

# The Security Clearance Process: How to Help Soldiers Who Lose Their Clearances (and Potentially Their Careers)<sup>1</sup>

Major Mark “Max” Maxwell, USA  
Chief, Operational Law Branch  
International and Operational Law Division  
Office of the Judge Advocate General  
The Pentagon

## Scenario

Assume, for a moment, that you are a military defense counsel. First Lieutenant (1LT) True Blue, an Arabic linguist with the 34th Military Intelligence Battalion, comes to you for legal advice because he is under investigation for allegations of downloading child pornography and disclosing classified information. The U.S. Army Criminal Investigation Command (CID) thinks your client downloaded the pornography on his government computer, and that he also electronically mailed classified information to a non-authorized recipient on the same computer system. Your client proclaims his innocence on the pornography charge; he maintains that the government computer is a workstation shared by several individuals, any of whom could have downloaded the pornography. As for the sending of classified information to an unauthorized user, 1LT Blue admits this mistake but claims that it was a one-time transgression resulting from simple negligence. You also learn that he gave a statement to CID consistent with this version.

At the end of the counseling, you tell your client to remain silent, and then you call CID to inform the investigating agent that you now represent 1LT Blue.<sup>2</sup> After several months, the government decided not to pursue criminal charges. The command, upon consultation with its trial counsel, did not think the case should go to court because there was not enough evi-

dence.<sup>3</sup> Although the child pornography was found on his personal account, the government was unable to show that 1LT Blue was the person who downloaded the files. The isolated nature of the classified breach resulted only in a verbal reprimand from 1LT Blue’s battalion commander. Your client is very happy; it is yet another defense victory.

## Receiving an “Intent to Revoke Security Clearance” Letter

About a month later, there is a knock on your office door. It is 1LT Blue, and he looks very upset. He is holding a letter entitled, “Intent to Revoke Security Clearance.” The letter is from the U.S. Army Central Personnel Security Clearance Facility (CCF); it states that the CCF has made a preliminary decision to revoke 1LT Blue’s security clearance.

You realize that the letter your client now holds is a result of the criminal investigation. During this investigation, the CID found “credible information”<sup>4</sup> to believe that 1LT Blue possessed illegal child pornography and compromised classified information, in violation of the Uniform Code of Military Justice (UCMJ).<sup>5</sup> This information, in the form of a CID report, was then forwarded to 1LT Blue’s command.<sup>6</sup> The command, in turn, forwarded a Department of Army Form 5248-R, “Report of Unfavorable Information for Security Determina-

1. This note addresses the process for the revocation of an existing clearance, but the process is the same for an initial denial of a security clearance.
2. This call to CID triggers your client’s rights under *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Under *McOmber*, law enforcement officers must inform the defense counsel before they interrogate a soldier they know to be one of the defense counsel’s clients. *Id.* at 383.
3. The standard of proof at a court-martial would be that 1LT Blue is “presumed to be innocent until [his] guilt is established by legal and competent evidence beyond reasonable doubt.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(5)(A) (2002).
4. See U.S. DEP’T OF DEFENSE, INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE app. E, at E1.1.1 (7 Jan. 2003) (defining “credible information” as “[i]nformation disclosed or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained investigator to presume that the fact or facts in question are true”); see also U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES paras. 1-4f(1)(b), 4-4b (30 Oct. 1985) [hereinafter AR 195-2].
5. This determination is known as “titling” and constitutes a decision by an authorized official, such as a CID agent,

to place the name of a person or other entity in the “subject” block of a CID report of investigation (ROI). A “subject” is “[a] person . . . about which credible information exists which would cause a reasonable person to suspect that person . . . may have committed a criminal offense, or otherwise cause such person . . . to be the object of a criminal investigation.”

Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW., Aug. 1998, at 1 (quoting AR 195-2, *supra* note 4, at glossary). Titling is not a determination that “there is probable cause to believe that the subject actually committed the offense for which he is titled.” *Id.* at 2. Lieutenant Colonel Ham’s article is an excellent discussion of the titling process.

