Union Calendar No. 413

95th Congress, 1st Session - - - - - - - - House Report No. 95-794

INVESTIGATION OF MAIL OPENING BY THE CUSTOMS SERVICE

FOURTEENTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

NOVEMBER 2, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

29-006 WASHINGTON : 1977

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., November 2, 1977.

Hon. THOMAS P. O'NEILL, JR.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's fourteenth report to the 95th Congress. The committee's report is based on a study made by its Government Information and Individual Rights Subcommittee.

JACK BROOKS, *Chairman.*

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NOVEMBER 2, 1977.—Committed to the Committee of the Whole House in the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

FOURTEENTH REPORT

BASED ON A STUDY BY THE GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE

On November 2, 1977, the Committee on Government Operations approved and adopted a report entitled "Investigation of Mail Opening by the Customs Service." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

Since 1971, the Customs Service,[1] with cooperation of the Postal Service,[2] has opened without search warrant certain letter-class mail which was sealed against postal inspection and was entering the Customs Territory of the United States.[3] Under this arrangement, customs officers opened such letter mail upon reasonable cause to suspect that each such mail item contained dutiable goods or contraband. Customs regulations expressly forbid reading any correspondence found inside such mail without a search warrant.[4]

The Supreme Court, on June 6, 1977, in *United States* v. *Ramsey*,[5] held in an appeal from a criminal conviction that the evidence obtained from such a mail opening was admissible evidence because it was lawful and not unconstitutional for Customs to have conducted that mail opening.

Shortly before the *Ramsey* decision, the Subcommittee on Government Information and Individual Rights received several complaints

[1] Hereinafter frequently referred to as Customs.
[2] Hereinafter frequently referred to as Postal.
[3] Customs Territory of the United States includes only the 50 States, District of Columbia, and Puerto Rico. 19 U.S.C. § 1202(2) (1970).
[4] *See* 19 CFR § 145.3 (1976).
[5] 431 U.S. ——, 97 S. Ct. 1972 (1977).

by citizens whose mail had been opened by Customs without, in their view, any reasonable cause to believe anything except correspondence was enclosed.

Since the Supreme Court's *Ramsey* decision in effect permitted these openings to continue, the subcommittee decided to examine: (1) the policies and rules governing these mail openings; (2) whether the policies and rules are followed in practice; and (3) whether the policies and rules should be changed. The subcommittee's jurisdiction in this area came from its responsibility for oversight of the Postal Service, and also from its concern for matters affecting individual rights, including the right to privacy.

Recent disclosures of mail openings by the Central Intelligence Agency and Federal Bureau of Investigation [6] have created a climate of more urgent concern about the potential intrusions of any mail-opening program, whether carried out illegally and surreptitiously, as by the CIA and FBI, or under claim of legal authority and with published regulations, as by Customs.

Sanctity of mail, while not absolute, is deeply rooted in the first and fourth amendments, criminal statutes [7] and Supreme Court interpretations.[8] A century ago the Court unanimously said a search warrant is required to open letters and letter packages which are sealed against postal inspection and declared:

> No law of Congress can place in the hands of officials connected with the Postal Service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.[9]

The openings in question are performed by Customs, not the Postal Service, and have been justified on the basis of the Nation's right to defend itself against incoming materials, including narcotics and pornography. But whether this justification is sufficient to override the normal search warrant requirement is in the final analysis properly a policy decision for the Congress.

Four days of hearings were conducted during this investigation:

July 28, 1977: Postal Service. Chief Inspector C. Neil Benson, Assistant General Counsel Charles R. Braun, and Director of Office of Transportation Services Robert H. Wieman.

September 12, 1977: Treasury Department and Customs Service. Treasury Department General Counsel Robert H. Mundheim, and Commissioner of Customs Robert E. Chasen.

September 15, 1977: Nonagency witnesses. Congressman Charles W. Whalen, Jr.; A.C.L.U. Attorney Helene M. Freeman; Georgetown Law Professor Peter Tague; and Institute for Public Interest Representation attorney Ann Franke.

September 19, 1977: Department of Defense. Deputy Assistant Secretary of Defense David O. Cooke, and Director of Defense Investigative Programs Rowland A. Morrow.

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[6] *See Generally* Hearings and reports of the Senate Select Committee to Study Government Operations With Respect to Intelligence Activities (Church Committee) (1975–76).

[7] *See* 18 U.S.C. 1701–03, note 14 *infra*.

[8] *See* U.S. Postal Service proposed mail security regulations, supplementary information, 42 Fed. Reg. 18754 (Apr. 8, 1977).

[9] *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (dictum), cited with approval in *United States v. Van Leeuwen*, 397 U.S. 249 (1970).

II. Findings

1. The legal basis for customs mail opening is not explicit. The result is disagreement between Postal and Customs on the source and scope of Customs' authority to open. Although the *Ramsey* case construed one customs statute and the implementing Postal and Customs regulations as giving authority to open, the facts of that case make the holding possibly subject to a narrow reading.

2. The legal effect of the prohibition on reading of correspondence found in mail opened legally by Customs but without warrant is not uniformly interpreted. One U.S. attorney's office advised earlier this year that such correspondence could be read without warrant. This office later took the opposite position after the Department of Justice intervened. Postal Service believes such readings violate a federal criminal statute. Customs Service believes they are merely improper under customs regulations, which Customs could change if it wished.

3. Customs agents for at least 2 years routinely, without search warrant, turned over to military investigators the correspondence found with contraband seized in warrantless mail openings. In unrelated and isolated instances, other such correspondence was read by customs employees without warrant.

4. Mail was improperly opened in some instances. Domestic mail at a south Texas post office was improperly opened by a customs employee. Diplomatic mail, exempt from customs examination, was opened in one instance. Some business or personal-size envelopes containing only a sheet or two of stationery have been opened by Customs, raising the question of what reasonable cause had been found to open them.

5. Recordkeeping in connection with the mail openings is totally inadequate. No data except gross estimates is available on how many items are opened. No data is kept on such significant matters as what kinds of items are opened, how often various specific factors create reasonable cause to open, how effective such factors are in predicting that contraband or dutiable goods will be found, or how skilled various mail centers or personnel are in picking items to be opened. Since the Customs Service has advised that it will now gather such information, Congress should not determine at this time whether to impose any warrant requirement on customs mail openings.

6. Whether the mail-opening program is significantly effective in protecting the country from illegal narcotic imports is questionable. But it is currently impossible to determine whether or how much such imports through the mail might increase if warrantless openings were stopped or significantly curtailed.

