

Dissenting Views on H.R. 3129

We reluctantly express our opposition to H.R. 3129.

In the aftermath of September 11th, we had hoped that Democrats and Republicans could work together to produce a Customs authorization bill that provides Customs with the tools necessary to protect our borders, and that shows support for the men and women performing that function. Regrettably, Republicans on the Committee did not share this view. With respect to providing Customs with the appropriate tools, this bill is based on the Customs' budget request and House Appropriations bill, both of which pre-date September 11th. Moreover, the Majority includes in this bill the same authorization priorities included in the bill they drafted three years ago. Authorizations for equipment were not updated to reflect needs that have clearly presented themselves in recent weeks. In fact, rather than bolstering Customs' efforts to combat terrorism, one element of the bill will undermine it by penalizing one-third of the Customs inspector workforce.

Section 123 of this bill amends existing law governing the payment of night shift differential pay for Customs inspectors. According to Customs officials' testimony before the Committee, over 2,000 hardworking men and women will lose money under the Majority's proposal. The Majority does not offer any legitimate justification for making the proposed changes. They do not contend that Customs inspectors are overpaid. They do not contend that there is abuse in the existing system. The Majority, in fact, offers no explanation for the change other than they disagree with what hours qualify for premium pay. In a vacuum, that rationale might be sufficient. But in the real world, where a change such as the one the Majority is proposing will result in real people losing real money, that rationale is insufficient, particularly when the people affected are the very ones that serve as our front line of defense against terrorism.

The existing provision governing night shift differential pay takes a balanced approach toward compensating Customs officers for working odd hour shifts. The current law governing night shift differential pay was passed by Congress in 1993, as part of a comprehensive package of Customs compensation reforms, the Customs Officers' Pay Reform Amendments ("COPRA"), (P.L. 103-66, 107 Stat. 670). The purpose of the reforms was to rationalize the method of paying Customs officers for overtime, while also ensuring that Customs officers received pay commensurate with the important work they perform. To achieve this balance, Congress, on a bipartisan basis, altered Customs officers' entire compensation structure, including the amendment to the hours eligible for and the wage rate applied to night shift differential pay. By considering and amending compensation on an aggregate basis, Congress ensured that the correction of certain payment abuses did not result in Customs officers receiving an unwarranted cut in pay.

On night shift differential pay, the 1993 reforms provided that

- if a majority of hours worked by a Customs officer in a shift fell between 3 p.m. and midnight, all hours in the shift were paid at the hourly rate + 15%

- if a majority of hours worked by a Customs officer in a shift fell between 11 p.m. and 8 a.m., all hours in the shift were paid at the hourly rate + 20%
- however, if a majority of the hours worked by a Customs officer in a shift did not fall within the 3 p.m. to 8 a.m. period, the employee was paid at the hourly rate only

The purpose of this premium is to compensate Customs officers for working shifts that begin or end outside a normal work day (i.e., 3 p.m. to 11 p.m., midnight to 8 a.m.). As stated in the 1993 Committee report, the Committee found that these odd hour shifts, which were assigned by management (and not the employee), had “an adverse impact on the quality of life of Customs officials who are required to work regularly scheduled shifts at night or on Sundays and holidays.” H. Rep. No. 103-11, at 573, 574 (May 25, 1993). Recognizing this problem, the Committee amended the hours eligible for and the wage rate applied to the night shift differential specifically to provide for “shift differential compensation at levels substantially greater than applied generally to other Federal employees for such regularly scheduled work.” H. Rep. No. 103-11, at 573, 574 (May 25, 1993).

Section 123 of the bill alters the balanced approach crafted in 1993 in two ways. First, the provision restricts the hours that qualify for the night shift differential to hours between 5 p.m. and 6 a.m. Second, the provision compensates Customs officers at the differential rate only for those hours that occur between 5 p.m. and 6 a.m. (with two limited exceptions), and not the entire shift. These changes will mean that a Grade 9 Customs officer who works a shift starting at 3 a.m. and ending at 11 a.m. will receive the shift differential for only 3 hours of that shift, resulting in a loss to that Customs officer of \$75 per week.

The shifts most adversely affected under the Majority’s proposal include four heavily worked shifts at major airports. At New York’s JFK airport, for example, there are 200 inspectors who work the 1 p.m. - 9 p.m. shift. Sixty-six of those inspectors are grade 9 (earning a base pay of \$37,000- \$49,000), and would lose \$2,220 per year under the Majority’s proposal.