6. AR 195-2, *supra* note 4, para. 4-2e(2).

tion,” to the Commander of the CCF.<sup>7</sup> Based on that report, the CCF reviewed 1LT Blue’s security suitability. Pending the CCF’s decision whether to revoke a soldier’s clearance, the soldier’s command or the CCF will normally suspend the soldier’s access to classified information.<sup>8</sup>

1LT Blue’s situation is serious. If he loses his clearance, he will be referred to the Department of Army’s Suitability Evaluation Board (DASEB). The DASEB will “decide what unfavorable information, if any, will be made a part of the recipient’s official personnel files.”<sup>9</sup> If the unfavorable information is placed in 1LT Blue’s official military personnel file (OMPF),<sup>10</sup> it will hinder promotion, assignment, and schooling opportunities, and could even trigger an elimination board.<sup>11</sup>

### The “Intent to Revoke” Process

The “intent to revoke security clearance” letter from CCF contains a statement of reasons (SOR).<sup>12</sup> The SOR outlines the security concerns and the adverse information pertaining to the soldier; in 1LT Blue’s case, the concerns stem from security violations and sexual behavior that is criminal in nature.

The “intent to revoke” letter sets forth two procedural paths for 1LT Blue: (1) forfeit his opportunity to contest the security

clearance revocation; or (2) elect to submit a statement and materials for consideration in the final adjudication.<sup>13</sup> A client should always elect to submit a statement and materials for consideration in the CCF’s final adjudication. First Lieutenant Blue has ten calendar days to inform the CCF of his intent to submit a statement and materials for consideration. He then has sixty calendar days from the date he received the “intent to revoke” letter to respond.<sup>14</sup>

This timeline will give the client time to exercise two critical rights outlined in the letter: (1) his right to request a copy of the investigative file; and (2) his right to seek legal advice from a judge advocate. To understand the factual background of the case, the client or his attorney should immediately request a copy of the file from the CCF. A preprinted form requesting this information from the CCF should be attached to the letter.<sup>15</sup> The file will give the factual basis for the proposed revocation and allow the attorney and client to address each allegation with particularity. Armed with the facts, a judge advocate<sup>16</sup> can, in turn, hone the client’s submission and thereby give him the greatest possible benefit of counsel.<sup>17</sup>

As one administrative judge aptly penned, “[A]n attorney should give maximum effort to contesting the proposed denial or revocation at the agency level.”<sup>18</sup> The attorney drafting the response should therefore consult *Department of Defense*

7. U.S. DEP’T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. 8-101b(1) (9 Sept. 1988) [hereinafter AR 380-67].

8. *Id.* para. 8-102a. Titling is not the only way a soldier can have his security clearance denied or revoked. Others include a positive urinalysis for illegal drugs, a civilian criminal conviction, an attempted suicide, a diagnosis of alcohol abuse or dependence, bankruptcy or other financial problems, possession or use of a foreign passport, or other indications of foreign preference or influence. *See* U.S. DEP’T OF DEFENSE, REG. 5200.2-R, PERSONNEL SECURITY PROGRAM (1 Jan. 1987) [hereinafter DODR 5200.2-R]. This note addresses only the procedures used following the issuance of an “intent to revoke security clearance” letter.

9. U.S. DEP’T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 4-4a(3) (19 Dec. 1986).

10. The Commander, U.S. Army Personnel Command, usually maintains a soldier’s OMPF. It consists of a performance section (performance, commendatory, and disciplinary data), a service section (general information and service data), and, in some cases, a restricted section (controlled data). U.S. DEP’T OF ARMY, REG. 600-8-104, MILITARY PERSONNEL INFORMATION MANAGEMENT/RECORDS ch. 2 (27 Apr. 1992). Once unfavorable information is placed in a soldier’s OMPF, the procedure to remove this unfavorable information from the OMPF is difficult and “appeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered.” AR 600-37, *supra* note 9, para. 7-2a.

11. *See* U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (29 June 2002); U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (1 Nov. 2000) (governing the involuntary separation procedures for officers and enlisted personnel, respectively).

12. DODR 5200.2-R, *supra* note 8, at 169.

13. AR 380-67, *supra* note 7, para. 8-102b.

14. *Id.* para. 8-102c.