7. Mail has been subject to delays for as long as 90 days while Customs waited for other federal agencies to decide if they would seek a warrant for correspondence accompanying seized goods. Although Customs has now drastically curtailed at least some of these delays,

their proposed policy statement still establishes no firm limits on how long mail can be delayed for warrant or other purpose.

8. Some customs employees and military personnel are not sufficiently aware of restrictions on opening and reading mail, including the meaning of the postal classification of mail as sealed or unsealed.

9. Customs turns some goods removed from the mail over to other agencies for specialized examination, but these other agencies are not always aware of the restrictions on reading correspondence accompanying those goods.

10. Some persons are not notified that mail addressed to them has been seized without warrant and thus have no opportunity to contest the seizure.

11. Addressees whose mail has been opened without resultant seizure of dutiable goods or contraband are inaccurately or insufficiently informed why the mail was opened.

12. The military referred to Customs for opening items mailed from overseas but not addressed to areas within the Customs Territory of the United States. Customs now asserts it has no authority to open such items, and the Department of Defense says it no longer refers them. Since that testimony, however, postal inspectors have found such items still referred to Customs.

13. Customs' proposed regulation and policy statement would result in some tightening of mail-opening and mail-handling procedures, but such elements as time requirements and examples of what constitutes reasonable cause to open are too vague or general.

III. Recommendations

A. Legislation

(1) Authority to open

It is the recommendation of the committee that the differences of opinion between Customs and Postal concerning the source and scope of the authority for Customs to open sealed letter-class mail should be resolved by legislation. Legislation is appropriate because balancing the right of privacy in mailed correspondence against the need to avoid creating a secure channel for passage of contraband is properly a congressional policy decision rather than an administrative matter.

Any intrusion into the right of privacy in correspondence should be structured as an exception to that right; the right should not be granted merely because other considerations permit. Any such exceptions should be expressly passed upon by the Congress.

Therefore, the committee recommends enactment of legislation to expressly provide that notwithstanding any prior law, it is illegal for any agent, official or employee of any governmental unit to open sealed mail in postal channels except with a proper search warrant issued under federal civilian authority, valid consent of the sender or addressee, or as expressly provided by some other statute making specific reference to this proposed statute. Violation of such law should be criminally punishable by fine or imprisonment.

The committee further recommends that express authority for Customs to open sealed mail should be provided by legislation. Because reliable statistics on present Customs mail-opening are virtually nonexistent, the committee is unable to make a reasoned determination at this time how broad that opening authority should be. In the absence of concrete justification for the warrantless sealed mail openings currently performed by Customs, the committee believes they should not be conducted. The present justifications are only general, and not adequately supported by data. Because the Customs Commissioner testified that he is moving rapidly to implement adequate recordkeeping, however, the committee believes it is prudent to await relevant data before recommending just how much mail-opening authority Customs should have. If the committee's recommendations concerning Customs Service recordkeeping are put into effect speedily, several months of data should be available by late winter for use in completing the committee's recommendations.

Pending receipt of valid data, the committee tends to think that packages and packets which are mailed into the Customs Territory of the United States at sealed letter-class rates should probably be subject to opening upon reasonable cause to believe they contain dutiable goods or contraband. This is the present practice. The committee thinks, however, that letter-type items mailed at the letter-class rates should probably be subject to a warrant before they can be opened. Valid data will help in determining where the line between

warrant and warrantless openings would be drawn. For example, letters weighing less than some specific amount might be subject to a warrant requirement. Alternatively, a stricter standard for warrantless opening might be imposed for letter-type items, for example probable cause rather than reasonable cause.[10] The committee is concerned that any warrant requirement provide for a genuine review, not merely a routine, rubber-stamp process giving no more safeguards than the present system.

The committee believes that if its recommendation of a general mail-opening prohibition is approved, three exceptions should also be enacted to permit present lawful mail openings to continue. Each of these exceptions would refer specifically to the (proposed) prohibition statute. These are:

1. The Postal Service's authority to open sealed letter mail in connection with its dead letter operation, now set forth in 39 U.S.C. 404(a)(1) and 3623(d). Under terms of 3623(d), correspondence examined in such openings is considered to be still constructively sealed against any purpose other than attempting to deliver or return the dead letter.

2. The Postal Service asserts authority to open sealed mail in self-defense in certain exceptional circumstances where there is reasonable cause to fear imminent danger of harm to persons or property, such as in the case of a ticking package that might contain a time bomb.[11] This authority should be expressly provided by statute.

3. Prison officials are generally considered to have a limited implied authority to exercise such mail censorship as is necessary for the security of the prison, at least where the prisoner consents to receive his mail at the prison through prison authorities.[12] This authority should be expressly provided by statute within carefully defined limits.

(2) Authority to read correspondence

It has sometimes been reasoned that when contraband is found in an opened envelope, the enclosed correspondence can be seized and read as an instrumentality of a crime. The Customs Service, Postal Service and Justice Department all now agree that this interpretation is not to be followed, that correspondence only should be read if a warrant is obtained. To eliminate future interpretation conflicts, the committee recommends that legislation be enacted to expressly provide that notwithstanding any prior law it is illegal for any agent, official or employee of any governmental unit to read correspondence contained in any sealed letter in postal channels which has been opened without search warrant or to transmit such correspondence to any other government agency except with a proper search warrant issued under federal civilian authority or as expressly provided by some other statute making specific exception to this (proposed) statute.

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[10] Probable cause exists when facts and circumstances within the knowledge of the person asserting probable cause are sufficient that a man of reasonable caution would believe an offense has been or is being committed. *See, e.g., Brinegar* v. *United States*, 338 U.S. 160 (1949). Reasonable cause is a less stringent standard founded upon some reason to suspect the offense has been or is being committed; the belief need not be that more likely than not, the offense has been or is being committed. *See United States* v. *Ramsey*, 431 U.S. ——, 97 S. Ct. 1972 (1977).

[11] *See* Postal Service proposed mail security regulations, 42 Fed. Reg. 18754 (April 8, 1977), 18755, ¶ (d) mail bombs; 18757, part 115.4, mail reasonably suspected of being dangerous to persons or property.

[12] *See Procunier* v. *Martinez*, 416 U.S. 396 (1974).

If a warrant requirement is imposed for certain customs openings, such legislation should provide that reading of the correspondence in the item opened can only occur:

1. If and only if undeclared dutiable goods or contraband are found in the opened item; and

2. Pursuant to an investigation of the violation of a criminal statute; and

3. By an employee of an agency investigating or prosecuting that possible violation, or pursuant to judicial proceedings.

