THE SMITH AMENDMENT, 10 U.S.C. §986 HAS BEEN REPEALED AND REPLACED BY 50 U.S.C. 435b § 3002 (2008)

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On January 28, 2008, the President signed into law, Public Law 110-181, the Defense Authorization Act for Fiscal Year 2008, Section 1072 of which repealed 10 U.S.C. §986, formerly known as the "Smith Amendment". 10 U.S.C. §986 had barred contractors to, and employees of the Department of Defense and military personnel from holding a security clearance if they had been convicted of a crime and served more than one year of incarceration.[2] That law, now repealed, has been replaced by a new statute, 50 U.S.C. 435b, Section 3002, which applies the bar government-wide, not only to the Department of Defense, and to a much smaller group of individuals holding higher levels of access. While the former prohibition barred only Department of Defense personnel from holding any clearance for access to any program, including Confidential, Secret or Top Secret, the new law now bars access only to Special Access Programs (SAP's), Restricted Data (Atomic Energy Information), and other Sensitive Compartment Information (SCI, i.e. intelligence information). All of these highly sensitive programs presently require at least a Top Secret clearance or its equivalent. The new law still contains a provision for a waiver in meritorious cases.

The repeal of the Smith Amendment has had a difficult history in Congress. Originally enacted in 2000 as a result of sensational, but incorrect, newspaper article charging the Department of Defense, Office of Hearings and Appeals with allowing numerous convicted felons to hold security clearances.[3] 10 U.S.C. §986 originally barred anyone from holding a clearance if convicted of an offense and *sentenced* to at least a year regardless of whether they were allowed to serve community service and never spent a day in jail. The effect was to cause numerous long-standing excellent employees to lose their clearances, and thus their jobs, even if convicted of an offense many years before.

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[2] Pub. L. 106-398 §1071(a) (Oct. 30, 2000), 114 Stat. 654..

[3] See, *Loss of a Security Clearance Because of a Felony Conviction - The effect of 10 U.S.C. §986, The Smith Amendment*". www.sheldoncohen.com/publications/loss_of_clearance.htm

The Department of Defense recognized the injustice of this law and its effect in causing the loss of valuable long-time employees with critical skills. As a result, in 2004, efforts were made primarily through the office of Congressman Rob Simmons of Connecticut to repeal the Smith Amendment. Located in Congressman Simmons' Congressional District is General Dynamics, Electric Boat Division, which produces our nuclear powered submarines and employs large numbers of highly skilled blue collar workers many of whom had "active" teen years. The Smith Act was having an substantial impact on its work force. Congress was not ready to allow convicted felons, even if reformed, to hold a security clearance. Thus the law was amended to change to the bar from having been convicted and *sentenced* to at least a year, to having been actually *incarcerated* for more than a year.[4]

While this change in the law was of some help, many employees who had long since made amends to society for perhaps youthful indiscretions were still losing their jobs. In January 2007, when the Department of Defense submitted to Congress its draft of the Defense Authorization Act for Fiscal Year 2008, it proposed the full repeal of 10 U.S.C.§986. [5]It was DoD's stated desire to have more flexibility to give clearances to otherwise qualified individuals who were currently barred from receiving or renewing their clearances. It argued that the mandatory standards "unduly limit the ability of the Department to manage its security clearance program and may create unwarranted hardships for individuals who have rehabilitated themselves as productive and trustworthy citizens."[6]

Even before the enactment of the Smith Amendment, DoD had the authority to bar persons with a past criminal record, an authority which it used freely, but it also had the authority to look at each person individually to see if their past conduct had been mitigated , an authority which 10 U.S.C. §986 removed. Despite DoD's wishes, the House of Representatives left 10 U.S.C.§ 986 intact when it passed its version of the Defense Authorization Act, continuing the bar for DoD contractors, employees and military. [7]

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4 Pub. L. 108-375, §1062 (Oct. 28, 204), 118 Stat. 2056.

