

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

BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES

MANDATORY MINIMUM SENTENCING LAWS – THE ISSUES

PRESENTED BY  
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NATIONAL PRESIDENT

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The National Border Patrol Council appreciates this opportunity to share the views and concerns of the 11,000 front-line Border Patrol employees that it represents regarding some of the issues related to the prosecution of Border Patrol Agents Ignacio Ramos and José Alonso Compean.

Few cases in recent memory have evoked such a strong emotional response, and for good reasons. The prosecution of these two Border Patrol agents raises a number of serious questions and concerns about the fundamental fairness of our system of justice, as well as whether or not its checks and balances adequately protect against abuse by overzealous prosecutors. Although our judicial system is unquestionably one of the best that has ever been developed in the history of civilization, it is by no means perfect. Mistakes occur from time to time, but once they are identified, they must be quickly remedied in order to maintain the confidence of the public.

Before examining the effect of mandatory minimum sentencing laws on this case, it is important to determine whether the underlying facts justified the prosecution of these agents in the first place. If they did not, the discussion of mandatory minimum sentencing laws in this context becomes little more than a theoretical exercise.

Although some of the relevant facts in this case are in dispute, one thing is clear. There were only three eyewitnesses to the shooting that occurred on the afternoon of February 17, 2005 in Fabens, Texas: Border Patrol Agents Ignacio Ramos and José Alonso Compean, and Osvaldo Aldrete-Davila, a Mexican national who was transporting 743 pounds of marijuana into the United States. No one else who was near the scene of the shooting could have possibly seen what transpired, as their view was completely blocked by the levee access road, which is eleven feet higher than the ground on which they stood.

As one might expect, the version of events recounted by Agents Ramos and Compean differs dramatically from the story told by the drug smuggler. The Border Patrol agents maintain that they fired in self-defense because Osvaldo Aldrete-Davila was pointing a weapon at them, and he

contends that he was simply trying to flee back to Mexico. Since the drug smuggler absconded across the international boundary, we will never know with absolute certainty whether or not he was armed. It is possible, however, to glean some important clues from the few pieces of physical evidence that were able to be examined. The bullet that struck Osvaldo Aldrete-Davila did not exit his body, and a large fragment lodged in his right thigh near the skin and was subsequently recovered. Moreover, 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, and his torso was twisted back toward them.

This supports the agents' claim that as the drug smuggler was running away, he turned back and pointed a weapon at them. Logically, the only object that someone fleeing from law enforcement officers would turn around and point at them would be a firearm. Long-standing experience has

shown that almost all smugglers carry weapons while transporting large quantities of drugs. With the street value of his load of marijuana exceeding a million dollars, Osvaldo Aldrete-Davila had a very large investment to protect, and in all likelihood was armed that day.

In light of these facts, the only way to conclude that Agents Ramos and Compean should have been prosecuted is if the word of a known drug smuggler is given more credence than the sworn statements of two law enforcement officers, and also if the physical evidence as well as the laws of physics are ignored. In this case, that is precisely what happened. The public statements of the U.S. Attorney's Office for the Western District of Texas make it clear that these Border Patrol agents were prosecuted because the U.S. Attorney believed that they shot an unarmed suspect who was running away, destroyed evidence, engaged in a cover-up, and filed false official reports.

In support of the 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.

It is also important to dispel the ridiculous notion put forth by U.S. Attorney 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 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, where agents are required 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. In fact, the April 12, 2005 Memorandum of Activity prepared by the Office of Inspector General of the Department of Homeland Security corroborates this, stating 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 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." 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." [Emphasis in original] The rationale for this prohibition is explained in one of the preceding sections of the policy, 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 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)."

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 apprehended 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 brought to the attention of the U.S. Attorney's Office for the Western District of Texas, which vigorously argued that it should not be allowed into evidence in the trial against Agents Ramos and Compean. Amazingly, the Judge agreed to conceal that vital information from the jury. 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 the Border Patrol agent assigned to the Willcox, Arizona Border Patrol Station who initially 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, has never been disciplined for associating with a known drug smuggler and failing to report it, and in fact has been praised by the U.S. Attorney for the Western District of Texas.

Although U.S. Attorney Johnny Sutton has stated that he believes that the penalty levied against Agents Ramos and Compean is 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, 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,” 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.

As the foregoing demonstrates, the problem lies not so much with the underlying statutes, but with the misapplication thereof. In the case of 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, it is highly unlikely that Congress intended that it 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.

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 not only undermines the public's confidence in our system of justice, but also destroys the trust of those 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. Today marks the 160<sup>th</sup> day that

Agents Ramos and Compean have been incarcerated 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.