15. If there is no form, the CCF should obtain the investigative file from the Commander, U.S. Army Intelligence and Security Command, Freedom of Information and Privacy Office, 4552 Pike Road, Fort Meade, Maryland 20755-5995. If obtaining a copy of the investigative file takes more than sixty days, the client may request an extension of the response period. *Id.* para. 8-102b(2).

16. A local Memorandum of Agreement (MOA) between the Trial Defense Service (TDS) and the Office of the Staff Judge Advocate will determine which office will represent a soldier whose clearance is the subject of revocation proceedings. For example, a legal assistance attorney could assist this client. *See* U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3.7g (21 Feb. 1996).

17. In 1LT Blue’s scenario, because he already has an attorney-client relationship with a TDS counsel, the TDS counsel would likely handle the matter, even though the case is not a criminal matter. *See* U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (6 Sept. 2002) [hereinafter AR 27-10].

18. Emilio Jaksetic, *Judicial Review of Security Clearance Decisions*, 9 AD. LAW BULL. 4 (1996).

*Directive 5200.2*<sup>19</sup> (*DODD 5200.2*) and its implementing regulation. The implementing regulation outlines the procedures for the security clearance review process.<sup>20</sup> In particular, Appendix 8 of the regulation defines the “adjudicative guidelines for determining eligibility for access to classified information.”<sup>21</sup> This appendix lists thirteen guidelines used to determine “whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security.”<sup>22</sup> Each guideline begins with an explanation “of its relevance in determining whether it is clearly consistent with the interest of national security to grant or continue a person’s eligibility for access to classified information.”<sup>23</sup> Then, for each guideline, there is a list of “conditions that could raise a security concern and may be disqualifying” and “conditions that could mitigate security concerns.”<sup>24</sup> In the security clearance process, these are referred to as disqualifying and mitigating conditions.<sup>25</sup>

Appendix 8 also describes the adjudication process as “the careful weighing of a number of variables known as the *whole*

*person concept*.”<sup>26</sup> The appendix defines this concept by listing a number of factors for consideration in each case.<sup>27</sup> Using Appendix 8 as a road map will ground the client’s argument in language and policy the CCF knows and understands; this may help him muster a successful argument.

Ensuring that the client understands the overall security clearance process and some commonly held misconceptions is essential to preparing him to make the best possible argument.<sup>28</sup> First, there is no right or entitlement to a security clearance; there is no property interest in a security clearance.<sup>29</sup> The client and his lawyer should focus on how continued access to classified information is clearly consistent with the national interest. Second, the government may revoke a security clearance “by proving the [soldier]’s actual misconduct, by a preponderance of the evidence,”<sup>30</sup> even if the charges were dropped or the soldier was acquitted.<sup>31</sup> If the misconduct is disputed, the client must make this clear to the deciding officials and present supporting evidence. Third, hearsay and circumstantial evidence are admissible and may be a basis for the Army’s decision.<sup>32</sup>

---

19. U.S. DEP’T OF DEFENSE, DIR. 5200.2, DOD PERSONNEL SECURITY PROGRAM (9 Apr. 1999) [hereinafter *DODD 5200.2*].

20. See generally *DODR 5200.2-R*, *supra* note 8.

21. *Id.* at 132.

22. *Id.* at 133.

23. *Id.* at 134.

24. *Id.* at 135-53.

25. Interview with Michael H. Leonard, Administrative Judge, U.S. Dep’t of Defense, Defense Office of Hearings and Appeals, Washington Hearing Office, Arlington, Va. (Feb. 2, 2003) [hereinafter *Leonard Interview*]. In *1LT Blue*’s scenario, for example, mitigating conditions of a security violation could include: that the actions were inadvertent, isolated or infrequent; that they were due to improper or inadequate training; and that the individual demonstrates a positive attitude towards the discharge of security responsibilities. See *DODR 5200.2-R*, *supra* note 8, at 151.

26. *DODR 5200.2-R*, *supra* note 8, at 132 (emphasis added).

27. The “whole person concept” includes consideration of 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.

*Id.*

28. *Leonard Interview*, *supra* note 25.

29. *Dep’t of Navy v. Egan*, 484 U.S. 518, 528 (1988).

