

**ASMITH AMENDMENT@ UPDATE**  
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The ASmith Amendment,@ 10 U.S.C. 986, which was enacted in October 2000, prohibits the Department of Defense from granting or renewing a security clearance to anyone who was convicted of a crime and sentenced to more than a year in jail, who is an employee of the Department of Defense, a member of Armed Forces on active or inactive status, or an employee of a defense contractor. Since its enactment hundreds of people, many of whom who have had clearances for 20 or 30 years, have had their security clearances revoked. Although the Smith Amendment allows DoD to grant a waiver, almost none have been allowed.

On November 24, 2004, the President signed into law a bill requiring the Department of Defense to file a report with Congress within 60 days giving an assessment of the effect of the Smith Amendment on the national defense .<sup>2</sup> DoD was required to file its assessment by January 23, 2004, but as of the end of April that report has yet to be filed. In the meantime, numerous government employees, contractor employees and military members continue to lose their clearances. Hopefully, when the Department of Defense does file its assessment report, the adverse effect of the Smith Amendment on the national defense will become so obvious it will be repealed.

The Smith Amendment also requires DoD to file an annual report to Congress on the number of waivers it has granted for the preceding year. For 2003, DoD reported that eight waivers were granted, one by the Army and seven by the Navy. No waivers are reported for the Air Force or the Office of the Secretary of Defense. It is not known whether any waivers were recommended to the Secretary of the Air Force and denied, but it is known that numerous waivers have been recommended to the Secretary of Defense and to present, none have been acted on, either to grant or deny.

In the one waiver granted by the Army in 2003, the individual was 19 years old when convicted of assault, he later graduated college with honors, received a full pardon, enlisted in the Army as an infantry soldier at age 33, and after his honorable discharge, was ordained as a priest, went on to receive a master's degree, was commissioned in the Army Reserve as a chaplain, completed the officer's basic course at age 44 and in 2001 was hired to be the

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<sup>2</sup> P.L. 108-136, ' 1051.

civilian director of religious education at a major Army installation. One wonders if that is where the bar is set.

In the seven waivers granted by the Navy, the bar was not quite so high. It granted waivers where there was no additional disqualifying information after the conviction, and from 14 to 25 years of good conduct and superior employment history.

The Smith Amendment has been handled differently not only among the military departments, but even within the Office of the Secretary of Defense, notably regarding the effect of a pardon.<sup>3</sup> The Defense Office of Hearings and Appeals (DOHA) which handles contractor employee cases, has ruled that a pardon does *not* eliminate Smith Amendment consideration.<sup>4</sup> On the other hand, the Washington Headquarters Services, Clearance Appeals Board which reviews clearances for government employees *does* consider that a state pardon removes the case from Smith Amendment sanction.<sup>5</sup> DOHA's position is that

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<sup>3</sup> There are ten adjudication facilities in DoD. They are the: Air Force Central Adjudication Facility; Army Central Personnel Security Clearance Facility; Department of the Navy Central Adjudication Facility; National Security Agency; National Reconnaissance Office, Defense Intelligence Agency; Joint Chiefs of Staff; Washington Headquarters Services; Defense Industrial Security Clearance Office, and the Defense Office of Hearings and Appeals.

<sup>4</sup> DOHA ISCR Case No. 01-23923 (Aug. 19, 2003); DOHA ISCR Case No. 01-00407 (Sept. 18, 2002).

<sup>5</sup> The Navy Clearance Appeal Board has not yet considered the issue of a pardon. It is not known how the remaining six adjudication facilities have treated this issue (DISCO forwards its cases to DOHA for final decision).

Congress has declared a state conviction to be a bar to a security clearance and a state cannot overrule federal law. WHS's position in that Congress barred a conviction under state law, and when there is a state pardon there is no conviction under state law. Both DOHA and WHS make their recommendations for a waiver to the Secretary of Defense.

Another issue yet to be resolved is DOHA's practice of readjudicating prior actions under Guideline J, Criminal Conduct, for previously granted clearances. This practice appears contrary to the controlling DoD regulation which clearly prohibits a readjudication of previously decided personnel security determinations.<sup>6</sup> 10 U.S.C. ' 986 requires only one determination, whether to recommend a waiver.

DoD Directive 5200.2-R, ' 4-102 requires that prior adjudication determinations for access to classified information must be accepted by all DoD components unless there has been a break in service of greater than 24 months, or unless derogatory information becomes known which occurred subsequent to the prior security determination. Although DOHA Operating Instruction No. 64 instructs its judges to simply determine whether a clearance is to be denied or revoked because of 10 U.S.C. 986, and to give a recommendation for or against a waiver, its administrative judges and the DOHA Appeal Board are readjudicating the old conduct even though the contractor employees have repeatedly been cleared. Under that practice a denial of a waiver recommendation is almost a foregone conclusion. This goes beyond the language and intent of the Smith Amendment. While the impact of this may not be immediately felt by the employee, if and when the Smith Amendment is repealed, contractor employees will have a new denial determination on the record with which to contend.

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<sup>6</sup> DoD Directive 5200.2-R is the controlling regulation for DOHA. See, DoD Directive 5220.6, ' 6 (Jun. 6, 1992).