

**“SMITH AMENDMENT” UPDATE**  
**October, 2004**  
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**Success!** The Smith Amendment modification was passed by Congress on October 9, 2004, and is on its way to the White House for signature. Section 1062 of the “Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005” amends 10 U.S.C. § 986, the “Smith Amendment,” so that a person would not be barred from holding a security clearance unless he or she was actually imprisoned for at least one year, not just sentenced to that time. The modification also directs the Department of Defense to develop standards and procedures for the determining if a person who was barred by the Smith Amendment could be granted a waiver.

The effect of this change is to allow people who have been sentenced to more than year but placed on probation, or who actually served less than a year of incarceration to hold a security clearance. In cases where the Smith Amendment prohibition does apply, the change also now establishes standards for waivers where before, there were none. The new law delegates the waiver authority to persons below the level of Secretary of Defense, Army, Navy or Air Force where previously the Secretaries had to personally make that decision.

When the change is signed into law, 10 U.S.C. § 986 will read as follows:

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**(a) Prohibition.**—After October 30, 2000, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

**(b) Covered persons.**—This section applies to the following persons:

(1) An officer or employee of the Department of Defense.

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

**(c) Persons disqualified from being granted security clearances.**—A person is described in this subsection if any of the following applies to that person:

(1) The person has been convicted in any court of the United States of a crime, *was sentenced to imprisonment for a term exceeding one year and was incarcerated as a result of that sentence for not less than a year.*

(2) The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the controlled Substances Act (21 U.S.C. 802)).

(3) The person is mentally incompetent, as determined by a mental health professional approved by the Department of Defense.

(4) The person has been discharged or dismissed from the Armed Forces under dishonorable conditions.

**(d) Waiver authority.**—In a meritorious case, an exception to the prohibition in subsection (a) *may be authorized* for a person described in paragraph (1) or (4) of subsection (c) *if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.*

(New language in italics.)

At this time, Presidential guidance or authority has not been issued and no standards or procedures for granting waivers have been released to the public. However, all pending cases under the former law which would not be barred by the

new amendment have been put on hold pending the President's signature enacting the change into law.

Ambiguities in the latest amendment raise a number of questions. Subsection (c)(1) uses the terms "imprisonment" and "incarceration" in the same sentence. Was that an intended distinction? Does a sentence "to imprisonment" mean only to a prison or penitentiary or does it include house-arrest or a halfway house?

Sentencing must be for a term "exceeding one year" but minimum incarceration is for a day shorter period of "not less than a year." What does incarceration "for less than a year" mean? 364 days is less than a year, so "not less than a year" must mean a year or more. Would incarceration during a leap year differ from a nonleap year? A release after 365 days in a leap year would be "less than a year." We will have to await future decisions to resolve these questions.

Anyone who has lost his or her clearance since October 30, 2000 because of the Smith Amendment and who has served less than a year of incarceration should apply for reconsideration of their clearance denial or revocation.