

STATEMENT OF THE
NATIONAL BORDER PATROL COUNCIL
OF THE
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING TO EXAMINE THE PROSECUTION OF
IGNACIO RAMOS AND JOSÉ COMPEAN

PRESENTED BY
T.J. BONNER
NATIONAL PRESIDENT

JULY 17, 2007

On behalf of the 11,000 front-line Border Patrol employees that it represents, the National Border Patrol Council expresses its sincere appreciation for this opportunity to highlight some serious concerns about the prosecution of Border Patrol Agents Ignacio “Nacho” Ramos and José Alonso Compean. This case has captured the attention of the public like few others in recent memory. Hundreds of rallies have been held in support of these agents, hundreds of thousands of signatures have been gathered seeking executive clemency for them, and Congressional resolutions and bills have been introduced to address this miscarriage of justice. Law enforcement officers across the country are watching this case very closely, wondering if the same fate could befall them for simply doing their jobs.

There is nothing particularly unusual about the facts of the incident giving rise to this case. Every day, some of our Nation’s law enforcement officers encounter dangerous situations that require them to make split-second decisions that have far-reaching implications. What distinguishes this incident from others are the events that transpired afterward. In a bizarre twist, these agents were targeted for prosecution by the U.S. Attorney’s Office, and the drug smuggler who pointed a gun at them while fleeing toward the border was granted full transactional immunity for transporting 743 pounds of marijuana. Moreover, his involvement in smuggling another 753 pounds of marijuana was overlooked so that he could serve as the Government’s key witness to secure the convictions of two innocent law enforcement officers. As additional facts come to light, more and more questions arise. One thing is now abundantly clear: Border Patrol Agents Ramos and Compean should never have been prosecuted in the first place.

The Government’s rationale for prosecuting these agents is summed up in this statement from U.S. Attorney Johnny Sutton’s April 25, 2007 press release: “In order to maintain the rule of law, federal prosecutors cannot look the other way when law enforcement officers shoot unarmed suspects who are running away, then destroy evidence, engage in a cover-up, and file official reports that are false.” While all of these points are completely true, they have absolutely no relevance to the case of

Agents Ramos and Compean, who shot at a fleeing felon who was pointing a gun at them, and did not destroy any evidence, engage in any cover-up, nor file any false reports. The only way to reach a contrary conclusion is to ignore the physical evidence, the laws of physics, and the testimony of two sworn law enforcement officers, and to place absolute faith in the perjured assertions of a known drug cartel lieutenant.

There is no credible evidence that Osvaldo Aldrete-Davila, the Mexican national who was wounded by Agent Ramos, was unarmed on February 17, 2005 while smuggling more than a million dollars worth of marijuana into the United States. It is well-known that most criminals who are transporting large quantities of drugs carry weapons, not necessarily to assault law enforcement officers, but certainly to protect their illicit cargo from being hijacked by other criminals. Agents Ramos and Compean testified under oath that the drug smuggler turned and pointed a weapon at them as he neared the Rio Grande river. Although several other Border Patrol agents were in the vicinity of the scene where the shooting occurred, none of them could have possibly seen those events, as their view was completely obstructed by a levee access road that is situated eleven feet higher than the ground on which they stood. Thus, the only other eyewitness to the shooting was Osvaldo Aldrete-Davila, who had been involved in trafficking narcotics for the previous twelve years and occupied a position of high trust in the notorious Juarez cartel. The credibility of such an unsavory character is extremely suspect, to say the least.

Since Osvaldo Aldrete-Davila absconded into Mexico, it is impossible to know with absolute certainty whether or not he was armed. Several important clues can be gleaned from the few pieces of physical evidence that were examined, however. The bullet that struck him did not exit his body, and the largest fragment lodged in his right thigh near the skin and was subsequently recovered. Additionally, the wound channel became infected and was still quite visible when he was attended to by a doctor on March 16, 2005, about a month after he was shot.

