Date: April 28, 1997

In re:

SSN: ----------

Applicant for Security Clearance

ISCR OSD Case No. 96-0705

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On November 25, 1996, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated December 20, 1996, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The undersigned Administrative Judge received the case assignment on January 16, 1997. On February 24, 1997, notice of hearing was issued to the parties scheduling the hearing for March 11, 1997. A motion by the Department Counsel for a continuance of the hearing to at least March 13, 1997, due to the unavailability of a witness was denied by order dated March 10, 1997. The undersigned held the hearing on March 11, 1997, which was continued until completed on March 12, 1997, in order to hear the Government's witness who had been unavailable the previous day. The Department Counsel presented seven exhibits ("Exhs") and the testimony of three witnesses. The Applicant's case consisted of the presentation of one exhibit, but no witnesses besides himself. The undersigned Administrative Judge received the transcript ("Tr") of the hearings on March 20, 1997.

RULINGS ON PROCEDURE

The Applicant objected at the hearing that his privacy rights had been gravely violated by the Government and had thereby caused him considerable marital difficulty. Tr pages 30-35, 115-126, 131, 202, 209-211, 242-246, 335, 362. In

accordance with item 13 of the additional procedural guidance (encl. 3 to the Directive), the Deputy Chief Department Counsel, DOHA, mailed copies of the first five exhibits to the Applicant at his home address by letter dated January 8, 1997. The letter, however, was addressed to "Ms" rather than to "Mr," and the envelope was misaddressed to the 5-year-old son of the Applicant (the Applicant's first name and that of his 5-year-old son are unmistak-ably different). Exhibit A. The Applicant's wife received the mail at home while the Applicant was at work and, wondering why DOHA was writing to her 5-year-old son, opened the envelope. Seeing that the letter was addressed to her (or, arguably, to their 4-year-old daughter), the Applicant's wife read the letter and the enclosures.(1) She may leave the Applicant because she learned in this manner that the Applicant had been untruthful with her. Tr page 123.

While it is undoubtedly true that the Government's negligent handling of discovery materials led to the Applicant's privacy being violated, there is no evidence before this Administrative Judge that the violation was other than inadvertent. Even if it were deliberate,(2) this is not the appropriate forum in which the Applicant may seek a remedy. Exhibit A (the discovery material) is relevant to the question of the Applicant's current vulnerability to coercion, exploitation, or pressure under Criterion E (personal conduct). It does not otherwise tend to refute the SOR allegations. The Applicant's bankruptcy discharge order (exhibit B) was excluded from the evidence as irrelevant to the SOR allegations. Tr pages 127-132.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following three criteria: paragraph 1, Criterion J (criminal conduct); paragraph 2, Criterion E (personal conduct); and paragraph 3, Criterion D (sexual behavior). The Applicant has admitted the factual allegations contained in subparagraph 2.c. of the SOR. Except as noted herein, the Applicant's admission is hereby incorporated as a finding of fact. The Applicant denied the factual foundations of the alleg-ations contained in the other subparagraphs of the SOR in his December 20, 1996 answer to the SOR. However, his answer to subparagraph 1.c. of the SOR was unresponsive.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 36-year-old ---------- employed by a U.S. Government contractor. The Applicant seeks to retain a Confidential personnel security clearance. He was laid off on December 6, 1996, and is in the process of being recalled to work pursuant to a letter, dated March 3, 1997, from his employer. Tr pages 16-21.

The Applicant has three sons, ages 16, 5, and 3, and a daughter age 4. He and his current wife have been married nearly eight years and had gotten to know the first complainant ("C1") through attendance at their church in about 1989 when C1 was a girl of about ten years of age. C1 is the daughter of the girl friend of the Applicant's brother-in-law. In January 1992 C1 was physically matured beyond her 13 years and had been flirting with the Applicant for about six months. C1 was invited to spend Saturday night, January 11, 1992, with the Applicant and his family and to go to church with them early the next morning. At about 4:30 am on Sunday morning, January 12, 1992, C1 came out of the bedroom she was sharing with the Applicant's wife into the living room without disturbing the Applicant's wife. The Applicant then came out of the bedroom he was sharing with his eldest son and decided to make a sexual advance to C1. Approaching her from behind, he kissed and hugged C1, touched her breasts, and rubbed her thighs and her crotch, to which advance C1 responded in a sexually receptive manner, rather than resisting, screaming, etc. This sexual activity took place over a 5-10 minute period of time, interrupted only when they heard the alarm clock begin to ring in the bedroom of the Applicant's wife. The latter came into the living room and asked why the two of them were up and awake, to which the Applicant responded simply that he had awakened and that C1 had just come into the living room. They then went off to church. Later in the day the Applicant apologize to C1, who did not seem to the Applicant to be bothered by the incident.

