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A.

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

DATE: November 23, 1984

FILE: PER-17-03 CC:CF
PL-83-10-13

TO : John M. Walker, Jr.
Assistant Secretary
(Enforcement and Operations)

FROM : Commissioner of Customs

SUBJECT: Exclusion of the Intelligence Division from the Bargaining Unit

This memorandum proposes the issuance of an Executive Order excluding the Intelligence Division of the United States Customs Service (Customs) from coverage under the Federal Labor Relations Statute, (FLRS), Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 et seq.

Pursuant to 5 U.S.C. 7103 (b)(1) the President may issue an Executive Order excluding an agency or subdivision thereof from coverage under the labor relations statute if the President concludes that the agency or subdivision "has as a primary function intelligence, counterintelligence, investigative or national security work," and the President determines that the labor relations statute cannot be applied to the organization in a manner consistent with national security considerations. An exclusion pursuant to this section, therefore, involves a two-part determination by the President. First, an objective determination must be made that the group in question has as a primary function intelligence, counterintelligence, investigative or national security work. Second, the President must make the subjective finding that the application of the labor relations statute to the unit in question is inconsistent with national security considerations. Each part of the test is examined separately below.

I. Primary Function: Intelligence and National Security Work

Customs is an enforcement and revenue collecting agency. As such, it is concerned with the movement of persons, vehicles,

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merchandise, and currency across the border in violation of existing statutes and regulations.

Law enforcement is the highest priority of Customs. In view of its diverse and complex responsibilities, these law enforcement activities cover a wide range of special programs and projects such as anti-smuggling, EXODUS, commercial fraud, anti-terrorism, Operation FLORIDA, the Presidential Drug Enforcement Task Force Program, and the National Narcotics Border Interdiction System (NNBIS). (See Attachments A, B). In connection with the fulfillment of these responsibilities, the Intelligence Division, both in the regions and at Headquarters, was established primarily to provide intelligence support and to enhance the operational law enforcement efforts of Customs by providing timely and aggressive exchange of enforcement data.

The Intelligence Division, in the Office of Enforcement, is responsible for functional management of the intelligence system within Customs. (See Attachment C). It directly supports both Headquarter officials and field managers. The Division provides strong functional supervision regarding the timely tasking, collection, analysis, and dissemination of intelligence information. The Intelligence Division is Customs' focal point for active, continuing liaison with the "intelligence community" and other national elements for intelligence matters. (See Attachments D, E). The Division aggressively obtains tactical intelligence, from external sources, for dissemination to the appropriate internal operational elements. Continuing contact is maintained with the Central Intelligence Agency (CIA), National Security Agency (NSA), Drug Enforcement Administration (DEA), El Paso Intelligence Center (EPIC), Federal bureau of Investigation (FBI), U. S. Coast Guard, and other intelligence organizations. In addition, Headquarters personnel represent the Department of the Treasury and Customs in a variety of Intelligence Community committees and other governmental working groups. Among these are the Technology Transfer Intelligence Committee, the Export Control Committee, and several sub-groups and task forces sponsored by these committees, such as the Narcotics Working Group and Law Enforcement Security Panel, the Narcotics Intelligence Managers Group, and the Interdepartmental Committee on Internal Security.

The Regional Intelligence Branches provide direction, guidance, and management to the Customs intelligence function at the regional and subordinate levels and are responsible to the Assistant Regional Commissioners (Enforcement). (See Attachment F). These branches provide technical advice on all aspects of the Customs intelligence system and serve as a point of coordination and contact with the Intelligence Division at Headquarters.

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Further, the branches coordinate the aggressive collection, reporting, analysis, and dissemination of intelligence within the region, and are responsible for providing direct and timely analytical support to the wide spectrum of Customs field operational elements. (See Attachment G). Therefore, it is clear from this review of the Customs Intelligence Division, both at Headquarters and in the field, that it meets the objective criteria of 5 U.S.C. §7103(b)(1) for bargaining unit exclusion by having intelligence as its primary function.

