UPDATE ON 10 U.S.C. _ 986, THE "SMITH AMENDMENT"
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This is an update on the status of 10 U.S.C. _ 986, known as the "Smith Amendment." There is good news and bad news, but which applies depends upon the agency you work for and the clearance you hold.

As background, in my April, 2007 report on the Smith Amendment (see my website, www.sheldoncohen.com), I reported that the Department of Defense (DoD) had submitted a proposal to Congress to repeal 10 U.S.C. _ 986 as part of the National Defense Authorization Act for FY 2008. DoD proposed that the repeal was justified because, it said, security clearance decisions involving past criminal behavior should be made as part of the normal security clearance process without involving the Secretary of Defense or a Secretary of a military department. DoD also noted that the law unjustifiably applied only to DoD employees and its contractor-employees and not to other government agencies.

As of my April report, no action had been taken by Congress on the National Defense Authorization Act. Since then, on May 17, 2007, the House of Representatives passed House Bill, HR 1585, which deleted DoD's request to repeal 10 U.S.C. _ 986, leaving it intact. The National Defense Authorization Act was thereafter considered by the Senate. Two Senate Committees differed on whether 10 U.S.C. _ 986 should be repealed or expanded. The Senate Armed Services Committee agreed with DoD's request and recommended the repeal of 10

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U.S.C. _ 986. The Senate Select Committee on Intelligence, by a divided vote, took the opposite position, the majority believing it should be expanded to apply throughout the government. The majority of that Committee felt that "a blanket repeal of Section 986 could lead to unintended compromises or mishandling of classified information." It believed that security clearances, including procedures and standards for granting clearances, should be coordinated by DoD with other appropriate offices in the Executive Branch, and with the Office of Director of National Intelligence. However, a minority of the Senate Select Committee on Intelligence, Senators Rockefeller, Wyden, and Feingold disagreed, noting that there was no comparable statute applicable to any other Department or Agency of the government, and that DoD already had ample authority to judge when security clearances should be granted or denied.

On July 9, the Senate Armed Services Committee reported out to the Senate its Bill, S. 1547, which included a provision repealing 10 U.S.C. _ 986. On July 17, Senator Bond, a member of the Senate Select Committee on Intelligence, submitted Senate Amendment 2875, substituting the language ultimately found in the Bill passed by the Senate. Senate Amendment 2875 proposed to repeal 10 U.S.C. _ 986, and substituted a new section amending 50 U.S.C. _ 435b, dealing with "Security Clearances." The substituted language version would continue to disqualify anyone from holding a security clearance if he or she had been convicted of a crime and incarcerated as a result for not less than a year, and would continue to disqualify anyone who had been discharged or dismissed from the armed forces under dishonorable conditions, but only for higher level clearances.

The Amendment was a compromise between the differing positions of the two Senate Committees. On September 20, Senator Levin, Chairman of the Senate Armed Services

Committee, moved that Senate Amendment 2875 be agreed to by unanimous consent of the Senate, and it was. The full Senate substituted for its Bill, the House version of the National Defense Authorization Act, HR 1585, considered and voted on it at the end of September, and passed its own version of the Bill on October 1, 2007. Section 1064 of the Bill, as passed by the Senate, now contains the language of Senate Amendment 2875.

The Senate Bill would expand the effect of the present law to have adverse consequences for a great many government employees and contract-employees not now affected. It expands the automatic disqualification to employees and contractor-employees of *all* federal agencies who hold security clearances. However, under the new proposal, the automatic disqualification would apply only to security clearances which provide access to "Special Access Programs" (SAPs), "Restricted Data" (atomic energy information), or any information commonly referred to as "Sensitive Compartmented Information" (SCI). It would not apply to "collateral," Confidential, Secret, or Top Secret Clearances.

The proposed new amendment to 50 U.S.C. _ 435b would continue to bar members of the armed forces on active duty or active status from holding a clearance if they were drug users or adjudged to be mentally incompetent. It would also continue to allow a waiver in meritorious cases, even for high level access, for people who had previously been incarcerated, or who had received a discharge or dismissal from the armed forces under dishonorable conditions.

The new amendment to 50 U.S.C. _ 435b, if enacted by Congress, narrows the effect of the present law by removing the automatic loss or denial of a security clearance for DoD employees and contractor-employees who were previously incarcerated for at least a year as a result of a conviction, or who had a dishonorable discharge, if they hold only a Confidential,

Secret, or Top Secret clearance. This would remove from the jurisdiction of the Defense Office of Hearings and Appeals and other non-SCI adjudicating authorities the authority to deny a clearance soley based upon a past incarceration, or on a dismissal or discharge from the Armed Services under dishonorable conditions. It would return to DOHA and to the other adjudicating authorities the ability to make security clearance determinations based on the "mitigating factors" and the "whole person concept" of the Security Clearance Guidelines.

While the latest proposal broadens the disqualification to all federal agencies, it narrows it to only those persons having access to the most sensitive programs in the government. As of this writing, the Senate's version of HR 1585, containing the new provision, and the House of Representatives version of HR 1585, leaving 10 U.S.C. _ 986 intact, are yet to be resolved. A Conference Committee to resolve this and other differences in the National Defense Authorization Act has not yet been scheduled. The Senate has appointed its conferees but the House of Representatives has not. When final action is taken by Congress it will be reported by a further update on this website.