DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
WASHINGTON, DC 20350-2000

IN REPLY REFER TO
5520
Ser N09N2/5U981033
AUG 10 2005

From: Chief of Naval Operations

To: Director, Department of the Navy Central Adjudication Facility
President, Department of the Navy Personnel Security Appeals Board

Subj: RESTRICTIONS ON THE GRANTING OR RENEWAL OF SECURITY CLEARANCES

Encl: (1) CNO memo 5520 Ser 09N2/1U532430 of 13 Jul 01
(2) Section 1052 of FY05 Ronald Reagan National Defense Authorization Act (DRAFT; NOT AVAILABLE FOR RELEASE)

1. Enclosure (1) provided guidance concerning restrictions on granting or renewing security clearance eligibility, as mandated by Section 1071 of the FY 2001 Floyd D. Spence National Defense Authorization Act. Enclosure (2) amends the FY 2001 Act. Pending enclosure (2) implementation guidance from the Office of the Secretary of Defense (OSD), paragraph 1.a of enclosure (1) is modified as follows:

> "a. has been convicted in any court of the United States (Federal or State court including courts martial) of a crime for which they were sentenced *and INCARCERATED* for a term exceeding one year;"

2. All other requirements and procedures provided by enclosure (1) will remain in effect until enclosure (2) implementation guidance is provided by OSD.

3. The CNO (N09N2) point of contact for this matter is Ms. Francine Stephens who may be reached at (202) 433-8858, DSN 288-8858 or email fstephen@ncis.navy.mil.

B.A. Marshall

B.A. MARSHALL
Assistant for Information
and Personnel Security

Copy to:
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JUL 13 2001

From: Chief of Naval Operations

Subj: RESTRICTIONS ON THE GRANTING OR RENEWAL OF SECURITY CLEARANCES

Ref: (a) Deputy Secretary of Defense memo of 7 Jun 01 (NOTAL)
(b) SECNAVINST 5510.30A

Encl: (1) Smith Amendment (Report and Bill Language)
(2) 10 U.S.C. 986 Adjudication Guidelines
(3) Meritorious Waiver Procedures and Criteria

1. Reference (a) provided guidelines for implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to preclude the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four circumstances, specified in enclosure (1). Commonly referred to as the "Smith Amendment," this mandate applies to any DoD civilian or contractor employee or officer, or any member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status (including active reserve), who is considered for initial security clearance or renewal of security clearance and who falls under one or more of the following four provisions:

a. has been convicted in any court of the United States (Federal or State court including courts martial) of a crime and sentenced to imprisonment for a term exceeding one year (regardless of the amount of time actually served);

b. is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));

c. is mentally incompetent, as determined by a mental health professional approved by the DoD;

d. has been discharged or dismissed from the Armed Forces under dishonorable conditions.

2. The Department of the Navy Central Adjudication Facility (DON CAF) will determine whether the provisions of this amendment apply to Navy or Marine Corps military or civilian members after full investigation and adjudication using the revised guidelines of enclosure (2) and reference (b). The DON CAF will only apply these guidelines when adjudicating an investigation requested to support a new security clearance determination or a periodic reinvestigation (PR). Individuals with *existing clearances will be subject to the provisions of the amendment* when undergoing PR

or other new clearance investigation, regardless of whether the issues were previously considered and favorably resolved. The provisions will NOT be applied to clearance transfers, reinstatements or clearances reciprocally accepted from within or from outside the DoD.

3. The Secretary of the Navy may authorize a meritorious waiver of the prohibitions listed in paragraph 1.a or 1.d. The determination to nominate an individual for meritorious waiver will be made by the individual's command using the procedures provided in enclosure (3).

4. In order to expedite compliance with these guidelines, please distribute this memorandum to your subordinate commands or refer them to our web site at www.navysecurity.navy.mil. This policy will be incorporated into the next revision of reference (b).

5. The point of contact for this matter is Mrs. Paula Gage, who can be reached at (202) 433-8853 or DSN 288-8853, email: pgage@ncis.navy.mil.

MC Crawley
for M. F. BROWN
Assistant for Information
and Personnel Security

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Smith Amendment (Report & Bill Language)

Limitation on granting of security clearances (sec. 1071)

The Senate amendment contained a provision (sec. 1074) that would prohibit any officer, employee, or contractor of the Department of Defense, or any member of the armed forces, from receiving a security clearance if that person: (1) has been convicted in any court within the United States and sentenced to imprisonment for a term exceeding 1 year; (2) is an unlawful user of, or addicted to any controlled substance; (3) is currently mentally incompetent; or (4) has been discharged from the armed forces under dishonorable conditions.

The House bill contained no similar provision.

The House recedes with an amendment that would authorize the Secretary of Defense or the secretaries of the military departments to waive this provision in meritorious cases for persons who would otherwise be prohibited from receiving a security clearance. (p. 853)

SEC. 1071. LIMITATION ON GRANTING OF SECURITY CLEARANCES.

(a) IN GENERAL.— Chapter 49 of title 10, United States Code, is amended by adding at the end the following new section:

"§ 986. Security clearances: limitations

"(a) PROHIBITION.— After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

"(b) COVERED PERSONS.— This section applies to the following persons:

"(1) An officer or employee of the Department of Defense.

"(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

"(3) An officer or employee of a contractor of the Department of Defense.

"(c) PERSONS DISQUALIFIED FROM BEING GRANTED SECURITY CLEARANCES.— A person is described in this subsection if any of the following applies to that person:

"(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.

"(2) The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

"(3) The person is mentally incompetent, as determined by a mental health professional approved by the Department of Defense.

"(4) The person has been discharged or dismissed from the Armed Forces under dishonorable conditions.