The ambiguous term "national security" has been interpreted to include only those sensitive activities of the government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States. This includes the security of the government in domestic and foreign affairs, against or from espionage, sabotage, subversion, foreign aggression, and any other illegal acts which adversely affect the national defense. Cole v. Young, 351 U.S. 536 (1936); 32 CFR 136.5. Analysis of the specific work requirements of the members of the Intelligence Division demonstrates the relationship of the work of the Intelligence Division to the national security.

The intelligence research specialists stationed at Headquarters all possess security clearances ranging from a minimum of secret to compartmentalized, a clearance above that of top secret. (See Attachment H). When staffing for these positions is completed in the field, all employees, including support personnel, will possess a minimum clearance of secret. The possession of a security clearance is essential because Intelligence Division Intelligence Research Specialists are required to work with highly sensitive intelligence information. (See Attachment I). In fact, the position description for intelligence research specialists states as a principal duty and responsibility the collection, development, analysis and correlation of all intelligence. This includes continuous communication with members of the "Intelligence Community."

However, the duties of the Intelligence Research Specialists involve more than the gathering and disbursing of information. The position requires "detailed" analysis to produce a more complete picture of suspected criminal activities and to support current investigations. The position description cites domestic as well as foreign intelligence reports as critical to the assessment of the impact of foreign events upon Customs operations. (See Attachment J). Further, the Intelligence Division is involved in a large number of topical areas of national interest. However, two areas serve to emphasize the effect of the work of these Specialists on

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national security. These are the areas of critical technology and terrorism.

The Division processes intelligence regarding the sale, offer, or movement of suspected United States origin critical technology or strategic equipment to, or on behalf of, countries subject to United States trade restrictions or embargoes. Customs Directive 4310-01 lists the end-use countries of primary interest which include the Soviet Union, Libya, and Iraq among others. (Attachment A). Thus, it is incumbent upon the Division to prevent the illegal export of certain items (e.g., goods, equipment, software). The Directive cautions that if such items are acquired by the listed countries, it would be injurious to our and our allies' national security.

It has long been recognized that one of the most effective measures against transnational terrorism is the rapid communication of information and intelligence between law enforcement agencies. The United States has been fortunate in escaping the terrorism experienced in other countries. However, recent events indicate that terrorist activity in this country is a present danger. The specter of terrorist violence demands an efficient and effective Intelligence Division. Thus, the intelligence analysts play a crucial role in preventing terrorist attacks.

The Division's mission in this area is to track the personal identifying characteristics of terrorist individuals and their methods of operation. Further, the Division must be knowledgeable of the extent to which the terrorist groups are controlled or influenced by subversive sources. There are many documented cases that involve intelligence analysts coordinating intelligence relating to terrorist activities. Sample cases include the Libyan "hit squad," the Japanese Red Army Faction, and Baader-Meinhof, a German terrorist group. More recently, the intelligence analysts were in communication with military intelligence concerning counter-terrorist documents needed in preparation for the 1984 Olympics. (See Attachment K).

The support staff in the Intelligence Division is also eligible for exclusion from the bargaining unit. The necessarily close working relationship between the support and the professional staff mandates absolute confidentiality. The support staff is privy to all secret or confidential communications in the Division. Thus, their work involves them in sensitive national security matters. Moreover, the Presidential exclusion considers the work of an entity as a whole, not individual employees or sub-units. (Attachment K).

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II. Application of FLRS inconsistent with National Security

Under the FLRS the employees' exclusive representative may bring any matter relating to any condition of employment to the collective bargaining table. In fact, §7114(b)(2) makes it incumbent upon both agency and union to be "represented at the negotiations" and "to be prepared to discuss and negotiate on any condition of employment." Further, §7114(b)(4)(B) requires that both parties provide information which is "reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." Thus, the Division's functional responsibilities in the tasking, collection, analysis, and dissemination of intelligence information are all "conditions of employment" and subject to collective bargaining. Full and proper negotiations concerning these conditions would necessarily involve the disclosure of sensitive information and methods of operation. The result of such disclosures has a negative impact on the Division's national security objectives.

