the "federal government is not required to wait until an applicant poses a clear and present danger to national security before it can deny or revoke a security clearance,"[32] an Administrative Judge's decision, particularly when Criterion B is at issue, still nevertheless rests upon common sense. This common sense judgment is, of course, based upon the direct evidence that the Administrative Judge personally hears and reviews throughout the proceedings.

One of the more common disqualifying conditions under Guideline B (Foreign Influence) that leads to the ineligibility of an individual for a clearance under the 1997 guidelines states:

> A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other

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[29] *Cf.* ISCR Case No. 02-27028 (March 15, 2004)(clearance granted where e-mails sent once or twice or year, four visits in eight years, prior financial payments to relatives, are all infrequent and casual); ISCR Case No. 02-09102 (February 24, 2004)(four visits in fourteen years, phone calls about once a month and mail about four or five times a year with relatives in China is infrequent, and discussions of family affairs is casual so clearance is granted); ISCR Case No. 02-14995 (February 6, 2004)(contacts with siblings several times per year and five visits to Iran in twenty-fives years is infrequent and casual permitting clearance) *with* ISCR Case No. 02-29403 (April 21, 2004)(clearance denied due to three trips to Pakistan in ten years and phone calls no more than three to four times per year with relatives as they were neither casual nor infrequent).

[30] GAO-01-465, *DoD Personnel* at 21.

[31] *Id.*

[32] *See* ISCR Case No. 02-09907.a1 (March 17, 2004) at 6.

> countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

"The Government must establish a *prima facie* case under foreign influence (Guideline B), which establishes doubt about a person's judgment, reliability and trustworthiness."[33] "In a case involving Criterion B, Department Counsel need not present direct or objective evidence that affirmatively proves the applicant is vulnerable to coercion or undue influence, but it does need to present evidence that demonstrates the applicant is engaged in conduct or is in a situation that, as a matter of common sense (Directive, Section F.3.) raises the kinds of security concerns covered by Criterion B."[34]

Mitigating Condition 1 justifies the granting of a security clearance when there exists:

> A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States

The first prong is straightforward enough: family members cannot be "agents of a foreign power." The second prong is more complex, and has to be examined carefully. An Administrative Judge must somehow assure himself that the immediate family member is not (a) "in a position to be exploited by a foreign power", (b) "in a way that could force", (c) "the individual to choose between loyalty to the person(s) involved and the United States." Should any one of those parameters not apply, and each aspect can and should be examined separately, the entire second prong is mitigated.

While (a) "in a position to be exploited by a foreign power" does apply to the immediate family members,[35] (b) and (c) refers to the Applicant alone. Moreover, an immediate relative could be "in a position to be exploited by a foreign power" but *either* not (b) "in a way that could force" *or* where such force requires the Applicant to (c) "choose between loyalty to the person(s) involved and the United States."

The notion of "influence" applies to (b) and/or (c).[36] While this term is nowhere defined, specific limited examples have been discussed. For purposes of Guideline B, it does not matter whether an applicant is personally at risk because the applicant: (1) may be influenced through favorable feelings toward the government or regime of a foreign nation; (2) may be influenced through favorable feelings toward the people (including the applicant's relatives) and culture of a foreign nation; (3) may be influenced through a desire to avoid harm to, or to

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[33] *See* ISCR Case No. 02-21330 (December 17, 2003) at 5.

[34] *See* ISCR Case No. 98-0507.a1. at 3 (May 17, 1999).

[35] *Id.* ("The analysis of an applicant's case does not end simply because a Judge finds the applicant's relatives are not agents of a foreign power. Even if an applicant's relatives living in a foreign country are not agents of a foreign power, the Judge must consider whether the applicant's relatives are in a position that poses a risk that *they could be exploited* by a foreign power.")(emphasis added).

[36] *See* ISCR Case No. 99-0601 (January 30, 2001) at p. 5 ("The Appeal Board has noted that an applicant may be *influenced through a desire* to avoid harm to his relatives in a foreign nation.")(emphasis added).

gain benefit for, his relatives in a foreign nation; or (4) some combination or variation of such concerns.[37]

However, "[t]he mere possession of family ties with persons in a foreign country is not, as a matter of law, disqualifying under Criterion B. The language of Criterion B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties."[38]

Yet, with respect to exploitation of immediate family members, it is virtually impossible for any applicant to truly affirmatively prove a negative and demonstrate that a foreign relative or contact is not in some way possibly subject to exploitation by a foreign power.[39] In fact, this premise has no true relationship, particularly in our global age, to a territorial connection. A foreign government could easily threaten someone's family members or friends residing here in the United States. It is not even the practical reality of whether that government could or would carry out its threat but the perception of concern that could be raised by the very nature of the threat. Every individual possessing a security clearance is therefore facing a potential genuine risk.

Indeed, this would equally apply to myself. Anyone who conducts research will discover that I routinely handle high-profile national security related cases, and that I have been granted authorized access to classified information, at times up to the TS/SCI level, with several federal agencies. What is to stop a foreign government or terrorist organization from attempting to exploit, coerce or influence me through members of my family in order to gain access to sensitive, classified information? Additionally, if events such as the 1993 bombing of the World Trade Center, its destruction on 9/11 and the 1995 Oklahoma City bombing teach us anything, terrorists live among us as well.

Indeed, notwithstanding the asserted security concerns, I am not aware of any studies, classified or unclassified, that have demonstrated that any foreign power or terrorist organization has specifically targeted U.S. contractors in order to obtain access to classified information. And if there are classified studies, it is highly doubtful that any of the DOHA Judges are aware of them. Are contractors at risk from terrorists in particular? Of course, but anyone who reads a newspaper is aware that a primary danger they face is to be taken as a hostage, not as doorways to access to classified information. Yet these "risks" are repeatedly thrown at applicants without basis and used to deny clearances.

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[37] *Id.* The "influence" can be either coercive or noncoercive. *See e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at 10-11.

[38] *See* ISCR Case No. 98-0507.a1 (May 17, 1999), at 8.

[39] *See* ISCR Case No. 00-0461 (January 19, 2001)(applicant mitigated security concern where family in Ireland were not agents of foreign power or in position to be exploited, and contact of 12 visits in seven years and monthly phone calls and e-mails were casual and infrequent).

Moreover, the fact is that the evidence commonly utilized to allow a finding that a relative's immediate relatives are not agents of a foreign power is the testimony of the Applicant themselves.[40] Some judges assess great weight to an applicant's statements. Others view them as self-serving. [41] What distinguishes one from the other is unknown.

Another available mitigating factor under Guideline B: Foreign Influence that is commonly raised is that "contact and correspondence with foreign citizens are casual and infrequent." Unfortunately, the terms "casual" and "infrequent" have no standardized definition or application. The Adjudicative Desk Reference, published by The Personnel Security Committee of the U.S. Government Security Policy Board and which was to be used in conjunction with the 1997 guidelines, sets forth this definition:

> 3. **Casual and Infrequent:** Contact and correspondence with foreign citizens is not a concern when it is casual and infrequent. Contact is casual when it is unintended or occurs as an incidental byproduct of other activities, e.g., attending a party where a foreign citizen has also been invited. The contact may not be casual if the subject took the initiative in making it happen. Contact may also be casual if it is limited to an annual exchange of holiday greetings. Whether contact qualifies as infrequent depends upon the nature and circumstances of the contact.[42]

DOHA has made it clear it will not craft a specific test for identifying risk. What is the number of telephone calls to a loved one overseas that should be considered casual or infrequent? Four per year? Seven? Is it the number of calls or is the length of the conversation at issue as well? How many trips back to the home country per decade should arouse suspicion or concern? Two? Ten? Does the identity of the country matter? These are important questions and DOHA's reluctance to craft such a test is perfectly understandable. There is no true barometer that could have any rational general application. Yet, this leads to perceived or actual inconsistencies based on very similar facts.

Consider one case in particular where I represented a defense contractor originally from Pakistan whose clearance was denied based on Foreign Influence. My client provided unrefuted testimony that he had "infrequent contact" with his siblings, "perhaps telephone contact 3-4 times per year lasting only a few minutes at a time to merely inquire about their health and family life." Although the Administrative Judge ruled that there is nothing in the record to indicate that Applicant's brother is an agent of a foreign power, she nevertheless ruled that "there is no evidence to show that he is not in a position to be exploited by a foreign

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[40] *See e.g.* ISCR Case No. 02-10378.h1 (December 15, 2003)(only applicant testified to Korean family history, clearance granted); ISCR Case No. 02-14351.h1 (October 9, 2003)(same); ISCR Case No. 02-30929.h1 (June 30, 2003); ISCR Case No. 02-18810.h1 (May 21, 2003)(same); ISCR Case No. 02-02172.h1 (May 16, 2003); ISCR Case No. 01-19960.h1 (May 20, 2002))(same).

[41] A Judge is not required to accept a witness's testimony in an uncritical manner or weigh such testimony in isolation from the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 12. Moreover, a Judge is not compelled to accept a witness's testimony at face value merely because it is unrebutted. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 4 and n.9; ISCR Case No. 99-0005 (April 19, 2000) at p. 3

[42] This document was previously accessible at *http://www.dss.mil/nf/adr/forinfl/forinflF.htm* and was directly linked to DOHA's website. It was removed several months ago without explanation, though presumably due to the issuance of the revised 2005 guidelines, notwithstanding the fact that DoD has not yet implemented them.

power in a way that might force Applicant to choose between him and his well-being and his loyalty to the United States."[43]

It was noted that "despite Applicant's sincere demeanor and his assurances that he is not a security risk, the circumstances of his family situation argue otherwise. He was unable to put forward evidence that could mitigate the security concerns discussed herein and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information." Yet neither the Administrative Judge nor Government counsel questioned the Applicant's credibility and, in fact, the Judge concluded that "[n]othing in Applicant's testimony or demeanor suggested he was not a loyal American citizen and a credit to his adopted country."[44]

What then was beyond the Judge's rationale for the unfavorable decision?