"(d) WAIVER AUTHORITY.— In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

"(e) ANNUAL REPORT.— Not later than February 1 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report identifying each waiver issued under subsection (d) during the preceding year with an explanation for each case of the disqualifying factor in subsection (c) that applied, and the reason for the waiver of the disqualification.".

(b) CLERICAL AMENDMENT.— The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"986. Security clearances: limitations.".

Drug Involvement

The Concern:

a. Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

b. Drugs are defined as mood and behavior-altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) Inhalants and other similar substances.

c. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Conditions that could raise a security concern and may be disqualifying include:

a. Any drug abuse (see above definition);[1]

b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

c. Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;[1]

d. Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

e. Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.

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[1] Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.

Conditions that could mitigate security concerns include:

a. The drug involvement was not recent;

b. The drug involvement was an isolated or aberrational event;

c. A demonstrated intent not to abuse any drugs in the future;

d. Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

Emotional, Mental, and Personality Disorders

The Concern: Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual's mental health care provider.

Conditions that could raise a security concern and may be disqualifying include:

a. An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability;[1]

b. Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication;

c. A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;

d. Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

Conditions that could mitigate security concerns include:

a. There is no indication of a current problem;

b. Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission, and has a low probability of recurrence or exacerbation;

c. The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.

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[1] Under the provisions of 10 U.S.C. 986, any person who is mentally incompetent, as determined by a credentialed mental health professional approved by the Department of Defense, may not be granted or have renewed their access to classified information

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

b. A single serious crime or multiple lesser offenses;

c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year;[1]

d. Discharge or dismissal from the Armed Forces under dishonorable conditions;[2]

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent;

b. The crime was an isolated incident;

c. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

e. Acquittal;

f. There is clear evidence of successful rehabilitation.

g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

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[1] Under the provisions of 10 U.S.C. 986 (P.L.106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.

2 Under the above mentioned statute, a person who has received a dishonorable discharge or has been dismissed from the armed forces may not be granted or have renewed access to classified information. The same waiver provision also applies.

Meritorious Waiver Procedures

1. The "Smith Amendment" provisions do not impact the national adjudicative guidelines developed under Executive Order 12968 and implemented in reference (b) regarding drug involvement or emotional, mental or personality disorders. The following meritorious *waiver procedures apply only* to persons convicted of a crime and sentenced to imprisonment for a term exceeding one year and those discharged or dismissed from the Armed Forces under dishonorable conditions.

2. A meritorious waiver may only be considered when identified by the Department of the Navy Central Adjudication Facility (DON CAF) as "eligible for waiver consideration" and recommended by the individual's command.

a. A full security investigation will be conducted to develop a complete record and a Letter of Intent (LOI) will be issued under reference (b) guidelines to every individual whose investigation identifies criminal conduct issues (specified in paragraph 1).

b. After full consideration and adjudication of the LOI response, any case involving these criminal conduct issues *that may have been adjudicated favorably* under reference (b) guidelines prior to implementation of the Smith Amendment, will be identified by the DON CAF as eligible for meritorious waiver consideration. All issues must be fully mitigated with the exception of the paragraph 1 criminal conduct issues to be identified as eligible.

(1) The DON CAF Letter of Notification (LON) will notify the individual of the required unfavorable decision based on prohibitions implemented in Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. Only cases identified by the DON CAF as "eligible for waiver" will include this advisory language.

(2) The DON CAF LON will outline the mitigating factors from reference (b) that caused the case to be identified as eligible for meritorious waiver consideration. The LON will include a copy of enclosure (1).

(3) The LON will be forwarded to the individual via their command, with a copy to the Chief of Naval Operations (N09N2) and the Commander, Naval Personnel Command (PERS-831) or Headquarters, U.S. Marine Corps (ARS) for military members and the Commander, Office of Naval Intelligence or the Commander, Naval Security Group Command, as appropriate, for cases involving Sensitive Compartmented Information access determinations.

c. The response to the DON CAF LON will use the appeals procedures of reference (b) paragraph 7-8, except that the *command endorsement* to the appeal *is required* and will include a meritorious waiver justification and recommendation.

(1) Meritorious waiver recommendations and the individual's appeal will be forwarded via the chain of command to the DON Personnel Security Appeals Board (PSAB) for recommendation to the Secretary of the Navy.

(2) If an individual requests a personal appearance before an administrative judge from the Defense Office of Hearings and Appeals, the command's meritorious waiver recommendation will be forwarded separately via the chain of command to the PSAB.

(3) The command meritorious waiver recommendation may expound on the DON CAF outline of mitigating conditions, but should also focus on the individual's character and actions in furtherance of the Department of the Navy mission.

d. The PSAB will review the DON CAF outline of mitigating factors and the command's meritorious waiver nomination to assure the procedures and criteria of reference (b) were properly applied and will forward the meritorious waiver request for the Secretary of the Navy's consideration. The PSAB will not forward requests that surface procedural or criteria concerns until the issues are adequately resolved through coordination with the DON CAF and the individual's command, as appropriate.

e. Security clearances granted by the DON CAF based on meritorious waivers approved by the Secretary of the Navy are recorded and forwarded to the individual's command accordingly. Reciprocal acceptance of a clearance granted based on a waiver by other DoD entities is not required.

3. All other cases with criminal conduct issues which would have resulted in an unfavorable determination using reference (b) guidelines will continue to be adjudicated using the reference (b) procedures, citing all factors which were successfully mitigated by the individual's response to the LOI and those unfavorable factors remaining that dictate the denial or revocation. The enclosure (1) criteria and the meritorious waiver procedures are not applied to these cases.

4. If a PSAB review of any case surfaces new information that qualifies an individual for meritorious waiver consideration, the PSAB will notify the individual and the command of the meritorious waiver eligibility and provide nomination guidance.