About three days later, the Applicant was told to see a city detective because C1, prodded by her mother, has complained to the police. The Applicant was arrested on February 19, 1992, on a single felony count of statutory aggravated sexual battery(3) on a 13-year-old person and released on a $5,000 bond. On July 16, 1992, the Applicant pleaded not guilty, and the judge heard oral evidence. On July 21, 1992, the judge found the Applicant not guilty of aggravated sexual battery.

The day after the Applicant was arrested on the complaint of C1 he was arrested on the complaint of the second complainant ("C2"), a woman over the age of 18, also on a single felony count of statutory aggravated sexual battery.[(4)] C2 rented a room in the Applicant's house during 3-4 months in 1991-92, but had moved out prior to the time she made her allegation. C2 claimed that the Applicant entered her bedroom at night and touched her on her breasts and vagina. This allegation of C2 was wholly groundless, and, in fact, the Applicant was asleep with his wife during the night the assault was alleged to have occurred. The Applicant pleaded not guilty to the charge based on C2's allegation and was found not guilty in July 1992 in court.

The Applicant signed a National Agency Questionnaire (NAQ) on May 18, 1995, on which he disclosed his arrests in 1992 as well as his arrest in 1984 (charges dropped) for assaulting his first wife upon finding her in bed with another man. The Applicant was interviewed by two agents of the Defense Investigative Service (DIS) and signed a sworn statement for them on November 6, 1995. Tr page 268. At the outset of the interview one of the DIS agents reviewed the Privacy Act of 1974 with the Appellant, who initialed the printed form on which the statement was written to signify that he understood the four principal points of the Privacy Act. One of those points that he initialed states:

c. ROUTINE USES: The information obtained from you will be furnished to DoD officials and it will be maintained by the [Defense Investigative Service]. It may be furnished to accredited federal agencies, and law enforcement agencies for their official use.

Exhibit 4. The agents had orally briefed him on the Privacy Act when they first interviewed him. Tr pages 76-77, 85.

The Applicant stated with regard to the first of the 1992 incidents that resulted in his arrest:

. . . About five AM in the morning [C1] came out to the room where my son and I were. My son and I were already up because all of us had to get up early to go to church in [a neighboring state]. [C1] came out and sat down in the room where me and my son were and claims that I fondled her and that I tried to have sexual intercourse with her. This is not at all true and I feel that [C1] said this because she was still mad at me because I would not let her go out on the night she stayed with us. . . . .

* * *

. . . Also, I would like to state that I have never molested or sexually assaulted any female.

Exhibit 4, pages 1-2 (November 6, 1995). On March 28, 1996, the Applicant was interviewed by a third DIS agent. The Applicant maintained his false story concerning the incident with C1 at that time, but recanted after he was administered a polygraph test by the agent and several hours of discussion. Tr pages 223-226, 231-232, 304-305, 309. On April 1, 1996, the Applicant signed a sworn statement for the third DIS agent, on which is printed the four points of the Privacy Act, including:

c. ROUTINE USES: The information obtained from you will be furnished to DoD officials and it will be maintained by the [Defense Investigative Service]. It may be furnished to accredited federal agencies, and law enforcement agencies for their official use.

Exhibit 3; a similar warning was printed on the polygraph statement of consent that the Applicant signed on March 28, 1996 (exh. 7); tr page 299. The statement of April 1, 1996, reads in part:

In regards to the allegations that I sexually assaulted [C1], I admit that I was not truthful during my previous DIS interview. The main reason I did not tell the truth during the previous DIS interview was because I was uncomfortable being interviewed by two female agents. I felt that I was immediately being criticized over a situation that had happened with my first wife. I had admitted that I hit my first wife after I caught her with another man. I felt that I was being pressured, and pushed to admit that I was a wife beater, and this was simply not true. Therefore, I decided not to totally disclose information per-taining to [C1] or to [C2]. Basically, I clammed up and I went on the defensive. In this statement, I am providing the total truth concerning my two arrests for aggravated sexual battery that took place in Feb 92.

The Appellant read the statement again during the hearing and iterated then that it represented what truly happened. Tr pages 140, 151-153, 183. On June 11, 1996, the Applicant signed a third DIS statement, this time for one of the two agents that had interviewed him the previous autumn. Once again, the printed form sets forth the four points of the Privacy Act. Exhibit 2; tr page 90. The Applicant was surprised that the first DIS agent knew about of the contents of his April 1, 1996 statement and confronted the Applicant with the information. Tr pages 154-157, 233. The statement indicated that the Applicant was not susceptible to blackmail because he would deny the truth about the incident involving C1, it would merely be his word against the word of a blackmailer, and the Applicant would deny that he had signed or provided the April 1, 1996 DIS statement. Exhibit 2. In fact the Applicant did not do so but confessed to his wife when she mistakenly received exhibit A in January 1997. Tr pages 243-246, 250-251.