30. *Brown v. Dep’t of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983).

31. *Id.*

32. See, e.g., *United States v. Ellis*, 50 F.3d 419, 422 (7th Cir. 1995); *Crawford v. Dep’t of Agriculture*, 50 F.3d 46, 49 (D.C. Cir. 1995) (holding that “administrative agencies are not barred from reliance on hearsay evidence”).

This lower threshold may inure to the benefit of the soldier because he can collect affidavits, letters, and other favorable documentation without facing the hurdles of admissibility. Finally, unlike a criminal case where a reasonable doubt favors the defendant, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>33</sup> Again, the client and his attorney should focus on the favorable factors, as outlined in *DODD 5200.2* and its implementing regulation.<sup>34</sup>

### Revocation and the Personal Appearance Before DOHA

If, after considering the soldier’s statements and materials, the CCF decides to revoke the client’s security clearance, the CCF will send the soldier a letter of denial or revocation (LOD)<sup>35</sup> based on the information outlined in the SOR.<sup>36</sup> This LOD triggers two different appeal options for the client: he can either submit a direct written appeal to the Army Personnel Security Appeals Board (PSAB) within thirty days,<sup>37</sup> or he can request a personal appearance<sup>38</sup> before a Defense Office of Hearings and Appeals (DOHA) administrative judge within ten calendar days.<sup>39</sup> If the client selects the DOHA option, then the

administrative judge makes a written recommended decision to the PSAB. Thereafter, the PSAB, a three-member board, will consider the appeal and “render a final determination” on the soldier’s security clearance.<sup>40</sup>

The soldier has a right to appear personally before a DOHA administrative judge.<sup>41</sup> The soldier should elect this right whenever possible. The personal appearance<sup>42</sup> gives the soldier a face-to-face meeting with the administrative judge, and a fresh opportunity to argue against revoking his security clearance. It may also be possible for a judge advocate to make the argument on the client’s behalf.<sup>43</sup>

The soldier’s rights at his personal appearance are strikingly similar to those at an Article 15, UCMJ, hearing.<sup>44</sup> At the personal appearance, the administrative judge will have a copy of the SOR, the CCF file, and the client’s submissions. The soldier is limited to submitting documentary evidence to refute or mitigate the SOR. Government counsel will not be present, but the soldier or his representative will have the opportunity to speak on the soldier’s behalf.<sup>45</sup>

33. *Egan*, 484 U.S. at 531.

34. See generally *DODR 5200.2-R*, *supra* note 8; *DODD 5200.2*, *supra* note 19.

35. LOD is a term used in *DODR 5200.2-R*. *DODR 5200.2-R*, *supra* note 8, at 176.

36. *Id.* at 178; see *AR 380-67*, *supra* note 7, para. 8-201d.

37. *DODR 5200.2-R*, *supra* note 8, at 178-79. The notification to the PSAB, however, must be within ten days. *Id.*

38. An executive order created the personal appearance process under a uniform federal personnel security program for employees who will be considered for initial or continued access to classified information. Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995). Change 3 to *DODR 5200.2-R* implements this executive order. *DODR 5200.2-R*, *supra* note 8, change 3. On 29 February 1996, the Department of the Army issued guidance revising *AR 380-67*. See *AR 380-67*, *supra* note 7; Robert R. Gales, *The DOD Processes for Access to Classified Information and Employment in Sensitive Duties for Employees of American Industry, Civil Servants, and Military Members*, in *INTRODUCTION TO DEFENSE SECURITY CLEARANCE CASES 9* (2002).