> Applicant's case requires the recognition that Pakistan and the United States have a special political and economic relationship. At the same time it is also necessary to recognize that Pakistan is on the front lines in the war against international and regional terrorism and, despite the efforts of its government, there are individuals and groups within Pakistan who have acted and continue to act in a hostile manner to U.S. security interests.[45]

Beyond the fact that in today's world this generic assumption and description fits dozens of countries throughout the world, including the U.S. itself, it was completely inconsistent with factual findings reached by other DOHA Administrative Judges and this Administration. Consider another ruling issued just three months after the devastating terrorist attacks of September 11, 2001, wherein the Administrative Judge held:

> Applicant's situation is in marked contrast to a situation where an applicant's family reside in a country whose interests are considered inimical to those of the US. Pakistan is not a hostile country, but a country who enjoys allied support with the US in their current joint security efforts. Put another way, Pakistan is not a country hostile to the security interests of the US, but a country whose political institutions (while not democratic at present) are sufficiently aligned with our own traditions (which include the rule of law) to absolve Applicant of any foreseeable security risk. While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the nature of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Because of the presence of Applicant's immediate family members in Pakistan (a country whose interests have recently been friendly to those of the US), any potential risk of a hostage situation becomes unlikely, or at the very least, an acceptable one.[46]

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[43] ISCR Case No. 02-29403 (April 21, 2004) at 6.

[44] *Id.*

[45] *Id.* at 5.

[46] ISCR Case No. 01-07212 (December 26, 2001).

Despite literally facts identical to my client's case including immediate family members living in Pakistan, sporadic visits to Pakistan, certain family members in ill health, evidence that the majority of the family members were in private industry though some were connected to the government, particularly the military, completely opposite policy rulings were reached.[47]

Although DOHA Administrative Judges have authority to adjudicate the security eligibility of applicants under Executive Order 10865 and the Directive, that authority does not extend to adjudicating foreign policy and foreign relations issues.[48] The nature and status of United States relations with other countries or foreign entities involve sensitive policy decisions and judgments with potentially serious international, diplomatic, national security, and legal ramifications that are not suitable for adjudication in adversarial proceedings such as these. As the DOHA Appeal Board noted in ISCR Case No. 02-00318.a1 (February 25, 2004), it "does not have the authority to make its own pronouncements about the nature of relations between the United States and foreign countries. Pronouncements about the relationship between the United States and any given foreign country are committed to the President of the United States and other duly authorized Executive Branch officials." Yet adjudicators and DOHA Administrative Judges do so all the time.

To some extent the changes promulgated in the new guidelines merely implement existing perception about foreign preference cases that was shared by many including DOHA Administrative Judges. They reflect practical and rational modifications to fit a more realistic environment. The new guidelines legitimately raise the bar, or perhaps more precisely set a more appropriate bar, for the government to revoke/deny an individual's security clearance based on Foreign Preference. The most frequently cited disqualifying condition now requires a "heightened risk", though that term is undefined, "of foreign exploitation, inducement, manipulation, pressure, or coercion."

More importantly the mitigating condition now specifically and explicitly takes into consideration "the nature of the relationships with foreign persons" and "the country in which these persons are located." Additionally, the bar is lowered for the individual to demonstrate that "the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S."

I do firmly believe that the results of my client's case above would very likely have been different had the 2005 Guidelines been applied. Whether, of course, the application of the new

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[47] With respect to my specific case, the Administrative Judge concluded that the Applicant's "actions toward his father and father-in-law make it clear that his relationship with them is not casual and infrequent but intense and seriously concerned for their welfare." ISCR Case No. 02-29403 (April 21, 2004) at 6. Yet the only evidence in the record regarding Applicant and his father was that he speaks to him on the telephone twice per month, though this frequency is not followed diligently. He had visited his father a mere four times in over ten years. The conversations and meetings never concerned the Applicant's work and dealt solely with casual family issues, particularly to keep his father's morale up after being widowed. The Judge also concluded that "[w]hile his widowed father and father-in-law are not agents of a foreign power, *they are in fragile health and could be exploited by a foreign power* in a way that could force Applicant to choose between loyalty to them and the United States." *Id.* (emphasis added). How an individual's foreign relative being in "fragile health" versus good health exacerbates the potential concern for exploitation is unknown. Is a terrorist or a hostile government more likely to threaten an ailing relative than a healthy one in order to compromise classified information? Does an individual's affection for a person increase because the relative is in ill-health? These are some of the types of security assessments being utilized by DOHA Judges.

[48] *See* ISCR Case No. 02-00318 (February 25, 2004) at 6-7.

Guidelines results in different outcomes is yet to be seen. But on paper the modifications are a welcome change.

Foreign Preference Cases

Foreign Preference cases are usually more straightforward and easier to overcome than Foreign Influence. Most DOHA cases where Guideline C is at issue involve an individual's exercise of dual citizenship or possession and/or use of a foreign passport. Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision.[49] Under this guideline, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions."[50] Indeed, a mitigating factor to overcome this concern is to have the individual express "a willingness to renounce dual citizenship." Actual renunciation is not required.

Several years ago this became the hot button issue. On August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence issued a memorandum (called the "Money Memorandum") that "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States." The concern, of course, was that the individual could ostensibly travel abroad without knowledge of the United States.

Part of the problem under the 1997 Guidelines is what is meant by "surrenders"? For some countries there is no mechanism that permits the surrender of a passport. Oftentimes I will simply have the client mail the passport to the country's U.S. Embassy and certify that this had occurred. Possession of even an expired passport can be continuing grounds for concern. Indeed, continuation of dual citizenship would seemingly allow for the re-issuance of a passport anyway. Nevertheless, the new 2005 Guidelines adopt a more practical approach and allow the individual to simply destroy or otherwise invalidate the passport.

DOHA Appeals

Unlike in the majority of federal agencies, a favorable ruling attained by an individual can be appealed by the Government (the DOE is apparently the only other entity where this occurs). When that occurs, the odds are demonstrably in favor of the Government (and lately the resolution can easily take up to a year before a decision is rendered). A recent study that reviewed all DOHA Appeal Board decisions since January 2000 concluded that:

> its standards of appellate review are so vague and elastic that the Board can and does reverse or sustain virtually any decision of a DOHA administrative trial that fits its view of the facts, or despite the facts. The Appeal Board will depart from its frequently stated standards of appellate review to reach a decision that appears to simply substitute its judgment for that of the trial judge. It has done this with some frequency, but almost without fail in one category of cases, those of

[49] *See* ISCR Case No. 99-0454 (App. Bd. Oct. 17, 2000) at 5.

[50] *See* ISCR Case No. 98-0252 (App. Bd. Sep 15, 1999) at 5.

applicants with contacts or relatives in, or other ties to foreign countries.[51]

On appeal, the Board is not supposed to review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error.[52] However, the same study referenced above concluded that, in fact, the Appeal Board *often* issues its own *de novo* decisions in a manner and frequency that is quite alarming.[53]

When the rulings or conclusions of an Administrative Judge are challenged, the Appeal Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law.[54] 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.[55] In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law.

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."[56] 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.

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[51] Cohen, Sheldon, APPEAL BOARD DECISIONS OF THE DEFENSE OFFICE OF HEARINGS AND APPEALS Are they Arbitrary and Capricious? (July 10, 2006) at 31. A copy of this study can be accessed at *http://www.sheldoncohen.com/publications*.

[52] Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 02-09907.a1 (5 February 2004)(setting forth review authority of Board).

[53] Cohen, APPEAL BOARD DECISIONS, at 14 (Board acting as "super trial judge").

[54] Directive, Additional Procedural Guidance, Item E3.1.32.3.

[55] *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3.

[56] Directive, Additional Procedural Guidance, Item E3.1.32.1.

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

(1) Is the error harmful or harmless?[57];

(2) Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds?[58]; and

(3) If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded?[59]

The DOHA Appeal Board, under the 1997 Guidelines to be sure, has lost perspective of the specific concern that applies to Criterion B namely that "contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure." I daresay in most DOHA cases there is no evidence submitted into the record – much less any evidence I know of – that purports to link terrorism or terrorist attacks against Americans or their foreign family members for the purposes of *coercion, exploitation, or pressure* in order to compromise classified information. Nor is it customary that any specific evidence is introduced into the record with respect to the conduct of foreign countries either. Occasionally, a generic study on espionage statistics that identify known or presumed countries that engage in such conduct will be submitted for judicial notice.

The statistics involving Appeal Board decisions for Foreign Influence/Foreign Preference cases, in particular, is distressing. Since 2000, the Appeal Board, in cases involving a foreign connection, "has affirmed all (144) of applicants' appeals of decisions involving foreign countries denying a clearance, and reversed all but four (45) of the government's appeals of such decisions granting a clearance. In only one of those four cases did the applicant have immediate family living in a foreign country and in that case the Board could not reverse because the government did not appeal on that issue."[60]

PROPOSED RECOMMENDATIONS FOR LEGISLATIVE CHANGE OR ACTION

In light of my own experiences, and in the canvassing of colleagues who also routinely handle such cases, my recommendations, in no meaningful order, are as follows:

Specific To New Adjudicative Guidelines, Foreign Influence And Foreign Preference

- Require DoD, its components, and any other agencies which have yet to adopt the new Adjudicative Guidelines to do so immediately.