The Applicant has not had a valid motor vehicle operator's license since about 1989 when it was suspended due to several unpaid speeding tickets. He failed to pay those tickets due to neglect rather than to any lack of funds with which to pay them. He has, nevertheless, driven his automobile from time to time when he considers it necessary, though he knows he is disobeying the law. Exhibit 4, page 2; tr pages 159-162, 167-171, 235-236.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluation of an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

CRITERION J - CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

(1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns include:

(1) the criminal behavior was not recent;

CRITERION E - PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

(3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

(4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;

(5) a pattern of dishonesty or rule violations (to include violation of any written or recorded agreement made between the individual and the agency);

Conditions that could mitigate security concerns include:

None applicable.

CRITERION D - SEXUAL BEHAVIOR

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion. The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J); or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior. (Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance)

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

(1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion;

Conditions that could mitigate security concerns include:

(2) the behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

CRITERION I - EMOTIONAL, MENTAL, AND

PERSONALITY DISORDERS

Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability or stability.

When appropriate, a credentialed mental health professional (credentialed mental health professional: licensed clinical psychologist, licensed social worker, or board certified psychiatrist), acceptable to or approved by the government, should be consulted so that potentially disqualifying and mitigating information may be fully and properly evaluated.

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

None applicable.

Conditions that could mitigate security concerns include:

(1) there is no indication of a current problem;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

a. Nature and seriousness of the conduct and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum ***quantum*** of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below.[(5)]

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance.[(6)] Department Counsel's argument that a personnel security clearance must be denied, once the Government has presented the minimum ***quantum*** of admissible evidence, unless an applicant's evidence dispels all unresolved questions and doubts--**even unreasonable questions or doubts**-- is rejected on the basis that the Directive does not prescribe a burden of proof on an applicant greater than that he or she would bear as an accused in a criminal proceeding. Tr pages 361-367. As heavy a burden of persuasion as an applicant bears in these

cases, he or she need not put to rest unreasonable or purely speculative doubts.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Criterion J based upon the allegations under SOR ¶1.c.

The evidence in the record is uncontroverted that C1 had flirted with the Applicant for about six months prior to the January 12, 1992 incident, that she responded in a sexually responsive manner to his advances, and that he did not sexually abuse her against her will by force, threat or intimidation. There is no evidence of any mental incapacity or physical helplessness. In accordance with the statute cited in SOR ¶1.a., the Applicant was innocent of the charge on which he was arrested and tried. The Government did not present the testimony of C1 to contradict or otherwise counter either the Applicant's statement to the DIS polygrapher, the Government's own exhibit 3, or the Applicant's testimony--consistent with exhibit 3--at the hearing as to the circumstances under which the incident occurred. Although the Applicant's acquittal of the charge does not bar the Government from show-ing that criminal conduct actually did occur, it has not done so in this case.

With regard to the alleged incident involving C2 under SOR ¶1.b., the Government does not even allege that criminal conduct actually occurred. In fact, the SOR alleges that the charge brought regarding that incident was subsequently "dismissed."(7) The Government has not presented court documents corroborating the arrest and dismissal of the charge nor the testimony of C2 to contradict or otherwise counter the Applicant's account of his relationship with C2. It simply suggests that an administrative judge may properly find that the Applicant engaged in criminal conduct with C2 because the Applicant's denials lack credibility and because he allegedly engaged in similar criminal conduct during the same period of time with C1. Just because a person committed one crime doesn't prove that he committed another crime in a separate incident involving a different complainant. A liar is not necessarily a sex abuser. This Administrative Judge concludes both SOR ¶1.a. and SOR ¶1.b. favorably to the Applicant.

With further regard to Criterion J, however, subparagraph 1.c. of the SOR charges that Applicant's falsifications of his DIS statement of November 6, 1995, and his initial oral statements to another DIS agent on March 28, 1996, constitutes criminal conduct (18 U.S.C. §1001).(8) Conduct violative of that Act of Congress is a Federal felony. The undersigned concludes that the Applicant did knowingly and willfully falsify, conceal or cover up his sexual advance to C1 on January 12, 1992, (but not his relationship with C2 and not his operation of a motor vehicle without a valid license) and therefore concludes SOR ¶1.c. adversely to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Criterion E.

The evidence in the record is clear that the Applicant wilfully and knowingly concealed and falsified his sexual advance to C1 on January 12, 1992, as alleged in SOR ¶2.a. and SOR ¶2.b. in his DIS statement of November 6, 1995, and his initial oral statements to another DIS agent on March 28, 1996. The Applicant admitted that at the hearing although he denied those SOR allegations in his December 20, 1996 answer thereto. The Applicant's principal defense seems to be to don the cloak of victimhood and charge that DIS agents violated his privacy rights and their understandings with him that his post-polygraph admissions would be kept strictly confidential and not used against him in any way. That defense fails, both factually and on the law, to extenuate or otherwise rebut the abundant evidence produced by the Government in support of those subparagraphs of the second SOR paragraph. The December 1996 SOR answer denies what his April 1996 statement to the DIS polygrapher admits. Tr pages 232-238, 241-242.