The March 18, 2005 affidavit of the Department of Homeland Security's Office of Inspector General in support of the criminal complaint against Agents Ramos and Compean stated that "[o]n or about March 16, 2005, Colonel Winston J. Warne, MD, Orthopedics, William Beaumont Army Medical Center removed a 40 caliber Smith & Wesson jacketed hollow point projectile from the upper thigh of the victim. Colonel Warne, MD, advised that the bullet entered the lower left buttocks of the victim and passed through his pelvic triangle and lodged in his right thigh." At the trial, when Colonel Warne was asked if the "bullet was fired directly into the back of the person who was shot, or was it fired at an angle through his body," he responded that Aldrete-Davila's "body was on angle to the bullet," and that "the bullet went in on an angle." He also stated that "if [the person who was shot] were turning, as [the prosecutor] demonstrated, [the shooter] would have to be right behind the person." In other words, at the moment that the bullet struck him, Osvaldo Aldrete-Davila was running straight away from the Border Patrol agents, with his torso twisted back toward them.

In a sworn statement provided on March 19, 2005, long before he was aware of the aforementioned evidence and report, Border Patrol Agent José Compean stated that after wrestling on the ground with Osvaldo Aldrete-Davila in an attempt to arrest him, Aldrete-Davila "got up and started running back south towards Mexico. When he was running south he was pointing something shiny with his left hand. It looked like a gun. This is when I started shooting." At the trial, both Agents Compean and Ramos reiterated the fact that the drug smuggler turned and pointed a weapon with his left hand while he was running away. This is completely consistent with the medical evidence. The lower torso of an individual who is running away and pointing straight back with the left hand would twist about 90 degrees, placing it in perfect alignment for a bullet to enter the lower left buttock, transit through the pelvic triangle and enter the right thigh.

Law enforcement officers do not have to wait until they are shot at before using deadly force to stop an assailant. The Department of Justice has issued broad guidance for all law enforcement

agencies concerning the use of deadly force by their officers: “Law enforcement officers are authorized to use deadly force only when it is reasonable and necessary to protect the officer or others from an imminent danger of death or serious physical injury to the officer or another person.”¹ The U.S. Border Patrol’s Firearms Policy complies with that guidance: “Firearms may be discharged under the following circumstances: (1) When the officer reasonably believes that the person at whom the firearm is to be discharged possesses the means, the intent, and the opportunity of causing death or grievous bodily harm upon the officer or another person; . . .”² The actions of Border Patrol Agents Compean and Ramos on the afternoon of February 17, 2005 were in complete accord with the foregoing principle and policy, and fully justified. It is not a crime by any stretch of the imagination for law enforcement officers to defend themselves against an armed aggressor.

In support of his contention that Osvaldo Aldrete-Davila was unarmed, U.S. Attorney Johnny Sutton points to the fact that all of the Border Patrol agents at the scene of the incident, including Agents Ramos and Compean, testified that they did not see the drug smuggler brandish a weapon as he slid into or climbed out of the drainage ditch. This does not prove that he was unarmed. It does, however, explain why none of the agents shot at him at that time. Osvaldo Aldrete-Davila did not produce a weapon until after he was alone with Agent Compean on the other side of the levee road, out of view of the agents who remained north of the drainage ditch, and when he believed that the odds of prevailing in a gunfight were more in his favor.

It is also important to dispel the ridiculous notion put forth by U.S. Attorney Johnny Sutton that the drug smuggler tried to surrender, and that if Agent Compean had simply placed handcuffs on him at that point, the incident would have ended peacefully. A careful analysis of the facts reveals that

¹ U.S. Department of Justice, Principles for Promoting Police Integrity, January 2001, Section II.2., page 3.

² I&NS Firearms Policy, Section 7(B)(1), [page 17], February 19, 2003. (This policy is still in effect for all Border Patrol personnel.)

nothing could be farther from the truth. Osvaldo Aldrete-Davila could have pulled his van over to the side of the road and given up at any point after the Border Patrol vehicles following him activated their emergency lights, but he chose to ignore them and speed away. He could have obeyed the agents' commands to stop after he exited his vehicle north of the drainage ditch, but he chose to keep running. He could have stopped at the bottom of the drainage ditch, but chose to charge up the other side at full speed toward Agent Compean. None of these actions are consistent with those of someone who is desirous of surrendering. Agent Compean had every reason to believe that Osvaldo Aldrete-Davila was attempting to assault him, and acted appropriately when he tried to push him back down into the drainage ditch.