This would eliminate unnecessary duplication in obtaining warrants but would protect against unjustifiable reading of correspondence.

The exceptions for the Postal Service dead letter operation and for prison mail opening as discussed above should also apply to reading of correspondence.

(3) Customs' coordination with other agencies

The committee believes that such authority to open without warrant as Customs is given should not be delegable to any other agency. Customs, however, should be able to refer items other than correspondence found inside opened mail to employees of another agency for prompt specialist examination where Customs acts on behalf of that agency in intercepting items suspected of violating the other agency's statutes or regulations.[13] For example, if an item appears to contain seeds, Customs would have to perform the opening, but the contents other than correspondence could be referred to the Department of Agriculture for examination, treatment or seizure under appropriate statute or regulation. Specific time limits should be established by Customs for such referrals.

Where contraband is found but returned to postal channels in order to make a controlled delivery, the committee's earlier recommendations have the effect of confirming present practice that the investigative agency working with the Postal Service on the controlled delivery must obtain a warrant if the item is to be reopened prior to delivery in order to prepare it for the delivery.

(4) Postal coordination with other agencies

Present Postal Service regulations permit Department of Agriculture officials to open domestic mail from Hawaii or Puerto Rico for plant quarantine purposes if it is unsealed or if consent has been given. The purpose of these openings is to prevent spread of plant disease. The Department of Agriculture wants authority to open sealed packages as well for this purpose. The Committee believes the need for such authority should be studied and, if merited, should be provided by statute granting an express exception to the mail-opening prohibition recommended above. The Department stated it has no need to read enclosed correspondence.

B. CUSTOMS SERVICE ADMINISTRATIVE ACTIONS

(1) Recordkeeping

The committee recommends that Customs should as soon as possible require that data on suspect sealed mail be recorded as soon as an item is tentatively selected for opening. In the absence of such records,

[13] *See* Laws and Regulations Enforced or Administered by the U.S. Customs Service, reprinted in Hearings.

Customs now is unable to report how much mail is opened, which techniques are accurate indicators that contraband or dutiable goods are contained in a suspect letter, which employees are most skilled at selection, or why, in response to a later inquiry, a particular item was opened.

Use of rubber stamps, automatic numbering devices and check lists should enable the selector to complete the form in a very brief time. Rough estimates indicate that a selector might pick perhaps 10 items in a work shift for opening. The amount of time to complete a data form should be minimal.

The form should record at least the following information:

1. Reason for selecting the item for opening. Customs should be able to develop a list of reasons which cover nearly all situations so that the selector can simply check off the appropriate one, for example: "appeared to contain a powdery substance within an inside envelope."
2. Type of envelope or container, e.g., business-size envelope, personal-size envelope, manila envelope, etc. A check list can be used for this item.
3. Weight of item.
4. Reference or identification number. This unique number would be stamped on the form and on the item. This would enable Customs to locate the proper selection data form when an addressee inquired later why his item had been opened.
5. Number or name of selector.
6. Processing location.
7. Date of selection and opening.

Customs might also wish to record the country of origin and whether the item was sent in the military mail for its own statistical use in selecting target countries.

The name or address of sender or addressee should not be recorded.

The material listed above should be recorded prior to the opening. After the opening, the following should be recorded on the same form:

1. Was anything seized in the opening?
2. If so, describe what was seized. If not, describe what unseized contents, if any, apparently prompted the opening.
3. Did the item, after opening, apparently contain correspondence? [The ban on reading correspondence may prevent determining whether enclosed material is correspondence or not.]
4. Was a warrant sought or obtained for enclosed correspondence?

Alternatively, Customs might compile statistical data by a tally system rather than on individual forms, provided that sufficient information was recorded on the opened item itself so that the sender or addressee, upon inquiry, could learn just why his item was opened.

(2) *Delay and detention of mail*

The committee recommends that Customs in consultation with Postal Service establish firm outside time limits on how long it will hold correspondence while other agencies decide whether they wish to procure a search warrant. Although present stated policies appear to be a major improvement over past policies, Customs' proposed policy statement uses only the indefinite term "promptly". A 3-day limit now used in military mail referrals seems sufficient.

Time limits should also be set for other referrals of mail, such as to the Department of Agriculture for plant examination.

(3) *Supervision of openings*

It is the committee's belief that at least two persons should be present for all openings.

(4) *Instruction of employees*

Improvements are needed in conveying to new employees their responsibilities in handling the mail, such as the prohibition on reading correspondence. Customs should require a written acknowledgment from each employee opening sealed mail that he or she is familiar with these responsibilities and restrictions.

(5) *Cooperation with other agencies*

Customs must assume responsibility for insuring that personnel of other agencies whom it permits to examine contents of intercepted items are aware that no correspondence enclosed with the other contents can be read without a search warrant. The committee believes such instructions can most effectively be given at the time material is being handed over to another agency, rather than depending on another agency which inspects relatively few mail items to properly inform a small number of personnel.

(6) *Notification to addressees of seizures*

The committee recommends that Customs return to the mail stream for forwarding to the addressee all unseized contents and container or envelope, along with the form notification that contraband or undeclared dutiable goods have been seized. This should be done since it may not be possible to determine whether unseized contents of an item are correspondence, or whether even envelope notations such as a return address might be correspondence in the eyes of the sender or addressee.

(7) *Notification to addressees of openings*

The committee believes that Customs should more accurately notify addressees why an item from which no seizure was made was opened. At the minimum, the present rubber-stamp notation should be broadened to also include that the item possibly was opened because it was suspected of containing contraband. It would not be sufficient for the rubber-stamp merely to state that the item was opened by Customs, without further explanation. Where a government agency intrudes into privacy, even with justification, it should forthrightly state the reason for the intrusion.

C. POSTAL SERVICE ADMINISTRATIVE ACTIONS

(1) *Recordkeeping*

The committee recommends that Postal Service cooperate in recording data on selection of items for opening as more fully described above when a Postal employee makes a discretionary judgment based on examination of a sealed item to refer that item to Customs for possible opening.

(2) *Supervision of openings*

The committee believes that Postal should examine the feasibility of having a postal inspector, security employee, supervisor or other employee trained to observe and report unauthorized actions present at Customs' opening of letter-class items. (See discussion above at B(3), p. 9.)

D. DEPARTMENT OF DEFENSE ADMINISTRATIVE ACTIONS

(*1*) *Recordkeeping*

The committee recommends that the Department of Defense should cooperate in recording data on selection of items for opening when its personnel make discretionary judgments to refer items to Customs.