- Task GAO to conduct a thorough assessment and statistical analysis of the security clearance appeal process as it is implemented throughout the federal government, and not just DoD. Standardization should be the norm throughout the federal system. There is

[57] *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

[58] *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (*citing* federal cases).

[59] Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3.

[60] Cohen, APPEAL BOARD DECISIONS at 31.

simply no justifiable reason why one agency should be applying a different level of due process, procedural or substantive, than another.

- Consider removing DOHA's ability to appeal favorable decisions issued by an Administrative Judge unless a better, more balanced framework can be instituted. As far as I know, no other agency other than DOE is permitted to appeal a favorable decision.

- Consider loss of a clearance based on Foreign Influence, and perhaps Foreign Preference depending upon the circumstances, not as a security clearance denial, but as a less stigmatizing suitability decision as no question of loyalty or trust is or may be involved.

- Require modification to the SF-86 and other relevant security clearance questionnaires to include additional initial details about matters that could be disqualifying under Foreign Influence or Foreign Preference so as to permit earlier determinations (existence of expired foreign passport, frequency of contact with foreign nationals, definitions of "bound by affection" and "close and continuing contact". The instructions should also be amended to clarify exactly the specific type of information that is being sought.[61]

General Recommendations Applicable To Security Clearance Process And Challenges

- Create an administrative hearing system similar to that of DOHA and DOE across the board at all federal agencies.

- Create an independent body outside of the involved federal agency (most Offices of Inspector General believe they do not have jurisdiction to entertain challenges or reviews, nor does the Merit Systems Protection Board) to adjudicate final challenges to an unfavorable security clearance decision; OR

- Grant the federal judiciary statutory jurisdiction to review substantive security clearance determinations. While agencies always argue, and federal judges generally seem willing to accept, that such decisions require expertise lacking in the federal judiciary, the fact of the matter is that the majority of the decisions are based solely on common sense rationale. The granting of jurisdiction does not require that agencies no longer be accorded deference to their decisions. Yet Article I Administrative Judges, many of whom have little to no security clearance experience before being hired, substantively adjudicate DOHA and DOE cases and reverse DoD and DOE security decisions, respectively on a daily basis. How is it then that an Article III Judge, who is not even required to undergo a background investigation and is permitted automatic access to classified information by virtue of their Constitutional authority, cannot adjudicate a clearance challenge? Presumably DOHA and DOE Administrative Judges participate in certain trainings before assuming their initial responsibilities so there is obviously no good reason why Article III judges can not do the same.

- Require all federal agencies to audiotape security interviews and, most importantly, polygraph sessions and maintain preservation of those tapes for a reasonable period of time as well as permit unfettered access to at least a written transcript if a security

[61] More than five years ago the GAO noted that the "federal guidelines call for adjudicators to consider, among other things, the 'frequency' and 'recency' of the conduct, whether foreign contacts were 'casual,' and whether foreign holdings were 'minimal.' The guidelines, however, do not provide any guidance as to what represents a frequent or recent action, a casual contact, or minimal holdings." GAO-01-465, *DoD Personnel* at 28. This still remains the case.

clearance denial/revocation proceeding is initiated. Very often clearance decisions come down to a "did he or did he not say" what is alleged, or in what context was the statement made.

- Legislate additional protections into the system to include, but not be limited to, the release of further information and the ability of counsel/petitioners to have access to classified information.

- Remove immunity from civil liability from individuals who submit information that they should know or is known to be false to a federal agency that leads to the initiation of adverse clearance proceedings to include a suspension.

- Legislatively forbid agencies from suspending employees without pay during the pendency of their security clearance proceedings, or at least require agencies to provide back pay to those who favorably resolve their case.

- Legislatively require that agencies cover attorneys fees for those cases in which the adverse decision is reversed.

- Create a system of penalties for those federal officials who knowingly and intentionally retaliate against individuals for Whistleblower or other activities/conduct which then leads to the initiation of adverse security clearance proceedings. Section 6.4 of Executive Order 12968 states that "[e]mployees shall be subject to appropriate sanctions if they knowingly and willfully grant eligibility for, or allow access to, classified information in violation of this order or its implementing regulations. Sanctions may include reprimand, suspension without pay, removal, and other actions in accordance with applicable law and agency regulations." Yet absolutely no sanctions, or even the perceived threat of such, exist for those who abuse the system for purposes of harming others.

- Section E3.1.37 of DoD Directive 5220.6 (1992) states that an "applicant whose security clearance has been finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision." The positive intended effect of this provision is actually to ensure an individual is not penalized from pursuing an appeal following the issuance of an unfavorable initial hearing decision. That is, if an individual is denied a clearance by a decision issued January 1st and appeals that decision, they are eligible for reconsideration no matter the outcome of the appeal the following January 1st of the next calendar year. However, the practical effect of this provision also serves to unfairly penalize those individuals who prevail at their administrative hearing but then face an appeal by the Government. During the pendancy of the appeal that individual remains in absolute clearance limbo and should they ultimately lose to the Government on appeal, which is highly likely, the one year time clock does not begin to run until the appeal decision is issued. This date may be long after the one year period would have expired. For example, if an individual receives a favorable administrative decision on January 1st and the Government appeals, and that appeal results in a reversal nine months later (which unfortunately would not be an unusual lapse of time) on September 1st, this provision would not apply. The individual could not have their clearance access reconsidered until the following September 1st resulting in a loss of nearly one year of valuable time that may have directly caused the individual to lose his business or employment.

These are but just some examples that I would hope you consider. Again, I thank you for the opportunity to appear before this august body today. I am more than willing to answer any questions you might have, as well as work with Members of this Committee and its staff to best design the legislative actions I have suggested today.

EXHIBIT A

BIO OF MARK S. ZAID
RE: SECURITY CLEARANCES

* Practicing law for nearly 15 years. Managing Partner, Krieger & Zaid, PLLC, Washington, D.C., which is said (by agencies of the U.S. Government) to have represented more intelligence officers in the last ten years than any other law firm.

* Specializes in handling administrative and litigation challenges in national security cases.

* Has handled nearly 100 security clearance matters (suspensions, denials, revocations) throughout the Federal Intelligence and Law Enforcement Community during the last eight years. This has included administrative appearances as well as DOHA hearings.

* Frequently represents federal employees and contractors.

* Co-teaches a DC Bar Continuing Legal Education class on defending adverse security clearances.

* Testified in February 2006, as an expert witness on security clearances before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on the Judiciary, U.S. House of Representatives.

* Testified before the Committee on the Judiciary, U.S. Senate, in April 2001, on the use of pre-employment polygraphs by the U.S. Government.

EXHIBIT 2

2005 VERSION OF ADJUDICATIVE GUIDELINES FOR SECURITY CLEARANCES

GUIDELINE B: FOREIGN INFLUENCE

6. *The Concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

7. *Conditions that could raise a security concern and may be disqualifying include:*

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(c) counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;

(f) failure to report, when required, association with a foreign national;

(g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;

(h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion;

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

8. *Conditions that could mitigate security concerns include:*

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the

interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country;

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

GUIDELINE C: FOREIGN PREFERENCE

9. *The Concern.* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

10. *Conditions that could raise a security concern and may be disqualifying include:*

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(2) military service or a willingness to bear arms for a foreign country;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial or business interests in another country;

(6) seeking or holding political office in a foreign country;

(7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest;

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

11. *Conditions that could mitigate security concerns include:*

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;

(f) the vote in a foreign election was encouraged by the United States Government.

EXHIBIT 3

SIDE BY SIDE COMPARISON OF 1995 AND 2005 ADJUDICATIVE GUIDELINES WITH RESPECT TO FOREIGN INFLUENCE AND FOREIGN PREFERNCE

Guideline B: Foreign Influence

1995

The Concern. A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

2005

The Concern. Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Conditions that could raise a security concern and may be disqualifying include:

1995

a. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

2005

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

1995

b. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.

2005

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

1995

c. Relatives, cohabitants, or associates who are connected with any foreign government;

2005

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

1995

d. Failing to report, where required, associations with foreign nationals;

2005

(f) failure to report, when required, association with a foreign national;

1995

e. Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service.

2005

(g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service.

1995

f. Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;

2005

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

1995

g. Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure.

2005

(h) indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion.

1995

h. A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.

2005

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Conditions that could mitigate security concerns include:

1995

a. A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

2005

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

1995

b. Contacts with foreign citizens are the result of official U.S. Government business;

2005

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority.

1995

c. Contact and correspondence with foreign citizens are casual and infrequent;

2005

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

1995

d. The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons or organizations from a foreign country.

2005

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

1995

e. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

2005

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

1995

None

2005

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Guideline C: Foreign Preference

1995

The Concern. When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

2005

Same

Conditions that could raise a security concern and may be disqualifying include:

1995

a. The exercise of dual citizenship;

2005

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member.

1995

b. Possession and/or use of a foreign passport;

2005

(1) possession of a current foreign passport.

1995

c. Military service or a willingness to bear arms for a foreign country.

2005

Same.

1995

d. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

2005

Same, except for some minor reorganization of the words.

1995

e. Residence in a foreign country to meet citizenship requirements;

2005

Same.

1995

f. Using foreign citizenship to protect financial or business interests in another country;

2005

Same.

1995

g. Seeking or holding political office in the foreign country;

2005

Same.

1995

h. Voting in foreign elections.

2005

(7) voting in a foreign election.

1995

i. Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

2005

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest.

1995

None.

2005

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

1995

None.

2005

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Conditions that could mitigate security concerns include:

1995

a. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

2005

Same.

1995

b. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

2005

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor.

1995

c. Activity is sanctioned by the United States.