The alleged destruction of evidence consisted of Agent Compean picking up some of the empty cartridges and tossing them into the drainage ditch a few yards from where they were fired. If he were truly intent on "destroying evidence," he would have taken the shell casings as far away as possible and disposed of them. Rather than a sinister effort to conceal something, it is far more likely that in a state of confusion induced by post-traumatic stress disorder, he reverted to his firearms training that requires agents to pick up their empty cartridges at the shooting range and place them in nearby containers after firing their weapons.

According to U.S. Attorney Johnny Sutton, the failure by Agents Ramos and Compean to report the discharge of their weapons was a "cover-up," as Border Patrol policy requires agents to orally report such actions within one hour of the incident. If the shooting were justified, he reasons, the agents would not have hesitated to make the required report. Again, the truth is far less dramatic. Both agents believed that everyone at the scene knew that shots had been fired. Given the fact that they had just seized a van filled with the cartel's marijuana, it is quite likely that all of the agents were acutely aware of the dangers posed by following protocol and securing the scene of the shooting, which would have left them exposed to being shot at by the drug smuggler and his associates from the south side of the

border. The April 12, 2005 Memorandum of Activity prepared by the Office of Inspector General of the Department of Homeland Security states that its investigation disclosed that all nine of the other Border Patrol agents “were at the location of the shooting incident, assisted in destroying evidence of the shooting, and/or knew/heard about the shooting.” Significantly, none of these other employees were ever charged with any crimes for their actions or omissions on that day, and only three of them were accused of administrative violations, and that was not until late January of this year. The primary charges in those administrative actions revolved around their alleged false statements to investigators and lack of candor during the investigation. Interestingly, the failure to report the discharge of a firearm is an administrative infraction that, by the agency’s own rules, is punishable by a “written reprimand to 5-day suspension.”³ It is also noteworthy that the highest-ranking supervisor at the scene of the incident not only escaped any form of punishment, but has since received two promotions.

Finally, the allegation that Agents Ramos and Compean filed false official reports is based upon the mistaken belief that they should have mentioned the discharge of their weapons in the report concerning the seizure of marijuana. The Border Patrol’s Firearms Policy specifically precludes that, however, requiring that all “supervisory personnel or INS investigating officers are aware that employees involved in a shooting incident shall not be required or allowed to submit a written statement of the circumstances surrounding the incident. All written statements regarding the incident shall be prepared by the local INS investigating officers and shall be based upon an interview of the INS employee.”⁴ The rationale for this prohibition is explained in one of the preceding subsections, requiring that all “supervisory or investigative officers involved in the local INS investigation of the shooting incident are aware that any information provided by any employee under threat of disciplinary action by the Service or through any other means of coercion cannot be used against such employee

³ U.S. Customs and Border Protection Table of Offenses and Penalties, Section G.1. (June 21, 2004).

⁴ I&NS Firearms Policy, Section 12(B)(1)(g), [page 28], February 19, 2003. [Emphasis in original]

in any type of action other than administrative action(s) taken by the Service consistent with *Garrity v. New Jersey*, 385 U.S. 493 (1966).”⁵

It bears emphasizing that in order to prosecute these two Border Patrol agents, the U.S. Attorney’s Office granted a high-ranking member of the notorious Juarez cartel full transactional immunity against prosecution for transporting large quantities of illicit narcotics in exchange for his perjured testimony. This is unprecedented, and sends a terrible message to other law enforcement officers, as well as to law-abiding citizens.

On October 23, 2005, shortly before the trial of Agents Ramos and Compean was scheduled to begin, the Border Patrol and Drug Enforcement Administration seized another 753 pounds of marijuana belonging to Osvaldo Aldrete-Davila in a van parked in the back of a residence near the same area of the border where the February 17, 2005 shooting occurred. The house’s primary occupant identified Osvaldo Aldrete-Davila by name and physical description, and also picked him out of a photo lineup. Moreover, his brother in Mexico identified Osvaldo Aldrete-Davila over the phone as “the person who was shot by Border Patrol agents about six months ago.” All of this information was immediately brought to the attention of the U.S. Attorney’s Office for the Western District of Texas, which nonetheless pressed forward with the prosecution of Agents Ramos and Compean, and vigorously argued that such evidence should not be allowed to be presented to the jury in the trial against them. Amazingly, the Judge agreed to conceal that vital information. She also agreed with the U.S. Attorney’s Office that the level of violence along the border between the United States and Mexico had no bearing on the state of mind of Agents Ramos and Compean on the day of the incident, and the jury was not allowed to hear evidence concerning that issue either. (On an average day, three assaults are launched against Border Patrol agents.) Similarly, testimony raising serious questions about the integrity of René Sanchez, the Border Patrol agent assigned to the Willcox, Arizona Border Patrol Station who initially