(*2*) *Instruction of personnel*

The committee believes the Department should take continuing steps to insure that all military postal, military customs, military investigative and other concerned personnel are aware of the restrictions on letter opening and on reading of correspondence removed from even those letters lawfully opened.

IV. Background [14]

A. PAST PRACTICES [15]

The Post Office Department and Customs Bureau first established official cooperation for customs examination of incoming foreign mails in 1871. In its early years, this cooperation concerning mail sealed against postal inspection involved notifying Customs of suspicious items which were then opened with the consent of the addressee. This process was unanimously upheld by the Supreme Court in 1882.[16]

The Espionage Act of 1917 created express authority for the opening of sealed letter mail under authority of a search warrant.

In 1924, international postal agreements permitted for the first time the enclosure of certain dutiable goods with sealed letter mail. A so-called green label declaring the nature of the contents and their value was required to be attached to the mailed item. This label embodied the sender's consent to opening of the sealed item.

B. WARRANTLESS OPENINGS

A district court in 1969 held it was unconstitutional to require addressees to appear at the post office to open or consent to the opening of foreign letter mail.[17] The Government did not appeal this decision. In 1969 and 1971, two other district courts upheld the admission at trial of evidence obtained as a result of Customs' searches of mail despite the fact that the searches violated postal regulations.[18]

In 1970, the Treasury and Post Office Departments proposed regulations which would permit Customs to open without warrant certain incoming sealed international letter-class mail.[19] A principal reason for proposing this new authority was to enforce laws against importing drugs and pornography. Regulations permitting the warrantless openings became effective July 22, 1971.[20]

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[14] Testimony and documents referred to herein are printed as text or appendixes in "Customs Services Mail Opening", hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 95th Cong., 1st Sess., July 28, Sept. 12, 15, 19, 1977 (hereinafter cited as "Hearings").

The U.S. Postal Service, Department of the Treasury on behalf of the Customs Service, and Department of Defense each submitted a detailed reply to subcommittee written questions prior to presenting oral testimony. These are referred to respectively as "Postal reply", "Treasury/Customs reply", and "Defense reply", and are printed in Hearings.

[15] For a detailed history from which this brief summary is taken, see "Memorandum re: Administrative Practices of United States Government Regarding Incoming Letter Mail of Foreign Origin", prepared by Charles R. Braun, Assistant General Counsel, U.S. Postal Service, October 18, 1976, printed in Hearings.

[16] *Cotzhausen* v. *Nazro*, 107 U.S. 215 (1882).

[17] *Kalker* v. *Lee*, No. 51488 (N.D. Cal. 1969). Customs told the subcommittee that the pre-1971 technique of obtaining addressee's consent to open is ineffective where the mailed matter contains contraband since the addressee is simply not heard from. Then the matter is returned to the sender, who remails it in the hope it won't be intercepted the second time. *See* Treasury/Customs reply, printed in Hearings.

[18] *United States* v. *Sohnen*, 298 F. Supp. 51 (E.D. N.Y. 1969); *United States* v. *Swede*, 326 F. Supp. 553 (S.D. N.Y. 1971).

[19] Certain U.S. territorial governments such as those of Guam and the Trust Territory maintain their own Customs agencies. These agencies cannot open sealed mail without a warrant, and in the view of the Postal Service, have no color of federal statutory authority to do so. *See* 42 Fed. Reg. 18,758, proposed § 115.-94-95 (April 8, 1977). The Committee is aware of no need to change this procedure.

[20] For regulations as published, *see* 36 Fed. Reg. 11850-51 (June 22, 1971), printed in Hearings. For regulations as current at time of the Government Information and Individual Rights Subcommittee's examination, *see* 19 CFR 145.1-.3 (1976) (Customs) and Postal Service Publication 42, § 820-821.62 incorporated by reference into 39 CFR 10.1, (1976), printed in Hearings. *See also* in Hearings various Postal and Customs internal documents from 1971 to 1975 concerning implementation of the program.

C. CONGRESSIONAL INTEREST IN 1971

Some concern was voiced in Congress about the warrantless opening plan when it was proposed. At the same time, the Post Office Department was being legislatively reorganized into the U.S. Postal Service. An amendment offered on the House floor to the postal reorganization bill would have required a warrant for nonconsensual opening of foreign incoming sealed letter mail. This amendment was defeated. Some who voted against it said its purpose might be laudable, but it should be studied first in committee, not adopted as a floor amendment.[21] The agencies' mail-opening proposal was criticized on the Senate floor by Senator Ervin on constitutional grounds; the Postal Service countered that it was necessary to prevent easy evasion of customs laws.[22] Efforts in the Senate Post Office and Civil Service Committee to bar the proposal failed.[23]

D. SUBCOMMITTEE INTEREST IN 1977

A citizen submitted an unsolicited complaint to the subcommittee in May stating that he had received one-page personal letters in normal-sized envelopes from overseas which were rubber-stamped as opened by Customs. He could see no reasonable basis for these openings. The subcommittee was concerned whether a pattern of unjustified intrusions into privacy of correspondence existed. Attention was immediately directed to *United States* v. *Ramsey*, a pending Supreme Court case. The issue in that case was whether the warrantless openings of incoming international letter-class mail made the heroin seized in the openings constitutionally inadmissible as evidence in a criminal trial. The decision issued June 6, 1977,[24] held that the openings were not unconstitutional inasmuch as the Customs opener had reasonable cause to believe the envelopes contained dutiable goods or contraband.

Since the Court's decision in effect permitted the continuation of the Customs mail openings, the subcommittee began an examination of (1) the mail-opening rules and policies, (2) whether these rules and policies are followed in practice, and (3) whether they should be changed.