2005

(d) use of a foreign passport is approved by the cognizant security authority.

1995

d. Individual has expressed a willingness to renounce dual citizenship.

2005

Same.

1995

None.

2005

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

1995

None.

2005

(f) the vote in a foreign election was encouraged by the United States Government.

Chairman TOM DAVIS. Thank you for your excellent testimony. Mr. Wagoner.

STATEMENT OF DOUG WAGONER

Mr. WAGONER. Mr. Chairman, it is good to be here today. My name is Doug Wagoner. I'm the senior vice president of DSA, a small northern Virginia based information technology business that requires that all of my employees have clearance. I am speaking today, however, as the chairman of the ITAA'S Intelligence Committee and as a spokesman for the Security Clearance Reform Coalition.

Thank you for this opportunity to appear before you once again to discuss the industry perspective on the continued issues facing the Federal security clearance process. Our coalition is comprised of the Aerospace Industries Association, FC International Association, Associated General Contractors of America and the Association of Old Crows, Contract Services Association, ITAA, Intelligence and National Security Alliance, NDIA and PSC.

We represent thousands of companies that provide classified products, services and personnel to the Federal Government. The coalition compliments the President for extending the authority of Executive Order 13381 for an additional year and applauds the implementation of the updated December 2005 President's adjudicative guidelines for determining eligibility for access to classified information. This is a vital reform needed to achieve clearance reciprocity across the government. For too long clearances have not been reciprocally recognized between departments or even within agencies within the same department. The root of the problem is an institutional lack of trust between agency adjudicators, each of them thinking that only they can determine the person's trustworthiness for granting access to classified information that they control. These revised guidelines are the latest iteration of a longstanding effort to get departments and agencies to adopt uniform clearance adjudications.

Unfortunately, although the President has issued the revised guidelines in December 2005 they have yet to be uniformly adopted or applied across government. We continue to experience problems with the equitable application of adjudicative criteria and reciprocal acceptance of those criteria, and this lies at the heart of the problem.

If agencies could be confident that all Federal agencies adjudicate the same criteria and standards, they should have confidence in recognizing a clearance issued by another agency. However, there are efforts underway to bring about change and industry would like to recognize and thank Mr. Bill Leonard, the Director of Information Security Oversight Office, for his continued leadership on the issue of reciprocity with clearances.

The application of criteria regarding the foreign influence on an applicant is especially important to our coalition member companies because of the many gifted technical personnel with foreign connections who can provide valuable help to national security missions. Other clearance applicants are singled out because of family or marital status, marital ties to foreign nationals or because they

may be considered a dual citizen based on their birth abroad to U.S. parents. America cannot deny itself access to this talent.

There is the anecdotal case of the U.S. General who, upon retirement, applied to have his clearance transferred to his new employer and was rejected because he was married to a Canadian national. His spouse's nationality was never a disqualifier during his 30-year military career, yet the same person working for industry apparently was no longer considered trustworthy.

Unfortunately, the more frequent response is to either reject or forever delay applicants with such conditions without measurement of actual risks they may pose.

Chairman TOM DAVIS. That was when they had a liberal government I assume, right, before the Tories came in?

Mr. WAGONER. I am sure.

Part of this problem can be attributed to lack of training for adjudicators regarding the degree of risk presented by certain foreign nations. This measurement of risk should include counterintelligence, infrastructure of a nation and its ability or history of applying coercion to U.S. citizens with relatives or friends residing in the country.

Evaluating the extent of a person's foreign connections as part of the investigative process is one of the weakest links in the entire effort. Applicants with foreign interaction routinely wait months before being investigated, thereby creating uncertainty for the applicant and their employer. As part of its investigative process OPM queues up applications for foreign investigations, waiting for critical mass for those tied to a particular country to save money.

That is not good enough and other government agencies appear to agree. The State Department specifically sought and received approval to establish their own investigative and clearance granting program after they found OPM's process was unable to meet its needs. State electronically sends out queries for their international clearance applications as they are received. The State Department's personnel security program may already meet or exceed the ambitious time lines mandated by the Intelligence Reform Act of 2004. Industry suggests OPM contract with the State Department to utilize their best practice system when foreign checks on an applicant are needed.

Government oversight of adjudication is itself sometimes part of the problem. As discussed earlier, since GAO has previously criticized DOD for granting clearances on cases that do not fully comply with the national guidelines, DOD has directed OPM to not return any case for adjudication unless all leads have been completed. This development has caused many cases to be held at OPM that otherwise would have been favorably adjudicated on a risk management basis, pending completion of some relative minor lead in the case. While this approach assures complete adherence to the guidelines, it precludes a clearance based on otherwise favorable investigation where risk is minimal to non-existent.

Our coalition has two recommendations that we believe will enhance the Federal security process. Both of these steps are within the clear direction of Congress that Congress provided in the 2004 Intelligence Reform Act.

First, we recommend the creation of an agency-sponsored pilot program that would utilize technology with government and industry best practices in each stage of the clearance granting process, including periodic reinvestigation. This pilot program would provide an opportunity for government and industry to work together to demonstrate that technology can improve both the efficiency and even the security of the clearance process. Industry believes that the efficiencies of such a pilot would provide a clear contrast to current Eisenhower era, paperwork-intensive processes. A statistically valid sample of investigations could be selected for a parallel test of the standard OPM investigation versus an investigation utilizing automated applications, electronic submission of fingerprints and signatures and verification of investigative criteria using commercial and government data bases. If requested, industry can provide the committee staff with a detailed proposal, including how it can reduce the backlog, lower costs, and ensure equitable treatment of all applicants.

Second, we recommend each agency evaluate every stage of the clearance process against the 2004 Intelligence Reform Act. We are not aware that such metrics are being measured nor are there viable mechanisms to identify whether weaknesses persist. This should be a stoplight grading process much as the President's management agenda to recognize agencies with best practices and advice to those needing more attention.

On behalf of the ITA Intelligence Committee and the Security Clearance Reform Coalition, thank you again for this opportunity to testify before you today and I am happy to answer your questions.

[The prepared statement of Mr. Wagoner follows:]

STATEMENT

OF

Doug Wagoner

on behalf of the

Security Clearance Reform Coalition

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT REFORM

July 13, 2006

SECURITY CLEARANCE REFORM COALITION

Mr. Chairman and Members of the Committee, my name is Doug Wagoner and I am the President of DSA, Inc., a Northern Virginia-based information technology small business that requires clearances for our personnel supporting the National Security mission. I am speaking today as the Chairman of the Intelligence Committee of the Information Technology Association of America and as a spokesman for the Security Clearance Reform Coalition.

We would like to thank you for giving us this opportunity to appear before you once again to discuss the industry perspective on the continued shortcomings of the federal personnel security clearance granting process.

Our coalition, comprised of the Aerospace Industries Association, AFCEA International, the Associated General Contractors of America, the Association of Old Crows, the Contract Services Association, the Information Technology Association of America, the Intelligence and National Security Alliance, the National Defense Industrial Association

and the Professional Services Council, represents thousands of companies that provide products, services and support personnel to the federal civilian, defense and intelligence communities. Our focus here today is on those personnel supporting vital National Security programs and efforts that require a clearance.

The Coalition compliments the President for extending the authority of Executive Order 13381 for an additional year and applauds and supports the adoption and implementation of the updated December 2005 President's Adjudicative Guidelines for Determining Eligibility for Access to Classified Information as a vital reform necessary for the eventual attainment of consistent clearance outcomes that support clearance reciprocity across the government. For too long, clearances have not been reciprocally recognized from agency-to-agency, department-to-department and even between agencies within the same department. At the root of the problem is an inherent lack of trust between agency adjudicators, each one thinking that they alone can evaluate and determine a person's trustworthiness for a clearance

granting access to the classified information they control. These revised Guidelines are the latest iteration of a longstanding effort to get agencies and departments to adopt uniform criteria for determining whether or not to grant a clearance.

Unfortunately, although the President issued the revised guidelines in December 2005, they have yet to be uniformly adopted or applied across government. We continue to experience problems regarding the equitable application of adjudicative criteria and the reciprocal acceptance of those criteria across agencies, and this lies at the heart of the problem. If agencies can be confident that all of the federal agencies adjudicate to the same criteria and standard, they should have confidence recognizing a clearance issued by another agency for the same level of access. That is sadly not the case. It is worth noting, however, that efforts are underway to bring about change and industry would like to recognize and thank Mr. Bill Leonard, the Director of the Information Security Oversight Office, for his continued leadership in the issue of reciprocity in the clearance granting process.

The application of criteria regarding the foreign influence on an applicant is especially important to our Coalition member companies because of the many gifted technical personnel with foreign connections who can provide valuable help to our National Security missions. Other clearance applicants are singled out because of family or marital ties to foreign nationals or because they may be considered to be a dual citizen based merely on their birth abroad to US parents. America cannot deny itself access to this talent. There is the anecdotal case of the U.S. military general, who, upon retirement, applied to have his clearance transferred to his new place of employment and was rejected because he was married to a Canadian national. The nationality of his spouse was never a disqualifier during his military service, yet the same person working for industry apparently was no longer considered trustworthy. Unfortunately, the more frequent response is to reject applicants with such conditions without any viable measurement of the actual risk they might pose during the adjudication process. Part of this problem can be attributed to the lack of training for adjudicators, some of which is classified,

regarding the degree of risk presented by certain foreign nations. This measurement of risk would include the intelligence/counterintelligence infrastructure of a nation and the ability or history of applying coercion or pressure by that nation to U.S. citizens with relatives or friends residing in the country. Before the end of the Cold War, there was a list of "designated countries," i.e. those whose interests were clearly inimical to the U.S., which adjudicators could use to assist them in rendering a decision. Since many countries who used to be on that now discontinued list are today allies of the U.S., these decisions must be made on a case-by-case basis depending on the country.