5 S. 1547. 110 Cong. 1st. Sess.

6 S. Rep. 110-077, 110th Cong. 1st. Sess. June 29, 2007

7 H.R. 1585, 110 Cong. 1st Sess. (Passed the House on May 15, 2005)

The Senate's consideration of the Bill was not so clear cut and resulted in three different proposals. The Senate Committee on Armed Service voted to approve DoD's request to entirely repeal the automatic bar on persons who had been convicted and served more than a year of incarceration.[8] The Senate Select Committee on Intelligence thought otherwise and came up with a majority and a minority position. The Report of the majority of the Senate Intelligence Committee recommend that the bar be extend to all levels of clearance, not only to DoD but throughout the government. A minority of the Senate Intelligence Committee agreed with the Senate Committee on Armed Services and recommend the complete repeal of 10 U.S.C. §986.[9]

Ultimately, a compromise was reached when the Bill was reported to the Senate floor for a vote.[10] The Senate passed its version of the Defense Appropriations Act with the present government-wide bar recommended by the Senate Select Committee on Intelligence, but only for the most highly sensitive Special Access, Restricted Data and Sensitive Compartmented Information programs.[11] That was not the end of this legislative journey. The Senate-passed version had to be reconciled with the House of Representatives-passed version of the Bill which had left the original law intact, barring only DoD personnel - but for all levels of clearance. In Conference, the House deferred to the Senate version, and the final Bill, as passed by both Houses of Congress and sent to the President on December 19, 2007 contained the language ultimately enacted into law.[12]

That was not the end of this long process, however. President Bush refused to sign the Bill because of a totally unrelated section that would have allowed the seizure of assets of any foreign government sponsoring terrorist activity.[13] Whether the President's decision not to sign this was a valid "Pocket Veto" remains a matter of dispute between Congress and the White House, but rather than hold up military appropriations until the Supreme Court could decide that arcane issue, Congress, in January 2008, removed the offending section of the Bill and again sent it to the President who signed it on January 28, 2008 .[14] The effective date under the new law is

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[8] S. Rep. 110-077, 110th Cong. 1st. Sess. June 29, 2007

[9] S. Rep. 110-125, 110th Cong. 1st Sess. June 29, 2007

[10] Senate Amendment SA 2875 to H.R. 1585, Cong Rec. p. S11610, 110th Cong. 1st Sess. Sept 17, 2007. The amendment was agreed to by unanimous consent on Sept 20, 2007. Cong rec. S. Rep. 110-077, 110th Cong. 1st. Sess. June 29, 2007,Cong. Rec. p. S11810-11816, 110th Cons. 1sr Sess.

[11] The Senate passed H.R. 1585 on Oct.1, 2007. Cong. rec. p. S12562-12691

[12] Conference Report, House Rep. 110-477, 110th Cong. 1st Sess. Dec. 6, 2006.

[13] Memorandum of Disapproval, Dec. 28, 2007. www.whitehouse.gov/news/releases/2007/12/print/20071228-5.html

[14] See, *After Veto, House Passes a Revised Military Policy Measure*, N.Y. Times, Jan 17, 2008

now January 1, 2008.

Section 1072 of the National Defense Authorization Act for Fiscal Year 2008, as enacted, added to the end of 50 U.S.C. 435b a new Section 3002 which now covers all officers and employees of any Federal Agency, all members of the Army, Navy, Air Force or Marine Corps who are on Active duty or in an active status, and officers and employees of a contractor of a Federal Agency. It bars them from having access to Special Access Programs, Restricted Data or any other information commonly referred to as sensitive compartmented information if they have been convicted in any court of the United States of a crime, have been sentenced to imprisonment for a term exceeding one year and have been incarcerated as a result of that sentence for not less than one year. The law continues to allow a waiver "in a meritorious case" if there are mitigating factors under standards and procedures proscribed by or under the authority of the President, or the Adjudicative Guidelines for determining eligibility for access to classified Information.

Many questions remain. Will the Department of Defense reconsider cases of persons who have lost there clearances solely as a result of the Smith Amendment? How will the Department of Defense decide cases presently pending for denial of revocation of a clearance solely because of the Smith Amendment? Will the adjudicative authorities now limit their mitigation review to those factors stated in the Adjudicative Guidelines and not look for some "higher authority"? In the past, some adjudicative authorities reasoned that it was the intent of Congress in passing the Smith Amendment to raise the standards for waiver above the mitigating conditions in the Adjudicative Guidelines.

The net effect of the law will be positive. While it potentially covers a greater number of people in the every Federal Agency, not just the Department of Defense, as a practical matter its effect should be small. People being considered for the most highly sensitive positions have always been held to a higher degree of scrutiny and probably would not have gotten clearances for access even without the new restriction. People seeking clearances for access to less sensitive positions will have a fairer opportunity to be judged by who they are now, not just by their past. Overall, it appears to be a win-win situation for the Federal government and for its employees, contractors and military.

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