E. "RAMSEY" DECISION AND LEGAL BASIS FOR OPENINGS

In its *Ramsey* decision the Supreme Court construed 19 U.S.C. § 482 [25] as implemented by Postal and Customs regulations as authorizing Customs to open incoming letter-class mail. Customs sees this statute and five others as providing its authority to open such mail.[26] The Postal Service, however, does not view any of these statutes as expressly authorizing Customs to open sealed mail in the postal

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[21] *See* 116 Cong. Rec. 20482-83 (1970), printed in Hearings.
[22] *See* 116 Cong. Rec. 13362-64 (1970), printed in Hearings.
[23] *See* "Memorandum", *supra* note 15.
[24] 431 U.S. ——, 97 S. Ct. 1972 (1977), printed in hearings.
[25] "Any of the . . . officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; . . ."
[26] *See* Treasury/Customs reply.

channels.[27] The "envelope" language in 19 U.S.C. § 482, which dates from the enactment of that statute in 1866, is sometimes viewed as referring to other types of containers than those carrying correspondence in the mail.[28] Postal Service notes 18 U.S.C. § 1701–03,[29] statutes which variously prohibit improper opening, delay or turnover of the mails. Postal says, however, that despite such apparently prohibitory language on its turning mail over for opening, its inherent power to cooperate with another agency of government enables it to construe this statute reasonably rather than literally and hence to provide the mail to Customs when such a construction is necessary to prevent the easy evasion of the customs laws through the use of the mails.[30] An ultimate clash between Postal and Customs based on their differing views could produce either a refusal by Postal to turn over mail to Customs for opening or an interception of mail at the border by Customs before it was formally received at a postal exchange office from the dispatching country. Neither agency cared to speculate on the legal outcome of this theoretical possibility. Both stressed their intention to continue cooperation. Postal testified, however, that it had to raise the threat it might stop cooperating when Customs at first was reticent to adhere to a search warrant requirement for sealed letter mail opening in the District of Columbia.[31] The Postal Service insisted on that requirement after the Court of Appeals for the District of Columbia Circuit, later reversed, held the *Ramsey* mail opening was unconstitutional.[32]

The Supreme Court did not address whether it believed Congress conceived that statutory authorization was a necessary precondition to the validity of the Customs mail opening or whether it was viewed instead as a limitation on otherwise existing authority of the Executive.[33] The Court said it had to determine only whether the search which it concluded was authorized by statute was nonetheless unconstitutional. It held that the opening was within the scope of the "border search" exception to the fourth amendment search warrant

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[27] Mail is in postal channels from the time it is deposited in a mail box or similar postal facility until it is removed by the addressee or his agent from the addressee's mail box or comparable point of delivery.

[28] *See* 431 U.S. at ——, 97 S. Ct. at 1985 (Stevens, J., dissenting); "Memorandum", note 2, *supra*. *But see* 431 U.S. at ——, 97 S. Ct. at 1976 n. 8.

[29] § *1701. Obstruction of mails generally*
Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both.
§ *1702. Obstruction of correspondence*
Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.
§ *1703. Delay or destruction of mail or newspapers*
(a) Whoever, being a Postal Service officer or employee, unlawfully secretes, destroys, detains, delays, or opens any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or the Postal Service, shall be fined not more than $500 or imprisoned not more than five years, or both.
(b) Whoever, being a Postal Service officer or employee, improperly detains, delays, or destroys any newspaper, or permits any other person to detain, delay, or destroy the same, or opens, or permits any other person to open, any mail or package of newspapers not directed to the office where he is employed; or
Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined not more than $100 or imprisoned not more than one year, or both.

[30] *See* Postal reply.

[31] *See* Postal Service testimony, printed in Hearings.

[32] *United States* v. *Ramsey*, 538 F. 2d 415 (D.C. Cir. 1976).

[33] 431 U.S. at ——, 97 S. Ct. at 1978.

requirement.[34] Searches made at the border are considered reasonable in pursuance of the sovereign's right to protect itself by stopping and examining persons and property entering the country.[35]

The Supreme Court considered that the openings did not impermissibly chill first amendment exercise of free speech, noting that regulations prohibit reading of correspondence inside opened letters without a search warrant.[36] The Court did not consider what the result would be if that regulation were not in effect.[37]

Customs Service, although saying it intended to continue the reading prohibition, testified to the subcommittee that other law enforcement agencies sometimes expressed surprise at the prohibition on reading without a search warrant. Customs said that if it were not for the regulation, it could read correspondence accompanying letters in which dutiable goods or contraband had been seized. It testified that this correspondence would be available for reading as the instrumentality of a crime. A U.S. attorney's office advised this year that even the regulation would not bar reading the mail, because the regulation referred to sealed mail, but the mail was no longer sealed since it had been opened to search for contraband. After the Postal Service protested this view, the Justice Department intervened and said search warrants would be required for the reading.[38]

As a result of these disagreements and the fact that existing regulations are always subject to change by the issuing agency, issues for the Congress to consider are whether the authorization for and limitations on openings of mail and reading of correspondence should be set forth precisely by statute.

F. PROCESSING OF MAIL FOR OPENINGS

Incoming international mail is divided into three principal categories: Parcel Post, "AO" and Letter Class (or "LC").[39] Parcel Post is not sealed against postal inspection. Customs can inspect parcel post items at will. This is analogous to the Postal Service's right to open and inspect parcel post items moving in domestic mails. The subcommittee did not concern itself with Customs opening of parcel post.

"AO" mail includes printed matter, matter for the blind, and certain other small packets. With the exception of materials in braille or on tape for the blind, and qualified batches of letters from school children, "AO" mail cannot include correspondence. This category is not sealed against inspection and is treated by Customs in the same manner as parcel post.

Letter-class mail includes letters and post cards, and can be used to send packages weighing as much as four pounds, or 60 pounds if mailed from Canada. Sending a package by letter class is analogous to mailing

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[34] This holding is possibly subject to a narrow interpretation since the items opened were eight nearly identical bulky envelopes apparently addressed on the same typewriter. The reasonable cause to suspect something improper was contained in these was presumably stronger than reasonable cause would be in the openings of some strictly flat letters.

[35] 431 U.S. at ——, 97 S. Ct. at 1979-80.

[36] 431 U.S. at ——, 97 S. Ct. at 1982.

[37] *Id.*

[38] *See* Letter of January 12, 1977 from office of Robert B. Fiske, Jr., United States Attorney; Letter of February 8, 1977, from Charles R. Braun, Postal Service Assistant General Counsel; Letter of May 5, 1977, from office of Benjamin R. Civiletti, Assistant Attorney General, all reprinted in Hearings.

[39] A new international Express Mail Service to and from eight other countries is also regarded by the Postal Service as sealed against inspection. *See* 42 Fed. Reg. 18, 756 (April 8, 1977).

a domestic package by first class mail instead of parcel post. All letter-class mail including packages sent at those rates are sealed against postal inspection. The subcommittee concerned itself with the handling of letter class mail.

Several categories of mail which are domestic insofar as postal operations are concerned, are treated as international for Customs purposes. This results because the Postal Service domestic "border" is broader than the Customs Territory of the United States. These categories include mail from Guam, the Canal Zone, the Trust Territory of the United States, and American Samoa, and mail sent from abroad through the Army Post Office (APO) or Fleet Post Office (FPO) systems.