To offset some of the loss in pay likely to occur, section 121 of the bill adjusts the overtime cap that, under current law, restricts the amount of overtime pay a Customs officer may earn in one year. In effect, this adjustment would allow Customs officers to work more overtime to compensate for lost wages, or put another way, Customs officers will have to work more to get the same pay. Such a result is unfair. It is not even clear that it will be possible for the officers whose pay is reduced to work the additional hours to make up for the loss in pay. Moreover, only a small percentage of officers currently reach the overtime cap, and therefore would even benefit from the new provision.

We are not opposed to considering amendments to Customs officers pay, if a credible study evaluates and recommends that legislative changes be made. We have indicated that we would support a study, as the Majority has decided to do on two other Customs employee issues. However, we are opposed to cutting someone’s wages because a few Members of this Committee

are fixated on nomenclature (“night pay”) rather than the practical realities of the total Customs pay package. The men and women of the U.S. Customs Service perform vital functions with respect to both law enforcement - serving as a primary defense against terrorism - and preserving the integrity of U.S. trade with foreign nations. Their current compensation structure was designed to take account of the unusual stresses of their job - both the on-the-job safety risks and the irregular hours. Those aspects of a Customs officer’s job have only become more acute since September 11. Now is not the time to unilaterally cut these officers’ pay, which is precisely what the Customs Service stated that H.R. 3129 will do to one third of these inspectors.

In addition, we have serious concerns about two other provisions in the bill. Section 141 would provide any officer conducting a personal search at a border immunity from civil damages if the officer performed the search in “good faith.” Section 144 would allow the U.S. Customs Service to open outbound international mail without a warrant.

Personal Search

Section 141 is characterized as a “procedural” device to allow civil cases against individual customs agents to be dismissed in the early stages of litigation concerning their official duties. However, a plain reading of Section 141 evidences an intent to carve out a broader standard of immunity than that existing under current law. The existing doctrine of qualified immunity shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. The Supreme Court has repeatedly held that the objective reasonableness of an officer’s behavior, not a subjective “good faith” standard, is the proper test for liability. This provision could weaken protections against racial profiling and other illegal and unconstitutional searches by the Customs Service. Despite the Administration’s stated intent, section 141 appears to be a substantive, and not a procedural change.

Civil lawsuits against government officials and agencies are an important deterrent to racial profiling and unconstitutional and unlawful searches. Without the possibility of a lawsuit, individuals who have been treated in an unconstitutional manner by a government agency would have no redress, and the government agents would have less incentive to comply with the Constitution. Providing Customs officers with expanded immunity is not likely to have any impact on decreasing terrorism, but it will increase the likelihood that innocent passengers will have their constitutional rights violated.

Outbound Mail

Under current law, the Customs Service is empowered to search, without a warrant, *inbound* mail handled by the United States Postal Service and packages and letters handled by private carriers such as Federal Express and the United Parcel Service. This “border exception” to the Fourth Amendment derives from the traditional authority of the sovereign to protect its borders against inbound contraband and to collect duties on inbound freight.

Section 144 would allow Customs officials to open “sealed” mail with “reasonable cause,” a lower standard than probable cause, and would eliminate the need for judicial review. Moreover, section 144 would allow Customs officials to open “unsealed” mail, and any mail bearing a Customs declaration for no cause whatsoever. People in the United States have an expectation of privacy in the mail they send to friends, family, or business associates abroad. The Customs Service’s interest in confiscating illegal weapons’ shipments, drugs or other contraband is adequately protected by its ability to secure a search warrant when it has probable cause. Short of an emergency, postal officials can always hold a package while they wait for a court to issue a warrant.

We are not opposed *per se* to the policy underlying these amendments. For example, on the good faith immunity provision we did seek language prior to the mark-up that might clarify what was meant by “good faith.” The change we sought would have made the provision procedural, rather than substantive. Our suggestion was not incorporated into the bill, however. We hope that the courts will incorporate the definition of “good faith” included in the Committee report, as the Administration has assured the Committee. Notwithstanding, we remain concerned, and absent clarification and more information as to why these provisions are necessary, we believe the current language is unnecessary and potentially damaging to constitutional rights.

Dissenting Views
"Customs Border Security Act of 2001"

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