Evaluating the extent of a person's foreign connections as part of the investigative portion of the clearance granting process is one of the weakest links in the entire effort. Applications that raise issues regarding foreign interaction routinely wait months before being investigated, thereby creating a significant delay in the process. Because these "parked" applications are essentially invisible in the process, they also create much uncertainty for the applicant and the

employer. As part of its' investigative process, the Office of Personnel Management (OPM) continues to queue up applications for foreign investigations, only working on them when enough tied to a particular country have accumulated.

That is not good enough and other government agencies appear to agree. The Department of State specifically sought and received approval to establish their own investigative and clearance granting program after they evaluated the OPM process and found it lacking to meet it's needs. State electronically sends out queries regarding clearance applications it is handling as they are received. As a result, the Department of State personnel security program may already meet - if not exceed - the ambitious timelines mandated by the Intelligence Reform Act of 2004. Industry is unable to comprehend why OPM cannot either duplicate the State Department electronic transmission process or, even better, contract with the State Department to utilize their "best practice" system when foreign checks on an applicant are necessary.

Government oversight of adjudication is itself sometimes part of the problem. The Defense Industrial Security Clearance Office (DISCO), an office of the Defense Security Service, and other DoD Central Adjudication Facilities, have in the past routinely adjudicated cases which had been closed pending on some relatively minor investigative lead by either DSS or OPM, such as the FBI name check (vice criminal history check), with the rest of the case favorably completed. However, since the Government Accountability Office has previously criticized DoD for granting clearances on cases that do not fully comply with the national guidelines, DoD has directed that OPM not return any case for adjudication unless all leads have been completed. This development has caused many cases to be held at OPM that otherwise could have been favorably adjudicated on a risk management basis pending completion of some relatively minor lead in a case. While this approach assures complete adherence to the letter of the investigative guidelines, it precludes individuals from being issued a clearance based on an otherwise favorable investigation where the risk is minimal to non-existent.

In conclusion, our Coalition makes two recommendations that we believe will foster further reform of the federal personnel security clearance process. Both of these steps revolve around the clear direction Congress provided for improving the process in the 2004 Intelligence Reform and Terrorism Prevention Act. This direction established viable milestones for the improvement of the clearance granting process. However, agency failure to adopt and implement those standards is one of the reasons this Committee has convened twice in the last few months.

First, we recommend the creation of an agency-sponsored "pilot program" that would utilize technology and government and industry best practices for the application and investigation stages of the clearance granting process, including periodic reinvestigation. Since standards and criteria currently exist and are widely used across government and industry for these two functions, there is no inherent governmental role at these stages of the process. Industry believes that the efficiencies of such a pilot program would provide a clear

contrast to the antiquated technology and the Eisenhower-era, paperwork intensive processes currently in use by OPM and others. To create a means of comparison with existing processes and to measure the effectiveness of such a pilot program, the same applications entered into the pilot program would also be submitted to the existing clearance granting process. For example, a statistically valid sample of investigations or reinvestigations could be selected for a parallel test of 1) the standard OPM investigation, and 2) an investigation utilizing, among other things, automated applications, electronic submission of fingerprints and signatures and verification of investigative criteria using commercial and government databases and telephonic contacts. Testimony today does not provide sufficient time to detail such a proposal, but industry stands ready to work closely with the Committee and its staff to develop such a proposal, including how it can reduce the backlog of clearances, lower the costs to government, and use new case management technologies to expedite and improve the efficiency of the clearance process.

Second, we recommend evaluating the application, investigation, adjudication and reciprocal recognition stages of the clearance granting process for each agency against the legislatively mandated criteria of the 2004 Intelligence Reform Act and take appropriate action identified in the law, including the suspension or revocation of the ability to grant clearances. Obviously, such an action would be in the extreme, but we are not aware that such metrics are being measured or evaluated and therefore, there is no viable mechanism to identify where the weaknesses persist. A "stoplight" grading process – much like that currently employed to evaluate success under the President's Management Agenda - for all investigative and adjudicative agencies would be a sufficient first step to recognize success and best-practices where they have been developed and adopted and to single out those areas that are in need of greater support and attention.

Obviously, these recommendations would require a continued strong commitment from Congress and the Administration to see the clearance process reformed. An end-to-end evaluation for each

agency that submits applications and adjudicates clearances would provide transparency to the process and allow us to really focus resources. A pilot program would provide an opportunity for government and industry to work together to demonstrate that technology and automation can work to cut the red tape of the personnel security clearance process. Achieving the goal of reform is vital to ensuring that the contractor workforce is ready and able to support the National Security mission.

On behalf of the ITAA Intelligence Committee and the Security Clearance Reform Coalition, I wanted to thank you again for the opportunity to testify before you today. I am happy to answer your questions.

Chairman TOM DAVIS. Thank you very much.
Mr. Nagurny, thank you for being with us.

STATEMENT OF WALTER S. NAGURNY

Mr. NAGURNY. Chairman Davis, Ranking Minority Member Waxman and members of the Committee on Government Reform, first, I would like to commend you and your colleagues for your fast response and action in helping resolve the precarious situation created because of the daunting backlog in the security clearance process.

My name is Walter Nagurny. I am the Security Director for the U.S. Government Solutions business unit of Electronic Data Systems Corp. I have served EDS in that capacity for 2 years. I have experience that dates back to 1987 as a government employee and for the past 10 years as a contractor related to security clearances. My responsibilities at EDS include oversight of all activities related to security clearances and support of contracts awarded to EDS by the Federal Government. EDS has a sizable cleared work force.

As a major supplier of information technology to the Federal Government, the very significant challenge EDS faces is to identify and hire capable people who can provide the leading edge expertise government customers expect from EDS.

One practice EDS utilizes to identify appropriate candidates is to conduct a voluntary prescreening with respect to the likelihood the clearance need for access to classified information will be granted. To this point candidates are not asked to divulge personal information to EDS, but are required to read an EDS internal use document that provides an overview of the clearance process and the Hadley guidelines. Once educated about the process, some candidates decide they do not want to face the scrutiny of a security clearance investigation.

Prescreening minimizes drawn out clearance requests and helps the overarching U.S. Government security clearance infrastructure. Prescreening also provides EDS hiring managers with an estimated date the clearance process should be completed. Sometimes having a cleared employee on the job outweighs the technical qualifications of other candidates. That's unfortunate. EDS takes no action and makes no decisions that will impact an individual's eligibility for a security clearance. EDS will submit a candidate for a clearance under a contract that requires it as long as an EDS hiring manager made the decision that it is a good business. EDS's procedures simply provide an estimate about how long it might take to gain an approval for a security clearance.

EDS has a good track record of getting employees approved for a security clearance. One troubling area, however, is that some clearance requests languish for several months without any feedback or end in sight. All too often highly qualified employees leave because a clearance decision took longer than 18 months.

The overall security clearance process has improved. The Joint Personnel Adjudication System, JPAS, for example, has shown a major positive impact on the way contractors interface with government agencies regarding security clearances.

On the other hand, other changes have also made an impact. The assumption of responsibility for DOD clearance investigations by

the Office of Personnel Management in March 2005 is a case in point. I say that because on one hand a DOD interim secret clearance is now being granted to many employees in less than 5 business days, some in fact overnight. Final secret clearances are often being granted within 60 days.

EDS has many employees who are either naturalized U.S. citizens, have non-citizen immediate family members or hold dual citizenship. Getting a security clearance for them is often difficult.

EDS recognizes the indisputable need to keep classified and other sensitive information out of the hands of non-citizens. It is no doubt a huge challenge to distinguish foreign preference individuals who could be blackmailed from individuals who would never contemplate divulging information. The Hadley guidelines address such concerns as well as the factors that mitigate security concerns. As significant numbers of naturalized citizens accept positions in the IT industry, the need for government contractors to submit naturalized citizens for a security clearance will only increase.

Cleared EDS employees who are naturalized citizens have an outstanding record of filing required security reports, complying with classification rules and following security procedures. While the Hadley guidelines speak of dual citizens expressing willingness to renounce their non-U.S. citizenship as mitigation, these cases nonetheless always end up at DOHA. A dual citizen who submits proof that it is his expressed intent to renounce non-U.S. citizenship would seem to satisfy the adjudicative guidelines.

A real time example: A well-qualified EDS employee was recently denied an interim secret clearance. He is a veteran of the U.S. Marine Corps and retains a dual citizenship in Portugal, where he was born. Eventually DOHA will ask this employee to renounce his Portuguese citizenship and he will receive swift clearance approval. There must be a method to handle cases in which dual citizenship is the issue more swiftly.

In closing, a few observations regarding the overarching status of contractors being processed for security clearances. Security requirements issued by user agencies that are well written, clear and explicit streamline the overall process. Many companies, including EDS, conduct a comprehensive background investigation and drug screening of all potential employees as a condition of employment. It is conceivable that standards could be developed to leverage on a voluntary basis the information obtained in preemployment investigations done by many national industrial security program companies, thereby leading to more informed security clearance decisions being made more swiftly.

I thank you and I am happy to answer any questions you might have, Mr. Chairman.

[The prepared statement of Mr. Nagurny follows:]

Statement of

Walt Nagurny

Director, Industrial Security Office

EDS U.S. Government Solutions

Before the

U. S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM

on

"Can You Clear Me Now?: Weighing "Foreign Influence" Factors in Security Clearance Investigations"

Thursday, July 13, 2006
2154 Rayburn House Office Building
Washington, DC

Chairman Davis, Ranking Minority Member Waxman and Members of the Committee on Government Reform.