Incoming international mail is first processed through a Postal exchange office, an office specially designated to receive such mail and dispatch the appropriate receipts to the country which sent the mail. Customs mail opening is conducted at 25 locations, 17 of them at a Postal facility. A tabulation for the subcommittee showed Customs had 62 mail inspectors and 409 other employees who also worked regularly on mail opening.[40]

More than 1 billion pieces of mail arrive annually, too much to permit screening of every item. Customs designates particular countries from which it is interested in screening mail. This list changes from time to time and might typically include 30 to 40 countries. Countries listed are suspected of being the source of one type or another of contraband: for example, pornography from Denmark, narcotics from Thailand. Bags of mail from designated countries as well as all incoming APO and FPO mail are set aside for screening. The exact patterns of screening vary from one location to another.[41] At some locations, designated postal employees screen the mail by feel, sight, and smell, selecting suspicious items for referral to Customs. At some locations the initial screening is done by customs employees. Some screening is done by detector dogs working with customs employees. Mail initially selected as suspicious by postal employees is then referred to Customs, where it is rechecked. Most, but not all, mail referred by Postal is opened.

Military postal personnel who handle mail in the APO or FPO system also are instructed to be on the alert for suspicious items. When selected, these items are referred by the military to Customs for opening. Mail in the APO or FPO systems is considered domestic mail from the Postal standpoint; thus, first-class mail is sealed against postal inspection and carries with it the sender's expectation of privacy. For a time, the military referred to Customs suspicious items which were being sent from one address overseas to another. Customs now declines to open such items on the grounds that they are not coming to an address inside the Customs Territory of the United States. The military says it no longer refers such items, although in the view of the Postal Service, Army regulations as of midsummer did not flatly prohibit such referrals. Postal inspectors found such items still being referred to Customs as of October 1977.[42]

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[40] *See* table of facilities and personnel printed in Hearings.

[41] For a description of procedures at several New York City area facilities, *see* "Memorandum: Staff Visit to Customs Service Mail Inspection and Mail-Opening Facilities and Related Postal Service Facilities in New York City Area," printed in Hearings.

[42] *See* letter from Postal Service, reprinted in Hearings, App. 1.

All agencies concerned testified that they do not maintain watch lists on specific senders or addressees and that in any event, it would be impractical to check the volume of mail handled against a watch list at the point in the mail stream where the customs openings are performed.[43] Customs is alert, however, to mass mailings by a particular sender, as when a number of identical items appears in a mailbag. Customs sometimes identifies persons or firms in alert notices which officials said are used to convey information on methods and routes of smuggling.

The statute, 19 U.S.C. § 482, requires that a customs employee have reasonable cause to suspect the presence of dutiable goods or contraband before the item can be opened. Customs has treated such findings as an alert to narcotics by dog sniff, a powdery feel inside an envelope or the sheer bulkiness of an item as reasonable cause to suspect.[44]

When the mail item is opened, the customs agent checks the contents to see if dutiable goods or contraband indeed are inside. He is prohibited by regulation from reading any enclosed correspondence. If no improper contents are found, the item is resealed, rubber-stamped, and returned to the mail channel. The rubber-stamp advises the addressee that the item was "opened by U.S. Customs for tariff purposes only," and includes the name of the opening location and a number identifying the opener.[45] The slogan is, of course, inaccurate since many items are opened on suspicion of containing prohibited articles, not for tariff purposes.

If legal and declared dutiable goods are found, they are either held while notification is made to the addressee that payment is due or forwarded for collection of the duty through the Postal Service.

If contraband is found, it is seized. A seizure report [46] listing the contents is prepared. In the case of drugs, the agency empowered to investigate is the Drug Enforcement Administration. Normally a DEA agent will inspect seizure reports within a few hours and decide whether DEA is interested in investigating for prosecution. If DEA wishes to pursue the matter (and it usually doesn't because of the small quantity of drugs involved) the mail item may be forwarded through the mails to the city of the addressee, where a so-called controlled delivery is arranged. In such a controlled delivery, the suspect item is forwarded to the addressee's post office under security conditions, then is delivered under the observation of DEA. The field investigator must obtain a search warrant if he wishes to open the item in order to prepare it for delivery, such as by removing most of the narcotics enclosed or treating the contents so their physical possession can be traced.

If DEA does not wish to pursue the matter, Customs retains the seized material for destruction and forwards the remaining contents of the envelope, if any, to the addressee with an enclosed brief form stating that contraband has been seized from the envelope by Customs. One exception to this rule concerns mail from an APO or FPO. Here, if DEA refuses the case, military investigators are called. Their first step normally is to determine if the sender's name on the envelope is that of an actual member of the military. If it is, then the military will seek a search warrant for the correspondence in the envelope. Then a

[43] Mail covers, typically targeting a specific addressee at the request of a law enforcement agency, are normally maintained at the postal unit closest to the addressee, not at bulk processing facilities. *See generally* Postal Inspection Service's Monitoring and Control of Mail Surveillance and Mail Cover Programs, Hearings before the Subcommittee on Postal Facilities, Mail and Labor Management of the Committee on Post Office and Civil Service, House of Representatives, Serial 94-39 (1975).

[44] *See* Customs Service proposed policy statement, 42 Fed. Reg. 38393-94 (1977), printed in Hearings.

[45] *See* sample rubber-stamping, printed in Hearings.

[46] *See* sample Form 151, printed in Hearings.

military investigation will ensue, pointing toward potential court-martial or administrative proceedings. Customs testified that it currently gives the military 3 business days to reach its decision on whether to obtain a search warrant. The military testified that it would prefer somewhat more time. Until recently, Customs held correspondence for as long as 90 days while the military reached its warrant decision.

Certain goods may be held for specialist inspection by another agency. For example, the Department of Agriculture examines plants in its program to bar plant and insect pests from entering the country. The Fish and Wildlife Service, Department of Interior, examines some goods in connection with restrictions of the Endangered Species Act. Food and Drug Administration, Department of Health, Education, and Welfare, examines some pharmaceuticals in connection with various drug laws it enforces.

Customs also testified that for a time, some agents of the Drug Enforcement Administration who were delegated customs authority had performed some mail openings under this authority. Customs testified that these openings have ended and that Customs is attempting to totally end the delegation of customs authority to DEA agents.

G. RECORDKEEPING AND COMMUNICATIONS

The Government estimated in its brief in the *Ramsey* case that Customs opened 270,000 pieces of mail a year and found dutiable goods or contraband in 48,000 of these. Customs officials acknowledged in staff interviews and in testimony, however, that the estimate of items opened was only a very rough total, arrived at by asking regional offices for their estimates of how many items had been opened by each.