39. The Defense Office of Hearings and Appeals (DOHA) is a creation of the Secretary of Defense pursuant to 10 U.S.C. § 125(a) and its implementing regulations. The DOHA, under the general supervision of the DOD General Counsel, is the largest component of the Defense Legal Services Agency. The DOHA: (1) provides hearings and issues decisions in personnel security clearance cases for contractor personnel doing classified work for all DOD components and twenty other federal agencies and departments; (2) conducts personal appearances and issues recommended decisions in security clearance cases for DOD civilian employees and military personnel; (3) settles claims for uniformed service pay and allowances and claims for transportation carriers for amounts deducted for loss or damage; (4) conducts hearings and issues decisions in cases involving claims for special education benefits and claims for medical and dental benefits; and (5) functions as a central clearing house for DOD alternative dispute regulation activities and as a source of third-party arbitrators for such activities. U.S. DEP’T OF DEFENSE, DIR. 5220.6, *DEFENSE INDUSTRIAL PERSONNEL SECURITY CLEARANCE REVIEW PROGRAM* ch. 4 (2 Jan. 1992) (implementing the industrial security program); Leonard Interview, *supra* note 25; U.S. Dep’t of Defense, *Defense Office of Hearings and Appeals*, at <http://www.defenselink.mil/dodgc/doha/> (last visited June 6, 2003).

40. *DODR 5200.2-R*, *supra* note 8, app. 12 (detailing the structure and function of the PSAB).

41. *Id.* at 76 (“No final unfavorable personnel security clearance or access determination shall be made on a member of the Armed Forces . . . without granting the individual concerned the procedural benefit[] [of an a]ppeal with a personal appearance.”).

42. See *id.* app. 13 (explaining how a personal appearance is conducted).

43. It will up to the judge advocate’s chain of command to determine whether he will be allowed to represent the soldier at the DOHA hearing. There is no regulatory right to free representation at the hearing, but the soldier does have a regulatory right to consult with an attorney. At a minimum, therefore, the judge advocate can help prepare the soldier to present his case in the most favorable light possible. If the opportunity arises, however, representing soldiers at the personal appearance hearing could be a tremendous advocacy opportunity for a young judge advocate, as well as the best way to help the client. See *supra* notes 16-17.

44. See *AR 27-10*, *supra* note 17, para. 3-18 (explaining the soldier’s rights at an Article 15, UCMJ, hearing).

*Department of Defense Regulation 5200.2-R* is surprisingly silent about the necessary quantum of proof for a personal appearance case before a DOHA administrative judge. The Supreme Court observed, however, that the government's burden of proof in a security clearance case is less than a preponderance of the evidence.<sup>46</sup> Likewise, during the DOHA's parallel industrial security clearance cases involving employees of defense contractors,<sup>47</sup> the government's burden of proof is substantial evidence, which is less than a preponderance of the evidence.<sup>48</sup>

Using the substantial evidence standard as a template, although arguably not controlling for personal appearance cases, will help the attorney and client work within an established framework. The DOHA administrative judge is likely to be comfortable with this standard, and the attorney and client's use of it will foster a procedural fluency, which will help the attorney tailor a more effective presentation. With this standard in mind, the attorney and client can make their best argument that the favorable factors outweigh the disqualifying ones.

After the attorney has done the relevant research, he and the client must present documentary evidence and testimony that supports a coherent theory of the case. In the case of 1LT Blue, he will contest the pornography charge and mitigate the inadvertent disclosure of classified information. He should consider presenting documentary evidence that many people have access to the computer in question. Concerning the security violation, his theory could be that he was careless on this one occasion, but that he is not a criminal. He should attempt to demonstrate some command training deficiencies; for example, he could present evidence that he was not properly trained how

to secure or use the secure network. First Lieutenant Blue should also explain the steps he will take to ensure that he will not repeat the inadvertent release of classified information. Documents from 1LT Blue's supervisors can help demonstrate his positive attitude toward his security responsibilities.<sup>49</sup> Moreover, 1LT Blue should present information that falls within any of the pertinent favorable factors of the "whole person concept."<sup>50</sup>

### The Soldier's Remaining Options

After the personal appearance, the DOHA will issue a recommendation to the PSAB on whether to sustain or overturn the CCF's decision to revoke the security clearance. The PSAB will then make a final determination based on an official transcript of the DOHA hearing, the allied documents, and the recommended decision of the DOHA administrative judge.<sup>51</sup> If the PSAB's decision is adverse, then the client has two last options: he can file suit in federal district court, or he can request a waiver from the Secretary of the Army.<sup>52</sup>