Thank you for the opportunity to share my views on improving the security clearance process. My name is Walter Nagurny. I am the Security Director for the U.S. Government Solutions business unit of Electronic Data Systems (EDS) Corporation. I've served EDS in that capacity for two years. I have experience that dates back to 1987 as a government employee, and for the past 10 years as a contractor, related to security clearances. My responsibilities at EDS include oversight of all activities related to security clearances and other vetting of personnel required in support of contracts awarded to EDS by the Federal Government. EDS has a sizeable cleared workforce that's centered in the National Capital Region, but extends around the world.

As a major supplier of Information Technology (IT) to the Federal Government, a very significant challenge EDS faces is to identify and hire capable people who can provide the leading-edge expertise government customers expect from EDS. Many positions in EDS Government Solutions require either a Public Trust approval or a security clearance for access to classified information. Some positions require both. One practice EDS utilizes in trying to identify appropriate candidates is to conduct a voluntary pre-screening of candidates with respect to the likelihood the clearance needed for access to classified information will be granted. At this point in the process, EDS has not yet seen a candidate's clearance paperwork (SF86 Form). Candidates are asked not to divulge personal information to EDS, but are required to read an EDS internal-use document that provides an overview of the clearance process and has detailed information about the adjudicative standards in the "Hadley Memorandum." EDS does not make a value judgment regarding a candidate's eligibility for the necessary clearance. Once educated about the process, some candidates then decide at this point that they do not want to face the scrutiny of a security clearance investigation. Other candidates decide that the approval process could lead to an unfavorable decision, or that an approval process might be so lengthy they could be at risk of being laid-off before the clearance is approved.

The pre-screening conducted by EDS serves two purposes. First, a concerted effort to minimize, if not avoid, drawn-out clearance requests helps the overarching U.S. Government security clearance infrastructure, and is therefore good business. Pre-screening's other purpose is to provide hiring managers with subjective data, based on prior clearance information, if any, they can apply towards their business decisions. In parallel with a candidate's review of the Adjudicative Guidelines, EDS managers are provided with an opinion of how long the manager can reasonably expect it will take until a clearance request is expected to be approved. Such opinions are in some cases objective, but in most cases are subjective. Regardless, having a general idea of how long it will be until an employee requiring a clearance can become productive is valuable information to a manager. EDS managers, in most cases, can analyze the impact of an expected lengthy approval process against the overall qualifications of candidates being considered for a position. In some cases the need to have a cleared employee on the job outweighs the technical qualifications of other candidates. That's unfortunate.

EDS takes no actions and makes no decisions that will impact an individual's eligibility for a security clearance. EDS will submit a candidate for a clearance under a contract that requires it as long as an EDS hiring manager made the decision that submitting the candidate is the best business decision to make. While EDS' procedures provide hiring managers as well as prospective employees with subjective information about how long it might take to gain approval for a security clearance, that opinion is but one data point amongst many that are factored into a decision to hire or transfer-in someone who must be submitted for a security clearance.

EDS has a good track record of getting both newly-hired and long term employees approved for a security clearance. One troubling area, however, is that some clearance requests languish for several months -- without any feedback or end in sight. Highly qualified, and perhaps as important, affordable, candidates often leave the company or pursue other opportunities inside the company. All too often highly qualified employees leave because a clearance decision took longer than eighteen months.

Looking back across the past five years, changes to the overall security clearance infrastructure have been positive and improved the process. I can cite the implementation of the Joint

Personnel Adjudication System (JPAS) as a very significant change that is beginning to show a major, positive impact on the way contractors interface with government agencies regarding security clearances.

Other changes have made an impact. However, it is not as clear that the impact was entirely positive. The assumption of responsibility for DoD clearance investigations by the Office of Personnel Management (OPM) in March, 2005 is a case in point. I say that because, on the one hand, a (DoD) Interim Secret clearance is now being granted to many employees in less than five business days – some, in fact, overnight. Final Secret clearances are often being granted within 60 days. On the other hand, EDS has approximately one dozen employees who were submitted for a DoD security clearance prior to March, 2005. However, no one seems to be in a position to explain why these cases have not moved forward. Several of those cases were opened in 2002. In some cases, the Defense Industrial Security Clearance Office has recommended simply waiting. In other cases EDS is advised to cancel the request and re-submit it.

EDS has many employees who are either naturalized United States Citizens; have non-citizen immediate family members; or hold dual citizenship. The technical abilities these employees bring to both EDS and to our government customers are not in question, but getting a security clearance for them is often difficult. Moreover, whether or not the "foreign preference" concern is the issue that drives a lengthy clearance approval is conjecture since the contractor is not provided with feedback.

EDS recognizes the indisputable need to keep classified and other sensitive information out of the hands of non-citizens. It is no doubt a huge challenge to distinguish "foreign preference" individuals who could be blackmailed into providing classified information from individuals who would never contemplate divulging information. Many cleared EDS employees who are naturalized U.S. citizens openly acknowledge that a portion of their income is sent to family members in their country of origin. The Hadley Guidelines address such practices, as well as factors that mitigate security concerns. Cleared personnel sending part of their income outside of the United States could lead to the conclusion the employee might take actions that are harmful to the interests of the United States. To do so would likely eliminate a major source of family

income. As significant numbers of naturalized citizens accept positions in the IT industry, the need for government contractors to submit naturalized citizens for a security clearance will increase.

EDS' experience indicates that, as a group, naturalized citizens, follow above-average security practices. Cleared EDS employees who are naturalized citizens have an outstanding record of filing required security reports, complying with classification rules, and following security procedures.

While EDS has no cleared employees who retained their dual citizenship, there are several cases each year of a U.S. citizen who holds dual citizenship encountering difficulty in the clearance process. While the Hadley Guidelines speak of an individual expressing willingness to renounce the non-U.S. citizenship, in practice these cases end up at the Defense Office of Hearings and Appeals (DOHA). After the employee formally renounces the non-U.S. Citizenship and DOHA receives documentation from the respective embassy, the clearance is approved, and I might add, swiftly. In some cases it is both difficult and expensive, to renounce citizenship in a country and get requisite documentation from that country's government acknowledging the renunciation. A dual citizen who submits proof that it is his expressed intent to renounce non-U.S. citizenship would seem to satisfy the Adjudicative Guidelines.

A real time example: A current EDS employee with excellent technical qualifications, that EDS wants to assign to a business critical position, was recently denied an Interim Secret clearance. This employee is a veteran of the United States Marine Corps and retains a dual citizenship in Portugal, where he was born. There are no other apparent issues. In this case, it's going to take a long time before this U.S. citizen is granted a clearance. In the end, once this employee is formally asked by DOHA to renounce his Portuguese citizenship, he will no doubt receive swift approval. There must be a better method to handle cases in which dual citizenship is the issue .

In closing; a few observations regarding the overarching status of contractors being processed for security clearances.

It is fairly common for a recently completed Single Scope Background Investigation (SSBI) to go unused while an entirely new SSBI is conducted. This occurs, amongst other reasons, when someone changes jobs and needs a clearance with a different agency. On several occasions, EDS has been told that the finished, but un-adjudicated, investigative work cannot be shared between agencies.

Clearance requirements flow to a company as part of a contract. Whether security requirements flow through a DD Form254, or an equivalent document, there are significantly fewer clearance problems when the security requirements are well-written, clear, and explicit.

With regard to Interim Secret clearances, EDS sees what appear to be identical "foreign preference" issues not being weighed identically.

Many companies, including EDS, conduct a comprehensive background investigation and drug screening on all potential employees as a condition of employment. These investigations are, in some cases, conducted by the same investigators doing investigations under a contract with OPM or other user agencies. Since an Interim Secret clearance is granted, I have been told, after only a review of a candidate's answers on an SF86 form, it appears that a potential source of relevant information is not being used. It is conceivable that standards could be developed to leverage (on a voluntary basis) the information obtained in pre-employment investigations done by many National Industrial Security Program companies, thereby leading to more informed decisions being made more swiftly.

I thank you. I am happy to answer any questions you might have, Mr. Chairman.

Chairman TOM DAVIS. Well, thank you all very much. Mr. Zaid, let me start with you. A recent story in the Legal Times reported of the plight of the Korean American I referred to in the previous panel. It is a client of yours, I think, the government dropping its second appeal, the decision that granted your client a security clearance. Mr. Andrews pled amnesia on the case even though this was a very highly publicized case. What reason, if any, did DOD provide for dropping its appeal and why the sudden change of heart in your opinion?

Mr. ZAID. Thank you, Mr. Chairman. That was in fact my case. I am not entirely surprised that Mr. Andrews did not know that specific case. Quite frankly and with all due respect to him, he got quite a lot of facts wrong about how DOD has been implementing the security clearance process, especially the new guidelines. That case started to essentially focus——

Chairman TOM DAVIS. Do you think he is just mistaken or do you think he's up here——

Mr. ZAID. I got the impression frankly he just didn't know the answers to those questions.

Chairman TOM DAVIS. We will try to followup.

Mr. ZAID. I am sure he has quite a lot of responsibilities obviously and this is just one of them. And he was just misinformed on quite a bit; for example, like when the guidelines are going to be approved, the notice and comment period and why that would be. He kept referring back to the Smith amendment. Well, the Smith amendment was enacted 6 years ago. It has been long implemented within the DOD process and for the most part it's culled out most of the people in DOD who were subject to having a prior felony conviction in their record. So I am not quite sure why the Smith amendment is impacting current DOD policies or training, nor do I know why DOD feels they need to train their adjudicators any more so than every other Federal agency that's already adopted the new Hadley guidelines or President Bush guidelines.