Until now, Customs has kept no record whatsoever of all items opened. No record is created until undeclared dutiable goods or contraband are found in an item and a seizure report is initiated. At this point, after the opening has been made, the factors which constituted reasonable cause to suspect the item contained dutiable goods or contraband are recorded.

Because no records of openings have been kept, it is impossible for Customs to say with any assuredness which factors are more likely to accurately predict the presence of improper contents. It cannot determine which offices or which personnel are most accurate in selecting items for opening. It cannot effectively inform Postal employees who perform initial screening whether they are doing a successful job or not. An addressee who inquires why his mail was opened usually cannot be told why since no record of the reason for opening is made.

H. IMPROPER AND UNDESIRABLE ACTIONS AND SITUATIONS

(1) Referrals of correspondence to military investigators

For at least 2 years, Customs Service routinely handed over correspondence without a search warrant to military investigators. This correspondence was in envelopes which had yielded contraband, usually drugs, when opened by Customs. The correspondence then was read by the military investigators in the course of their investigation into the source of the contraband. Despite customs regulations

barring such warrantless turnover[47] and various other customs directives stating the same prohibition,[48] customs employees either relied on advice that such correspondence was the instrumentality of a crime and could be read without warrant, or were simply ignorant of the restrictions. The Department of Defense testified that it thought it was permissible to accept the correspondence. The practice was reported halted after the Postal Service learned of it and objected to it in mid-1976 in the course of discussions with the Naval Investigative Service, which had received some of the referrals. Virtually all of these turnovers apparently took place from the New York City customs facilities. It is not clear just how much correspondence was involved, but it appears based on current figures of cases referred that the total would number in the low thousands.

(2) Other warrantless readings

Postal Service and Customs reported to the subcommittee several isolated instances where Customs employees improperly read correspondence from opened mail. These instances were reported:

1. A Customs dog handler was observed reading correspondence during a 1975 Postal Service audit of a Customs facility in New York.[49]

2. The contract operator of the South Padre Island Rural Branch of the Port Isabel, Texas post office allowed a Customs agent and an accompanying Drug Enforcement Agency agent to examine and open without warrant a domestic first-class package suspected of containing narcotics.[50]

3. A Customs agent investigating imports by an individual in Hixson, Tenn., read, in at least three instances, enclosed materials received by the target of the investigation during a one-year period from September 1974 to September 1975. The material was written in Chinese and was translated. Customs testified that some of the material was voluntarily turned over by the addressee and that other material was an invoice, not correspondence.[51]

4. A letter to the Consulate of Chile in San Diego, California, was opened despite a prohibition against such an opening of consular mail.[52]

5. Five other instances involved three Customs employees who said they did not know of the regulation prohibiting reading, one who was scanning correspondence to find value information on enclosed goods, and one who was curious.[53]

(3) Improper or questionable openings

Customs officials, including a mail-opening specialist, testified they could not state why a particular flat, personal-size letter was opened by Customs. An individual complainant sent the letter to the Postal Service asking why it had been opened. It was made available to the subcommittee as an exhibit with the owner's consent. Additional complaints to the Postal Service and the subcommittee indicate that other flat letters have been opened without apparent reasonable

[47] *See* 19 C.F.R. § 145.3 (1976).

[48] *See, e.g.*, Customs Circular MAI-11-AC (July 6, 1971); Customs Circular MAI-11-O: A.E (May 21, 1973); Customs Manual Amendment No. 972 (October 8, 1975), all printed in Hearings.

[49] *See* Postal reply; Postal Audit Report; Treasury/Customs reply.

[50] *See* Postal reply; various Postal Service internal letters and memos, dated August 11, August 14, September 2, September 4, September 17, 1975, printed in Hearings.

[51] *See* Postal reply; Treasury/Customs reply.

[52] *See* letter of complaint, reprinted in Hearings. *See also* 19 C.F.R. 145.2(c) (1976) for prohibiting regulation.

[53] *See* Treasury/Customs reply.

cause to suspect they contained dutiable goods or contraband.[54] Customs testified that some letters may pick up the scent of narcotics from adjacent letters in a bundle of mail, and then be alerted to by detector dogs.

(4) Customs employee awareness of restrictions

Customs testified that its own inquiries showed that some employees were not sufficiently aware of restrictions on mail opening and reading of correspondence. The subcommittee staff's inspection visit to New York City area facilities found that customs employees do not properly distinguish between packages sent by parcel post and those sent by letter-class mail.[55] As a result, correspondence properly inside letter-class packages may not receive the protection to which it is entitled since these packages are opened along with parcel post, where there are no privacy restrictions.

(5) Other agency employees' awareness of restrictions

Since customs employees, who are most directly concerned, are not all aware of the restrictions on opening and reading, it appears even less likely that employees of other agencies to whom Customs refers some goods would be sufficiently aware of these restrictions. The conduct of the military in accepting warrantless referrals of correspondence and reading the correspondence is clear evidence these investigators ignored or were not aware of the prohibition.

(6) Notification of addressees concerning opened mail

Mail which is opened but yields no improper contents is supposed to be resealed and rubber-stamped with the notation that it has been opened by Customs. Customs testified that this stamping is now done in all instances. Postal testified that at other times in the past, Customs did not always stamp the mail, one customs supervisor once explaining that if it weren't stamped, the addressee wouldn't complain about the opening. Even when the mail is properly stamped, however, the legend is not accurate, as discussed above. Customs testified that where there are other contents in an envelope in addition to items seized, these are resealed and forwarded to the addressee. Since mail openers cannot read correspondence, they cannot with certainty determine whether other contents, including some kinds of wrappings, also are correspondence.

The subcommittee staff observed one incident in New York where paper enclosing contraband appeared to have writing on it. But the mail opener said he would not be forwarding that material, arguably correspondence, to the addressee. He did not believe it was correspondence. When nothing else is in an envelope other than seized goods, no notification is made to the addressee although the envelope itself might arguably contain information which the sender or addressee might regard as correspondence, for example a return address. In such a case, the addressee has no opportunity to challenge the seizure or ultimate destruction of the article.

