

2007 Update on the 10 U.S.C. §986, the “Smith Amendment” - Alert

This is an update on 10 U.S.C. § 986, known as the Smith Amendment . The Department of Defense has recently proposed to Congress the repeal of 10 U.S.C. § 986. This law which was first enacted in 2001 and amended in 2004, prohibits the Department of Defense from granting or renewing a security clearance to any person convicted of a crime who was sentenced to imprisonment for more than a year and as a result incarcerated for not less than a year. It also bars the granting a clearance to any person who is mentally incompetent, or a user of, or addicted to controlled substances, or who was discharged from the armed services under dishonorable conditions.

The Department of Defense has now proposed, as part of the National Defense Authorization Act for FY 2008, Section 921, which would repeal 10 U.S.C. § 986 entirely. The justification offered by the Department for the repeal is that 10 U.S.C. §986 unduly limits the ability of the Department to manage its security clearance program, and may have created unwarranted hardships for individuals who have rehabilitated themselves as productive and trustworthy citizens. The Department noted that in the five years since 10 U.S.C. § 986 was first enacted, the Secretaries of the Military Departments have granted only 54 waivers. The Secretary of Defense has granted no waivers because no cases were ever presented to him for consideration by the DoD Office of General Counsel even though a number of waivers were recommended.

DoD states that the repeal of 10 U.S.C. § 986 is justified because, it says, such decisions ought to be made in a normal course of the established security clearance process without having to personally involve the Secretary of Defense or a Secretary of a Military Department. The Department of Defense recognizes that having to go through the procedure for a waiver under 10

U.S.C. § 986 may have had a chilling affect on both individual applicants and the Defense agencies, discouraging them from pursuing an unknown number of otherwise meritorious cases.

The National Defense Authorization Act for 2008, as of May 1, 2007, is pending before the Senate Committee on Armed Services as Senate Bill, S. 567, and pending before the House of Representatives Committee of Armed Services as House Bill, H. R. 1585. No action has yet been taken by either Committee on the Bills.

This is the first time the Department of Defense has publicly taken a position opposing 10 U.S.C. § 986, although it has generally considered that law to be an obstacle to the personnel security program within the Department of Defense. As the National Defense Authorization Act makes its way through Congress, further updates will be posted on this website.