With respect to Mr. Moon's case, on appeal the second time around it was made known to me that they were a little bit concerned regarding a nonforeign influence question, which dealt with advertising on the client's Web site as to whether he had foreign business contacts. The Small Business Administration had told him it would be beneficial to him for business development of his minority company to promote his foreign business connections. He hadn't had any for about a decade, but he had never updated the Web site. So the department counsel had argued that he was lying about the extent of his business contacts. The administrative judge did not agree with that, thought it was somewhat absurd. And I made it analogous to as a lawyer, I often say, well, I represented X person; I don't any longer but I did at one point. And in fact it was very interesting to note in the case specifically that Mr. Moon was not just any individual contractor. He was the contractor who did the wiring, the computer wiring for the entire DOHA new building. The courtroom we sat in was all his handiwork. And I thought it quite ironic when we walked in for that morning his daughter testified, Korean American, born here in the United States, can't even speak Korean because her father wanted to make sure she was American more than Korean, and every security

guard in the building, which she is a young attractive woman, was saying hi, how are you? We missed seeing you around the building.

It is unclear and Sheldon Cohen, as you referenced, has put in this analysis, excellent analysis of the appeal process. It is unclear what motivates or the intent of department counsel as to why they appeal some favorable rulings and not others. All that is known is that it is quite clear that if you as a lawyer or an applicant prevail in a foreign influence case and that case is appealed, the odds are you might as well kiss that victory goodbye the way the current system is. And if you are denied a clearance at that initial stage you might as well forget trying to appeal it.

Chairman TOM DAVIS. You don't tell your clients that, do you?

Mr. ZAID. I have started recommending to clients don't waste your money paying me to have a worthless appeal.

Chairman TOM DAVIS. You think Mr. Cohen's analysis is essentially correct?

Mr. ZAID. It was absolutely consistent with my anecdotal experience. It's dead on.

Chairman TOM DAVIS. You note in your testimony that DOD and DOE have the authority to appeal favorable clearance determinations and you recommend abolishing DOD's authority to do so. What's your understanding of the historical origins of that unique authority?

Mr. ZAID. I don't know. In fact, I posed that to some senior government officials in the security field and they didn't know about it either. It's very interesting, most of the agencies really don't know how the other agencies conduct their own clearance processes. There is a basic framework, of course, but they have all implemented them differently. And in fact they not only implement them differently, but there are different factors that are taken more seriously at one agency versus the other. For example, the CIA is one of the worst agencies to take a clearance appeal to. If you did a statistical analysis, although you will probably never get the data because they refuse to give it to GAO, every time you ask them to get it you probably will find they have the lowest percentage of having applicants overturn a clearance decision, including foreign influence cases.

I don't know why some agencies have implemented it differently. DOHA clearly proves as well as the Energy Department that, one, you can have a seemingly transparent process by publishing your decisions with privacy concerns redacted of course, and that you can have live witnesses, no other agency does that, and sworn statements and all sort of a more formal judicial process. There are nuances of the DOHA process. We don't have subpoena ability. We can't obtain additional documentation from the agencies if we think it is relevant. We can't utilize classified information, and I would say in fact that the DOHA judges I believe don't even have generally access to classified information.

Chairman TOM DAVIS. You know, we wouldn't be here complaining about DOHA if there weren't such a backlog. If they were denying people and we still had plenty of people in the pipeline, I suspect that congressional interest, there may be some rights issues, but the fact is we have such a huge backlog at this point and it

looks like a lot of qualified people for important jobs just aren't being qualified and cleared to do it and that's a huge burden.

Mr. ZAID. That's a huge problem. Every agency has a different backlog. The CIA process will take 2 to 3 years to get somebody through. DOHA process now is probably within a year you will get a hearing. A decision will take 4 to 6 months depending on the judge's individual backlog, and the appeal can take anywhere from 6 to another 12 months. If the government appeals, you are stuck in a process for 2 to 3 years if not longer.

Chairman TOM DAVIS. So you're going to be doing something else for your employment.

Mr. ZAID. As we are sitting here today, I checked my trusty BlackBerry, I got an e-mail from a high level DOJ official whose daughter it took 45 months to get a clearance approved by DOHA in a foreign influence case.

Chairman TOM DAVIS. And that is not atypical, right?

Mr. ZAID. That's a little bit longer than I have seen but doesn't surprise me.

Chairman TOM DAVIS. Mr. Wagoner, you have a small company, right?

Mr. WAGONER. Yes, sir.

Chairman TOM DAVIS. You depend on clearances?

Mr. WAGONER. Yes, absolutely. Everyone has to have a clearance.

Chairman TOM DAVIS. Do you have trouble keeping people because of the scarcity of just—the clearance is like a commodity itself outside of the qualifications, isn't it?

Mr. WAGONER. Absolutely, and we do have a hard time keeping people, and what's ironic is a lot of the proposals these days they want to talk about describe your ability to retain people and we are all losing people because of another broken government process. One part of the government says, hey, you got to keep your turnover low but the other side is not doing anything to help us out there.

Chairman TOM DAVIS. You are caught in a Catch–22 because of the government's own regulations?

Mr. WAGONER. Absolutely.

Chairman TOM DAVIS. Now, I hear from large companies because of the scarcity, but the smaller companies if your clearance expires or you need a clearance you can't afford sometimes to put people on another job while you're waiting for clearance.

Mr. WAGONER. We can't. Obviously, that's why we are small. We don't have enough jobs just to move those people around while we're waiting, putting people on the bench, so to speak. We can't afford that. But even the larger companies, they have margin issues as well. They have a hard time keeping people on the bench as well.

Chairman TOM DAVIS. What do you think the premium is in payment? I will ask Mr. Nagurny the same thing. What is the clearance premium that somebody is paid today because of the backlog and the scarcity versus if we had plenty of—if clearances weren't a problem?

Mr. WAGONER. ITAA, we have just finished our third; second or third survey of industry. This last time we went through Federal Computer Week Magazine so we have many more respondents this

time, and the premium for a top secret clearance was somewhere between 15 and 25 percent. I know even in my company we give special bonuses to those people, special incentives to those people, again, treating them like a whole different class of citizen, which I don't want to do, but I have contractual commitments to my customers where I have to keep these people.

Chairman TOM DAVIS. Mr. Nagurny, what do you think? Do you have a premium you pay? If somebody loses a clearance are they worth as much at EDS without a clearance?

Mr. NAGURNY. Salary information is generally not something I have exposure to. Candidates tell us, just like Mr. Wagoner said, 15 to 20 percent is what they were offered in the marketplace.

Chairman TOM DAVIS. If you had two candidates in front of you for the same job and one had a security clearance and one didn't, which one are you going to hire, all things being equal?

Mr. NAGURNY. The one with the clearance. And from my own personal experience certainly, and the salary would be higher for the person with the clearance.

Chairman TOM DAVIS. They're more mobile with that, right? Again you can train them for anything. If they've got that clearance it ends up being a premium. So the real question, and nobody can answer it accurately, is how much is this costing American taxpayers because they're afraid to spend a few dollars on the front end; how much is this costing us up the back end because of these premiums that we are having to pay, let alone the inefficiencies that you have to do in shuffling people around and everything else, and the answer is you are better off paying upfront.

Mr. WAGONER. Absolutely. And there's a cost that our missions are not getting done. Our missions are being delayed.

Chairman TOM DAVIS. And some critical missions in some cases. And that's why this foreign influence, why we're talking about that. Some of these jobs are so specialized. This isn't just somebody who wants to get in line for a security clearance and happened to live in a foreign country or had a foreign relative. In many cases these have a language expertise or a specific expertise. Why else would you sit through 3 years waiting for a clearance when you can go out and do something else? I am saying you can put a man on the Moon but you can't move a security clearance through in a reasonable time and it just shows priorities. Somebody needs to pay full time and attention to get this done and all we can do, we can legislate until the cows come home, the Smith act 6 years ago, and they are using that as an excuse. We mandated in the Intelligence Reform Act certain things, and it's just very difficult. So we can hold hearings. We can hold our feet to the fire. We can beat them up. We can penalize them a little bit on the budgetary side.

We had the State Department up here and the head of OMB didn't know this was a problem until they said we're not moving ahead with security clearances. There's just no coordination. It's got to be a priority. It just needs full time and attention and supervision.

Mr. Wagoner, what are some of the new technologies available that allow the private sector to improve on the current investigative approach employed by OPM?

Mr. WAGONER. Again, what's ironic is that they're not even necessarily new technologies, Mr. Chairman. These are technologies that have been out there, they're proven. The private industry uses them. Two key areas, one is trying to use digital signature and digital fingerprints. We think that would speed up the process. We also think that it would lead to a lot more accuracy. Additionally, related to that, we're going to have a huge tidal wave coming of additional investigations for HSPD–12; as Mr. Leonard said, additional investigations coming down for transportation workers. And I believe they are using digital fingerprints, digital signatures. So we would like that to be part of the pilot.

Additionally, we think a lot of data collected with that shoe leather can be acquired and analyzed through commercial government data bases. And that is what I would like to do with the pilot, to do the math and see what is the accuracy. I mean the entire consumer credit, consumer insurance industry relies on the exact same kind of data to verify a person's identity, previous addresses, creditworthiness. We would like to see a pilot and do the math and see if we could be just as accurate with the security clearances.

Chairman TOM DAVIS. Let me ask you both, and I don't want to get company specific because I don't want to put your company in a situation that somebody could somehow misconstrue that, so without naming names but in a generic basis, do you think companies are sometimes forced to settle for employees that are perhaps less qualified for a particular position than others who have been unable to obtain a clearance because of foreign preference and influence issues?