(7) Remedial action taken by agencies

Following the subcommittee's inquiry and in consultation with the subcommittee, Customs Service proposed an amended regulation and accompanying statement of policy concerning mail opening. These

[54] *See* sample letters of complaint and responses, printed in Hearings.
[55] *See* "Memorandum: Staff Visit" *supra*, n. 20.

were published July 28, 1977, for a 60-day comment period.[56] These proposals represented an effort to clarify opening and reading procedures and prohibitions. The policy statement sought to identify factors considered to give reasonable cause for opening of mail. The proposals were a step in the right direction but lacked precision on some points such as definition of some reasonable cause factors and length of time Customs could detain mail while awaiting a warrant decision from another agency.[57] One reasonable cause factor, for example, was listed as "the weight, shape and feel of the mail article or its contents."

Customs received some public and agency comment on its proposals and planned to study that before issuing a final version of the regulation and policy statement, probably late this year.

Customs Commissioner Chasen emphasized in his testimony that he was implementing other procedural changes designed to improve the mail opening operation. He said he is particularly moving to gather statistical data which will enable Customs as well as the subcommittee to evaluate the effectiveness of various mail opening indicia as well as detemine just how much mail is actually being opened.

The Commissioner testified he also is planning to implement a system whereby all openings will be done in the presence of a supervisor. He also said he intends to have posted in customs offices concise placards listing the mail handling restrictions.

The Postal Service is working with Customs in some areas of mail handling to improve compliance with mail handling restrictions. Postal is also reexamining its own responsibilities to assure proper and expeditious mail handling.

Postal Service had published prior to the subcommittee's investigation a proposed mail security regulation.[58] One section of this [59] concerns customs mail handling, and essentially repeats the requirement of reasonable cause for opening and the prohibition against warrantless reading of correspondence.

I. WARRANT REQUIREMENT CONSIDERATIONS

In determining whether to impose a warrant requirement for opening of some or all letter-class mail, Congress must weigh a number of factual and logistical matters in addition to balancing the general principles of right to privacy against the desire to avoid creating a safe channel for contraband.

(1) Effectiveness of the present program

Statistics presented by the government in the *Ramsey* case showed that during 1975 and 1976, 39,326 items were seized by Customs from letter-class mail as contraband.[60] Of these, 29,550, or about 75 percent, were pornography. All but two of the remaining seizures were of drugs. Of the drug items, 85 percent were marijuana or hashish. In two years, 220 seizures of heroin were made.

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[56] *See* 42 Fed. Reg. 38303-04 (July 28, 1977), printed in Hearings.
[57] *See* Subcommittee staff analysis of Customs Service Proposed Mail Opening Regulation and Policy Statement, published in Hearings. *See also* testimony of witnesses Helene Freeman, Peter Tague, and Ann Franke.
[58] *See* 42 Fed. Reg. 13754-58, printed in Hearings.
[59] *Id.*, at 13758, proposed § 115.91.
[60] *See* Brief for the United States in *United States* v. *Ramsey*, Appendix B, printed in Hearings.

The Department of Defense testified that most seizures which resulted in action against military personnel led only to administrative punishment because the offenses were considered minor. Defense and customs officials testified, however, that if there were no openings at all and hence no deterrent, they believe the mails could become a secure channel for drugs. In addition to contraband, about 27,000 seizures of dutiable goods were made during 1976 from letter-class mail. Creating a secure channel for sending dutiable goods without payment of duty would presumably have an adverse revenue effect.

(2) Effectiveness of techniques for detecting suspect items in sealed mail

Customs statistics, when compiled, are expected to furnish better guidance than now available on the effectiveness of factors cited as giving reasonable cause to open. In the *Ramsey* case, the justices, judges, and proponents who favored a warrant requirement stressed the ability of detector dogs and X-ray machines to select mail for opening. Testimony and staff investigation indicate this reliability may be overstated. Detector dogs sniff at bundles containing anywhere from a dozen to several dozen letters. If a dog reacts to a bundle, the individual letters are then hand-screened by the dog handler. The dogs are not allowed to sniff at individual letters because they tend to tear them apart. Additionally, a letter which has been bundled next to a letter containing a narcotic may pick up the narcotic scent. A letter may even carry a scent of drugs simply as a result of the sender storing his stationery near drugs. Dogs also sniff at packages, which of course are not bundled together as are letters. X-ray devices seem to be effective only when used to compare contents of a package against the contents as listed on a declaration. But when there is no declaration to compare the X-ray against, the picture is normally too unspecific to enable the operator to determine what is inside.[61]

(3) Logistics of a warrant requirement

For a warrant to provide meaningful protection of the privacy interest, the process of obtaining it should not become so standardized or frequently used that it would amount to rubber-stamping. If numerous warrants are required, it might be desirable to create an administrative channel to handle them rather than add that load to the U.S. district judges or magistrates. The protection of independent review could be compromised, however, if the official passing on the warrant became too ingrained a part of the customs system.

(4) Division of letter-class mail into warrant and nonwarrant categories

Although all letter-class mail is entitled to the same level of protection under postal requirements, policy balancing could determine that an intrusion into privacy which is acceptable for larger articles of such mail is not acceptable for the smaller. Thus, the fact that valuable items can easily be hidden inside letter-class packages may be sufficient reason not to require a search warrant for their opening. By contrast, however, it is more difficult to hide anything inside a business or personal envelope whose total contents weigh, for example, one-half ounce or less. Since the contents of such envelopes are virtually always only correspondence, the privacy interest and presumption of correspondence may be sufficient to require a warrant for their opening.

[61] *See* "Memorandum: Staff Visit," supra note 41.

Size or type of envelope is another possible dividing point: for example, a warrant might be required to open a lightweight aerogramme envelope, but not other letter-class items. Or, business and personal envelopes less than a certain thickness might be subject to a warrant requirement although the problem of compression might make such measurements more cumbersome than weighing.

(5) *Standard for issuance of a warrant*

Any warrant requirement should specify what is required in order for the warrant to issue. The present nonwarrant standard is "reasonable cause to suspect." The constitutional warrant standard is "probable cause to believe." With a warrant requirement the answer to the question: "probable cause to believe what?", would better be expressly provided by Congress than left to administrative determination or litigation. There are at least three possibilities:

1. Probable cause to believe there is a specific dutiable or prohibited item in the letter, e.g., probable cause to believe it contains heroin or contains counterfeit money. This would be the most difficult standard and likely seldom could be met.

2. Probable cause to believe there is some dutiable good or prohibited item in the letter, without requirement that the specific item be named. A mail screener feeling something crumbly would not have to decide whether it was hashish or marijuana, for example. This would be a moderately difficult standard to meet.

3. Probable cause to believe there is some item besides correspondence in the letter which might be a dutiable good or contraband. This would be a lenient standard.

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