⁵ I&NS Firearms Policy, Section 12(B)(1)(e), [page 28], February 19, 2003.

reported the shooting to the Office of Inspector General, was not allowed in open court, and remains sealed. This individual, who has been a close friend of Osvaldo Aldrete-Davila since childhood, remains employed as a Border Patrol agent, and has never been disciplined for “[k]nowingly and inappropriately associating with sources of information, illegal aliens, or persons connected with criminal activities ([o]n or off-duty. Includes any social, sexual, financial (including acceptance of gifts), or business relationship).” Under the Bureau’s guidelines, the penalty for this misconduct is a “14-day suspension to removal [from employment].”⁶ Moreover, no investigation has ever been undertaken to reconcile the glaring inconsistencies between his sworn trial testimony and that of his associate, drug smuggler Osvaldo Aldrete-Davila. Instead, this employee has been highly praised by U.S. Attorney Johnny Sutton for his role in securing the convictions of Border Patrol Agents Ramos and Compean.

Although U.S. Attorney Johnny Sutton has stated that he believes that the penalties levied against Agents Ramos and Compean are too harsh for the crime, this position is the height of hypocrisy. Federal prosecutors have extraordinary discretion concerning which charges to file in any given case. In the prosecution of Border Patrol Agents Ramos and Compean, for example, U.S. Attorney Sutton originally charged them with violations of 18 U.S.C. § 113(a)(1), “assault with intent to commit murder,” which carries a maximum penalty of 20 years imprisonment; 18 U.S.C. § 113(a)(3), “assault with a dangerous weapon, with intent to do bodily harm,” which carries a maximum penalty of 10 years imprisonment; and 18 U.S.C. § 113(a)(6), “assault resulting in serious bodily injury,” which also carries a maximum penalty of 10 years imprisonment. None of these charges have any mandatory minimum sentence associated with them. As the trial approached and Agents Ramos and Compean refused to enter into a plea bargain, U.S. Attorney Sutton added several more charges: one count apiece of violating 18 U.S.C. § 924(c)(1)(A)(iii), “discharge of a firearm in relation to a crime of violence,”

⁶ U.S. Customs and Border Protection Table of Offenses and Penalties, Section I.6. (June 21, 2004).

which carries a mandatory minimum sentence of 10 years imprisonment; one count apiece of violating 18 U.S.C. § 1512(c)(2), “tampering with an official proceeding,” which carries a maximum sentence of 20 years imprisonment; and two additional counts of the same charge against José Alonso Compean, which each carry an additional maximum sentence of 20 years imprisonment.

This stands in sharp contrast to a case filed earlier this year by U.S. Attorney Sutton against an individual in Del Rio, Texas who fired a high-powered (.30-06) rifle at Federal, State, and local law enforcement officers on the evening of January 28, 2007. While being handcuffed, the suspect remarked that he only stopped firing because he ran out of ammunition. This person was only charged with violating 18 U.S.C. § 111, “assaulting, resisting, or impeding certain officers or employees.” That statute provides for an enhanced penalty of no more than 20 years imprisonment if a deadly or dangerous weapon is used in the assault, but carries no mandatory minimum sentence.

It is highly unlikely that Congress intended that 18 U.S.C. § 924(c), which carries a mandatory minimum penalty for using or carrying a firearm during and in relation to any crime of violence, be applied to law enforcement officers who are using the tools of their trade – firearms – within the scope of their official duties. On the other hand, its application to rogue officers who utilize their service weapons in the furtherance of intentional crimes of violence or drug trafficking could very well be appropriate. In the case of Border Patrol Agents Ramos and Compean, however, the levying of this charge was clearly not justified. The facts of that case demonstrate that they had a good faith belief that Osvaldo Aldrete-Davila pointed a weapon at them. In such a circumstance, it was clearly inappropriate to charge them with a violation of that statute.

