

SMITH AMENDMENT ALERT !

Sheldon I. Cohen¹

The Smith Amendment, 10 U.S.C. 986, which prohibits granting security clearances to ex-criminal offenders is now under review by Congress. If you are affected by that law, write immediately to the Secretary of Defense and your Congressman urging its repeal. This is an opportunity to change a law which has caused the Government to lose the services of many long-time employees who have provided critical services to the national defense.

On November 24, 2003 the President signed into law HR 1588, the National Defense Authorization Act for fiscal Year 2004. Section 1051 of that law directs the Secretary of Defense to submit to Congress within 60 days, an assessment of the effects of the provisions of 10 U.S.C. 986 on the granting or renewal of security clearances for Department of Defense personnel and defense contractor personnel.² That report is due at Congress by January 23, 2004. The Secretary is directed to review the effects of the Smith Amendment and to recommend changes to law or regulation that he considers necessary.

As background, On October 30, 2000, Congress enacted a new law, known as the Smith Amendment, which prohibits the Department of Defense from granting or renewing a security clearance to any person who had been convicted in any court of the United States of a crime and

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² HR 1588, Sec. 1051 provides: Not later than 60 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives an assessment of the effects of the provisions of Section 986 of Title 10, United States Code (relating to limitations on security clearances), on the granting (or renewal) of security clearances for Department of Defense personnel and defense contractor personnel. The assessment shall review the effects of the disqualification factors specified in subsection (c) of that section and shall include such recommendations for legislation or administrative steps as the Secretary considers necessary.

sentenced to imprisonment for a term exceeding one year.[@] It includes convictions in either a Federal or State court, and includes any sentence of more than one year regardless of the amount time actually served. It bars people placed on probation who never served a day in jail. The Smith Amendment allows no exceptions no matter how long ago the offense occurred or what the person has done with their life since then.

That Amendment, provides that in a meritorious case the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the [above stated] prohibition.[@](Prior to the Smith Amendment, Administrative Judges of the Department of Defense always had the authority to deny clearances to convicted offenders and did so in serious cases or recent convictions.) From October 2000, when the Smith Amendment was enacted, through 2002, less than a dozen recommendations for waiver for defense contractor employees were made by the Director of the Defense Office of Hearing and Appeals. In 2003 there have been a few more. There is no public record of how many government employees have lost their clearances and their jobs but to this writer's knowledge there have been many. To the present time no action has been taken by the Secretary of Defense on any recommended cases forward to him. The two annual reports to Congress by DoD required by the Smith Amendment thus far filed offer little reason for optimism. The first report covering July 1, 2001 through December 31, 2002, stated that no waivers were approved by the Secretary of Defense or the Secretaries of the Military Departments for that period.³ The second report covering 2002, reported that only one waiver had been granted by the Secretary of the Navy

³ Letter from John P. Stenbit, Assistant Secretary of Defense for Command, Control, Communications and Intelligence, March 4, 2002 (on file with the House and Senate Armed Services Committee. The Senate Committee Control Number is SASC No. 107-2-08.)

during that period.⁴ It has been unofficially reported that the Navy has granted only seven waivers for the entire 2003.

The Smith Amendment has caused individuals who have served their country faithfully and meritoriously to lose their clearances and their jobs twenty to thirty years after having paid their debt to society for committing minor crimes. The effect on the national defense has been far more serious. People in critical positions whose skills and knowledge are virtually irreplaceable are being forced out even though they have had a clearance for many years. It is jeopardizing our submarine and aircraft industries where every craftsman, welder and electrician must have a clearance. Instead of strengthening our national defense, the Smith Amendment has put it at risk. This has truly been a law of unintended consequences@

If you or your employees have been or will be affected by the Smith Amendment and think it ought to be repealed, write to the Secretary of Defense, The Pentagon, Washington D.C. 20301-0003, with a copy to William J. Haynes, II, General Counsel, Department of Defense, The Pentagon, Washington D.C., 20301-0003. A report to Congress is due by January 23, 2004 so your views must be received promptly.

⁴ Letter from John P. Stenbit, Feb. 26, 2003 (On file with the House and Senate Armed Service Committees).