At the hearing the Department Counsel apologized to the Applicant for the "administrative error" in mailing discovery material in January 1997 that the Department Counsel candidly characterized as being "egregiously mishandled." Tr pages 33, 120. The discovery material was mailed to the Applicant's home address without the courtesy of phoning him first to determine whether he would prefer an alternate mailing address. He has a separate post office box. Tr page 6. Indeed, the Government's mistake now tends to deprive it of the opportunity to argue the Applicant is still vulnerable to

coercion, exploitation, or pressure under Criterion E (personal conduct) insofar as his wife is concerned. This in itself supports the inadvertent nature of such error. Nor does the Applicant have evidence that the disclosure to his wife was intentional. Tr page 125.

With regard to Criterion E, moreover, subparagraph 2.c. of the SOR charges that the Applicant continues to drive his motor vehicle "notwithstanding" the suspension of his operator's li-cense. The evidence shows that the license was suspended some 7-8 years ago due to the failure to pay speeding tickets. There is no evidence, however, to support the second sentence of SOR ¶2.c. that alleges that the suspension was the result of "noncompliance with DMV suspension orders." Although the Applicant usually takes the bus to work or receives rides from others, he admittedly has driven more than once while his license was suspended and knows he is disobeying the law. Considering the length of time and the wilfulness of the activity proven, application of DC #5, ident-ified on page 7 ***supra***, is warranted. Therefore, SOR ¶2 is also concluded adversely to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Criterion D.

The single incident of sexual misbehavior proven against the Applicant was not of a criminal nature, although it clearly caused him for some time to be vulnerable to undue influence or coercion. On the other hand, it occurred more than five years ago, and the Government has neither proven that other incidents of sexual misbehavior have since occurred nor that it was the product of an emotional, mental, or personality disorder with current security significance. To his credit, the Applicant acknowledges that this grave indiscretion was, though isolated and in the distant past, a matter of very poor judgment. The Applicant and his wife still occasionally socialize with C1 and C2, and the Applicant exercises the self-control in those contexts that the Government expects him to do. The former complaining witnesses clearly do not present a current coercive threat to the Applicant. One sexual indiscretion does not ***ipso facto*** disqualify an applicant from obtaining or holding a personnel security clearance. This Administrative Judge concludes SOR ¶3 favorably to the Applicant.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 9 ***supra***, be considered, as appropriate, in making this decision. The nature, seriousness, frequency, and recency of the falsification and disregard of motor vehicle rules all militate against the Applicant as does his age. He will probably continue to lie in matters of serious concern where he believes it to be in his narrow self-interest, notwithstanding the larger interests in the truth, and even though he will thereby avoid only short-term disadvantages or adversities.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Criterion D: FOR APPLICANT

Subparagraph 3.a.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Jerome H. Silber

Administrative Judge

1. The second enclosure to the letter (exh. 2), for example, contains a signed statement of the Applicant on June 11, 1996, that reads, ***inter alia***, "The only people who really know what happened with this incident are me and the female minor. I have not told my wife, family, or close friends."

2. The Department Counsel, of course, are not authorized to seek to compel applicants to disclose personal information to anyone except to the Federal Government itself for its official security clearance purposes. *See also* tr pages 109-111 with regard to the authority of DIS agents in this matter.

3. The statute makes punishable the sexual abuse of a 13-year-old complaining witness if "the act is accomplished against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness." The text of the current statute was provided at the hearing by the Department Counsel so that administrative notice could be taken of it. No other statutes were provided. Tr pages 67-69.

4. The statute makes punishable the sexual abuse of a complaining witness of 15 years of age or more if "the accused causes serious bodily or mental injury to the complaining witness," or if "the accused uses or threatens to use a dangerous weapon." Even in either of those situations, the statute is not violated unless "the act is accomplished against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness."

5. The rule has been restated as requiring "that security clearances should be revoked [***sic***] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). ***Cf.*** with regard to the ***quantum*** of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

6. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

7. The Government quibbles that the Applicant, a man of not quite 12 years' education, falsely stated that he was found "not guilty." Exhs.3 and 4; tr pages 81, 212-215, 340-345. There is no documentary evidence of a "dismissal."

8. The cited provision provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States **knowingly and willfully** falsifies, conceals or covers up by any trick, scheme, or device a material fact, or **makes any false, fictitious or fraudulent statements or representations**, or makes or uses any false writing or

document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." (emphasis added.) Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.