Those who believe that there should be no intervention until after the appeals process has run its course should fully acquaint themselves with the facts of the case involving Border Patrol Agent David Sipe, who was convicted in March of 2001 of using excessive force while effectuating the arrest of an alien smuggler near Penitas, Texas. In response to pre-trial motions from Agent Sipe’s defense

counsel seeking the production of exculpatory and mitigating evidence, the U.S. Attorney's Office for the Southern District of Texas provided some of the requested evidence, and admitted that the three illegal aliens who were testifying against Agent Sipe were allowed to remain and work in the United States pending the trial, but emphatically stated that "no other promises or advantages" had been given. This was not even remotely close to the truth. In fact, these witnesses were "given Social Security cards, paid witness and travel fees, allowed to travel to and from Mexico to visit family, permitted to travel to North Carolina to work, and allowed to use government phones to contact relatives in Mexico." Moreover, it was discovered that the U.S. Attorney's Office failed to disclose the fact that prior to the trial, the smuggler had been caught by the Border Patrol in the company of other illegal aliens and was released when he displayed a card given to him by prosecutors.⁷ Armed with this newly-obtained evidence, Agent Sipe moved for, and was granted, a new trial. The U.S. Attorney's Office appealed that ruling to the Fifth Circuit Court of Appeals, which upheld the lower court's ruling. At the new trial, Agent Sipe was exonerated. Despite this blatant prosecutorial misconduct, it does not appear that any action was ever taken against anyone responsible for this travesty.

At the time of Agent Sipe's conviction, his employment from the Border Patrol was terminated under the provisions of a newly-enacted law that required such action for any law enforcement officer convicted of a felony. The law also provided, however, that if the conviction was subsequently overturned on appeal, the removal had to be set aside retroactively to the date on which it occurred, with full back pay. Agent Sipe petitioned for reinstatement on those grounds in February of this year, and the Bureau of Customs and Border Protection refused to restore his employment for spurious procedural reasons. He appealed to the Merit Systems Protection Board, and an Administrative Law Judge ordered the Agency to reinstate him with full back pay. The agency is now appealing that decision, and refuses to allow Agent Sipe to return to work.

⁷ U.S. v. David Sipe, No. 03-40657, 5th Circuit Court of Appeals, (11-19-2004), pages 8 and 9.

Everyone who is involved in any aspect of our system of justice has an obligation to ensure that it is administered fairly and equitably. If that does not happen, public trust in the entire institution suffers. The recent case involving Durham County, North Carolina District Attorney Michael Nifong wrongfully prosecuting three Duke University lacrosse players illustrates this point very well, and also demonstrates how the system of checks and balances is supposed to weed out overzealous prosecutors who overstep their boundaries. In the case of U.S. Attorney Johnny Sutton, however, not so much as an inquiry has been initiated, despite the swirling controversy.

This case raises troubling questions about the judgement and motives of the U.S. Attorney for the Western District of Texas. It undermines the public's confidence in our system of justice, causing jurors and observers to wonder whether prosecutors are withholding key evidence and/or have a hidden agenda. Equally damaging, it destroys the trust of those who are charged with enforcing our laws, and could quite possibly cause some of them to hesitate at a crucial moment, jeopardizing their lives and/or the safety of the public. This untenable situation needs to be resolved immediately. Border Patrol Agents Ramos and Compean have now been incarcerated for six months for crimes that they did not commit. Shortly after arriving in prison, Agent Ramos was viciously attacked by five inmates, sustaining multiple contusions and lacerations, as well as two herniated discs. Both agents now languish in solitary confinement to protect them against further attacks.

While ideally the executive branch of government should resolve this matter, it is quite obvious that it is unwilling to do so. Since the intervention of the judicial branch could be perceived as a conflict of interest, it falls upon the legislative branch to take action. A full and impartial investigation needs to be conducted by an independent counsel with subpoena and prosecutorial jurisdiction over this and all related matters. Further inaction will only serve to exacerbate the crisis of confidence that now besets our Nation's system of justice.