I'm asking generically.

Mr. WAGONER. May I answer that? In that situation the security clearance is the No. 1 priority.

Chairman TOM DAVIS. So the end result would be that the person with the clearance, even if they have less qualifications, is the one that is going to be utilized?

Mr. WAGONER. Certainly we would not hire a nonqualified person because that would be in conflict with the contractual requirements, but the security clearance would be the No. 1 priority in that situation.

Chairman TOM DAVIS. But if you want Alfonso Soriano in the outfield and he has a clearance, that's who you would rather have and you would put me in left field. And I only mention myself because I did have an RBI single in the congressional baseball game.

Mr. WAGONER. What if Soriano is on second base though?

Chairman TOM DAVIS. He still would be better than me. I can fill in the holes for a couple of innings if I got the clearance.

Mr. Nagurny.

Mr. NAGURNY. I think indeed, yes, it would depend somewhat if we had some place for the person to work, if they could do productive work, billable work while the clearance was in process. Several of our largest sort of basic ordering agreement contracts, the people can go to work on that contract when they are cleared. Perhaps there are task orders that don't require a clearance, but generally yeah, the person with the clearance would be looked at more favorably than the person without.

Chairman TOM DAVIS. When employees have left EDS because of the delays in getting a clearance, what happens to them? Where do they go? Are they simply heading to other companies to try the process all over again or do they just drop out of that sector of the labor market or do they just go where they can get a job that doesn't require but maybe suits their needs better?

Mr. NAGURNY. I think the largest number get out of the Federal sector, if you will. State and local government is another business area of EDS. But something no one has mentioned was the public trust position which also requires the investigations OPM conducts and also taxes the same resources at OPM. So few people not able to get a clearance will be eligible for a public trust approval for nonclassified IT work. So generally they are leaving the Federal sector.

Chairman TOM DAVIS. In your testimony you mentioned a prescreening document that EDS has perspective security clearance applicants reviewed to prepare them for the process. You stated that this document is geared to the adjudicative standards that now are in the Hadley memorandum. Does EDS prepare clearance applicants using the revised adjudicative guidelines issued in December 2005?

Mr. NAGURNY. We're prohibited from—until we've actually made an offer to someone we can't review their personally sensitive information. What we can do with them is explain the process and the considerations the government looks at, the aggravating, the mitigating factors.

Chairman TOM DAVIS. Let them know that if you give them an offer and they have something that could delay them it may not happen as quickly?

Mr. NAGURNY. And that they may be let go very quickly if they don't get the clearance.

Chairman TOM DAVIS. OK. That's how it works.

Mr. ZAID. Mr. Chairman, if I might add to this a little bit with respect to the inefficiency of the system and the cost effectiveness. In fact, I give recommendations or advise defense contractors on how to best put their employees or perspective employees through this system. Part of the problem is that with respect to foreign preference and foreign influence cases, from an anecdotal perspective at the very least, the majority of the potentially derogatory or disqualifying information comes not from the background investigation, not from the computer checks, nothing like that. It comes from the applicant themselves. It comes from either the filling out of the SF–86 where you say I am a dual citizen or I have a foreign passport or where you list your relatives or during the security interview process that may take place months later. So there needs to be a way in which to streamline some of the transfer, the initial transfer of information. The SF–86 is not detailed enough. There are terms that are very confusing that are misapplied or differently applied from agency to agency. And clearly many of the individuals filling out the SF–86 do not understand what that agency may wish.

I had a foreign influence case with the CIA, an Iranian American, a lawyer whose actually family member had worked in intelligence services under the Shah when we had a good relationship

obviously with that country. One would think given her language experience we would want her to be able to contribute to the U.S. national security interests. One, among several, issues that came up was she did not indicate that she had been married to an Iranian American? Why didn't she indicate that? Because she had had the marriage annulled. She was a lawyer. She was going, the marriage is annulled, there is no legal record that this marriage took place. It is a legitimate argument but the agencies don't look at it that way. The CIA said, no, you were married. I don't care if you had it legally annulled. You were. Now, that could have been an easy issue to resolve if the instructions were a little bit more clear.

Chairman TOM DAVIS. I got you. Thank you all very much. It has been very, very helpful to us. We will continue to proceed, try to prod the executive branch. Mr. Zaid, we will take some of your recommendations and see if we might try to do something legislatively with them.

Mr. ZAID. I will be happy to help in any way, sir.

Chairman TOM DAVIS. Thank you very much. The hearing is adjourned.

[Whereupon, at 11:35 a.m., the committee was adjourned.]

[The prepared statements of Hon. Elijah E. Cummings and Hon. Jon C. Porter follow:]

U.S. House of Representatives
109th Congress

Opening Statement

Representative Elijah E. Cummings, D-Maryland

Full Committee Hearing: "Can You Clear Me Now?
Weighing 'Foreign Influence' Factors in Security Clearance Investigations"
Committee on Government Reform

July 13, 2006

Mr. Chairman,

Thank you for holding this important hearing to examine the process of granting security clearances to people with foreign ties.

Protecting our nation's top secret information is crucial. That's why we have a system in place to ensure that people who have access to top secret information do not share that information with our enemies.

Unfortunately, the system appears to be broken.

How else can we explain why, of the 47 Israel-related cases recently reviewed by national security expert Sheldon Cohen, 29 were denied clearance—with no consistent pattern among them?

In his March 2006 report, entitled "Israel: Foreign Influence—Foreign Preference Cases, a Review of Defense Office of Hearings and Appeals (DOHA) Decisions," Mr. Cohen finds that the system is both "arbitrary" and "unpredictable."

He asks: "What ... 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."

This is unsettling to say the least. If the process for determining who is granted access to top secret information is simply a "roll of the dice," as Mr. Cohen suggests it is, we cannot ensure the safety of our national secrets.

Furthermore, we may be keeping many highly-qualified, risk-free individuals out of public service.

While people with ties to foreign countries could in some circumstances present a risk to our country, there are several reasons why these individuals would be an asset.

Foreign-born employees and employees with foreign ties often bring to the job language skills, cultural knowledge, and a unique perspective. Simply refusing to hire them would be a major mistake.

We must balance the interest of national security with the interest of attracting our Nation's "best and brightest" in public service.

Mr. Cohen suggests that: "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."

I agree. Federal agencies should adopt a clear, consistent policy for issuing security clearances to individuals with foreign ties.

This is one area where we cannot afford to allow the muddled, bureaucratic system to continue unchecked. We must effectively and efficiently protect our nation's top secret information.

I look forward to the testimonies of today's witnesses and yield back the balance of my time.

QUESTIONS

The following witnesses are expected to testify:

Panel One

The Honorable Robert Andrews, Deputy Under Secretary for Counterintelligence and Security

Accompanied by:
Mr. Robert Rogalski, Special Assistant to the Under Secretary for Intelligence, U.S. Department of Defense

Mr. J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration

- Mr. Rogalski, according to Sheldon Cohen, national security expert who researched Israel-related appeals cases, found the process to be both "arbitrary" and "unpredictable." A DOD Inspector General report similarly found that there were "difficulties in effectively and efficiently processing personnel security investigation requests." What is DOD doing to address these issues?

- Mr. Leonard, we must balance the interest of national security with the interest of attracting our Nation's "best and brightest" in public service effectively and efficiently. How do you propose we achieve this goal?

- Mr. Leonard, if the process for determining who is granted access to top secret information is simply a "roll of the dice," as one national security expert suggests it is, how can we ensure the safety of our national secrets?

- Mr. Leonard, one of the problems that has been raised with regards to security clearances is the lack of accountability or oversight. How do you propose we address this issue?

Panel Two

Mr. Mark S. Zaid, Esq., counsel to Mr. Chan Moon

Mr. Doug Wagoner, Chairman, Intelligence Subcommittee, Information Technology Association of America (*on behalf of* The Security Clearance Coalition)

Mr. Walter S. Nagurny, Director, Industrial Security Office, EDS U.S. Government Solutions

- Mr. Zaid, your client has experienced the ramifications of our broken security clearance system firsthand. How do you think this mistake was made and do you think it could be avoided in the future?

- Mr. Wagoner, it has been suggested that the current system for granting security clearances is both "arbitrary" and "unpredictable." Would you say this is a fair characterization, from your investigations, and if so, what do you see as the solution?

STATEMENT FOR THE RECORD
CONGRESSMAN JON C. PORTER (R-NV-3)
"Can You Clear Me Now? Weighing 'Foreign Influence' Factors in Security Clearance Investigations
July 13, 2006

Mr. Chairman, I would like to thank you today for holding this very important hearing. And to the witnesses, thank you for taking time out to testify. I look forward to hearing your testimony.

This hearing examines the effectiveness of the current security clearance investigation system and whether reforms are needed for that system. The backlog in the system and the inability to clear critical employees demonstrates that it is more than apparent that a problem exists. The system does not run smoothly; it is broken and must be fixed.

The multiple government agencies that require cleared personnel share the same concern—a legitimate federal workforce. Therefore, a definitive solution must be made to achieve that ultimate goal for all involved—the employees who must wait to begin their work, the agencies which must deal with a deficient workforce, and the American people whose tax dollars our consumed in bureaucratic backlog.

Reforming the system to be more accurate will take the coordination and trust of every agency involved. Government is not an independent enterprise; each agency eventually becomes dependent upon the other. Therefore, all must work for an accurate, simple and streamlined system that dispenses with the bureaucratic backlog and proceeds with clearing this aspect of the workforce. I trust this hearing will lead us to solutions that will solve these concerns.

Again, Mr. Chairman, I thank you for holding this hearing and look forward to hearing the testimonies.

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