Further, the employee's representative may raise any matter relating to a condition of employment as a grievance. 5 U.S.C. §7114(a)(1). Much of the information that the Intelligence Division processes comes from confidential sources. Possible disclosure of this type of information through a grievance procedure has a chilling effect on the relationship between the Division and its intelligence sources. Not only would the Division's mission be undermined but also the duties and responsibilities set forth in Executive Order 12333, and Treasury Department Order No. 240.

Specifically, section 1.1(b) of Executive Order 12333 requires that "all means consistent with applicable United States laws and this Order . . . shall be used to develop intelligence. . ." Thus, the disclosure of specific intelligence procedures during a grievance process would adversely impact national security. Moreover, failure to employ such procedures in an effort to conform to a collective bargaining agreement, would be a violation of the Order and detrimental to our mission.

Section 1.1(d) of Executive Order 12333 states ".... all agencies and departments should seek to ensure full and free exchange of information in order to derive maximum benefit from the United States intelligence effort." Information resulting from this exchange could become an issue in a bargaining unit grievance proceeding. Disclosure of the information would be a violation of the "Third Agency Rule" unless properly coordinated and approved. Approval would be outside the authority of Customs and could result in a stalemate in the grievance procedure.

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Section 1.3(a)(5) of Executive Order 12333 requires the "protection of intelligence sources and methods." Issues arising during the course of a grievance procedure could jeopardize this protection. Under the current labor agreement, overtime is a condition of employment but management is required to give the employee the earliest notification of any overtime requirement. However, if for reasons beyond management's control, such as receipt of time-sensitive information from a sensitive source, an employee is required to work overtime with minimal notice, the employee could refuse or not perform satisfactorily. Any discipline for such action would be grievable, and during the course of the grievance proceedings, the source of the information or the information itself might be viewed as pertinent for adjudication of the matter. Disclosure of either would have an adverse impact on national security considerations. Failure to disclose in order to protect the source or the information would most likely result in an adverse judgment against management.

In fact, the refusal to disclose such information could lead to a charge of an unfair labor practice against the agency. Section 7116(a)(5) of the FLRS makes it an unfair labor practice for an agency to refuse to consult or negotiate in "good faith" and §7116(a)(8) makes it an unfair labor practice "to otherwise fail or refuse to comply with any provision of this chapter." Thus, in the eyes of the union, failure to provide full disclosure during grievance proceedings may evidence a lack of good faith and noncompliance with the duty to process grievances under the collective bargaining agreement as well as to comply with the requirements of the FLRS.

Treasury Order 240 sets forth procedures relating to interaction with the CIA. Customs personnel assigned to intelligence duties are regularly and routinely exposed to and process information received from the CIA. The sensitivity of such information is frequently at the highest levels and subject to strict controls. A bargaining unit grievance could result in disclosure of the manner of processing or other procedures which would have a direct, adverse impact on national security. Section 7106(b) of the FLRS makes the procedures which management observes in exercising any granted authority a subject of collective bargaining. Thus, management's right to "hire, assign, direct, layoff, and retain" would not protect the agency from disclosure of sensitive information under these circumstances.

The foregoing are only a few examples of the many and varied circumstances in which the actions of persons in the Intelligence Division could adversely impact national security if their

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activities were subject to collective bargaining and reviewed under the bargaining unit grievance procedures of the national agreement between Customs and the National Treasury Employees Union (NTEU).

The Division's duties and responsibilities as described in the areas of critical technology and terrorism, and as stated in Executive Order 12333 and Treasury Order No. 240, demonstrate the inconsistency of the application of the FLRS with the security of the government in domestic and foreign affairs. Thus it is mandatory that the Division have maximum flexibility in personnel practices and staffing. In order to effectively and lawfully accomplish their mission, the management of this Division, like that of the Office of Investigations, should not be encumbered by the duties and responsibilities required by the labor relations statute. Therefore, this office urges the approval and submission of the attached Executive Order for the exclusion of the Intelligence Division, in the Office of Enforcement, from the federal labor management relations program.

Attachment

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