There are problems with both options. Federal courts lack jurisdiction to review government security clearance decisions on their merits.<sup>53</sup> The courts can review whether the Army followed its own regulations, however.<sup>54</sup> If the Army has not done so, then the courts can compel compliance, but this does not mean that 1LT Blue will win back his security clearance; he merely gets a second chance to present his case after the agency fixes the procedural flaw.<sup>55</sup> Of course, 1LT Blue probably has neither the time nor the money for federal litigation. First Lieu-

---

45. Robert R. Gales, Chief Administrative Judge, Defense Legal Services Agency, Defense Office of Hearings and Appeals, *Guidance for Your Personal Appearance* (24 Oct. 1997), at <http://www.defenselink.mil/dodgc/doha/pap-g.html> [hereinafter DOHA Guide]. The documentary evidence need only be relevant and material. Moreover, the documents can take virtually any form, including memoranda, affidavits, or notarized papers. *Id.*

46. *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988).

47. For cases involving industrial personnel (unlike federal employees and service members) where an SOR is issued, industrial personnel can contest the SOR through the DOHA process. They will have more procedural rights than their military counterparts; for example, these personnel can produce documents, call witnesses, cross-examine the agency's witnesses, and make opening and closing statements. Gales, *supra* note 37, at 41-46. See also Emilio Jaksetic, *The DOHA Appeal Process: An Introduction and Overview*, in INTRODUCTION TO DEFENSE SECURITY CLEARANCE CASES 9-10 (2002).

48. ISCR Case No. 01-20700, 2002 DOHA LEXIS 204, at \*13-14 (App. Bd. Dec. 19, 2002) (noting that "[t]he government's burden to prove its case is one carried by 'substantial evidence'").

49. DODR 5200.2-R, *supra* note 8, at 151.

50. See *supra* note 27.

51. DOHA Guide, *supra* note 45.

52. See generally *Dep't of Navy v. Egan*, 484 U.S. 518 (1988); *Duane v. Dep't of Defense*, 275 F.3d 988 (10th Cir. 2002).

53. *Duane*, 275 F.3d at 993 (citing *Egan*, 484 U.S. at 518). Although *Egan* addressed only review by external administrative boards and not the judiciary, all the circuits that have addressed the scope of review have held that there is no jurisdiction for external review, including judicial review. See *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *Becerra v. Dalton*, 94 F.3d 145, 148-49 (4th Cir. 1996); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).

54. *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988).

55. *Duane*, 275 F.3d at 993-95.

tenant Blue can also request a waiver from the Secretary of Army; however, this is an extraordinary measure.<sup>56</sup>

### Conclusion

Security clearances are necessary for many soldiers to function in the military. If 1LT Blue does not get his clearance reinstated, this information will be placed in his personnel file. The Army, in turn, will review his suitability for continued service.

A security clearance thus could be central to 1LT Blue's future. Although a soldier's rights in the security clearance process are limited, judge advocate participation in the process—especially by writing responses to “intent to revoke” letters and making personal appearances before DOHA administrative judges—could significantly improve the odds the client will be able to keep his clearance. An attorney can help focus a client's submissions and presentation on the issues that are material and relevant, thereby increasing his chances of successfully defending his security clearance, and his military career.

---

56. Exec. Order No. 12,968, 60 Fed. Reg. 40,245, § 5.2(b) (Aug. 7, 1995) (“[N]othing in this section shall prohibit an agency head from personally exercising the appeal authority . . .”). Under a provision known as the Smith Amendment, the Secretary of the Army has no waiver authority when the revocation is due to current illegal drug use or mental incompetence. 10 U.S.C. § 986 (2000). This amendment applies only to the DOD and its services' personnel, including civil servants, military members, and contractors; it mandates that a security clearance *must* be revoked or denied if the person has been convicted of a crime in any court of the United States and sentenced to imprisonment for a term exceeding one year; is an unlawful user of, or is addicted to, a controlled substance; is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or has been discharged or dismissed from the Armed Forces under dishonorable conditions. The Secretary of the Army may grant a waiver if the person was convicted of a crime and sentenced to more than one year, or was discharged or dismissed from the military. *Id.* As of this date, the substance of the Smith Amendment has not been challenged in federal court. Leonard Interview, *supra* note 25.