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August 7, 2007

Senator Patrick Leahy
Chairman, Committee On The Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Written Questions From The Committee On The Judiciary

Dear Senator Leahy:

I am in receipt of your letter dated July 25, 2007, transmitting written questions to me from the Committee on the Judiciary. Please accept this letter as my response to those questions.

Written Questions To Botsford:

Question 1: Initially, I view the Mr. Sutton's attacks on the credibility of Agents Ramos and Compean as a diversionary tactic designed to avoid focusing on the real issue, which is the legal standard set forth by the Supreme Court in *Graham v. Connor*. This case governs the reasonableness of an officer's use of force: whether a reasonable officer on the scene would have made the same type of split second decision, without the benefit of 20/20 hindsight. Given the illegal entry by Davila, his high speed flight to avoid being stopped and questioned by the Agents, his failure to stop at the directions of Agent Compean (while holding a shotgun), his altercation with Agent Compean while Agents Ramos, Juarez and Vasquez were also yelling at him to stop, and the pointing of an object at Agents Ramos and Compean completely justified the discharge of weapons. A reasonable officer could have and I submit, would have taken similar action. While Davila claimed not to be pointing something back at the Agents, the trajectory of the bullet that struck him actually corroborated Agents Ramos and Compean, as testified to at trial by the doctor who removed that bullet.

Furthermore, I believe that the trial record reflects that Agents Ramos and

Compean were both far more credible than Davila and that Davila is not a person who is capable of belief under oath. The following supports my belief.

Davila breached his immunity agreement by not answering DHS OIG Agent Chris Sanchez's questions regarding (1) the names of the individuals who had taken him to a clinic in Mexico for medical treatment; (2) the names of the individuals who were friends of Davila that were planning to retaliate by shooting other Border Patrol Agents; and (3) the name of the doctor and clinic where Davila was treated in Mexico. Agent Chris Sanchez testified to each of the above and foregoing facts, which (again according to Agent Chris Sanchez), entitled the Government to declare Davila's immunity agreement null and void.

Furthermore, the immunity agreement also could have been declared null and void by the Government due to the following lies told by Davila:

(a) Agent Chris Sanchez testified that Davila had lied to Border Patrol Agent Rene Sanchez (a life long friend of Davila's) by claiming to Agent Rene Sanchez that he (Davila) had been shot when he was trying to **enter** the United States.

(b) Agent Chris Sanchez testified that in his initial conversation with Davila, Davila admitted that he had been driving a load of marijuana, whereas at trial, Davila falsely claimed that he was not aware of the type of narcotics in the van and did not smell anything unusual in the van laden with close to 750 pounds of marijuana (a very implausible if not totally false statement, as anyone who has ever been around any significant quantity of marijuana would testify to the distinct musty odor of bales of marijuana).

(c) Agent Chris Sanchez testified that Davila attempted to create the impression in their initial conversation that he (Davila) was trying to surrender as soon as he got out of the van at the ditch. This of course was a false impression and contrary to his actions: he intended to flee and did flee from the three Border Patrol vehicles which were pursuing him from Fabens and did not stop in the ditch when Agent Compean repeatedly yelled for him to stop.

(d) Agent Chris Sanchez testified that Davila claimed that when he got back to the Mexican side of the border (after the altercation at the ditch), he flagged down a "passerby" who picked him up. Sanchez further testified this was a lie and that Davila subsequently admitted, on the third or fourth interview with Sanchez, that the

two people in the white vehicle who picked him up were the same two people who had dropped him off at the border immediately before he illegally crossed the border and located the van laden with marijuana (i.e., these people were actually members of the drug organization).

(e) Agent Chris Sanchez testified that it was not until well after Agents Ramos and Compean were arrested (and there was corresponding publicity surrounding the events) that Davila claimed that he did not have a gun or anything shiny in his hand.

(f) Davila claimed to have agreed to drive the van to earn money because his mother was ill and he had lost his commercial drivers license. However, due to the October 2006 "second load" of marijuana, it is now clear that this testimony was not true.

(g) Davila testified that he only had one cell phone: a cell phone that was given to him before he illegally entered the United States. He also testified that he did not plug the cell phone into the cell phone charger that was located in the van, and that he left the cell phone in the van. However, Agent Vasquez testified the cell phone found in the van was connected to a charger which was plugged into the cigarette lighter. Therefore, Davila lied about not taking a cell phone out of the van when he fled, or by falsely claiming he did not plug it into the phone charger in the van.

(h) Davila had 5 million reasons to lie at trial, because his lawyer filed a claim with the Border Patrol seeking \$5 million from the United States Government. That claim, although filed by Davila's civil attorney on March 31, 2005 (a mere 15 days after Davila received his immunity on March 16, 2005), was not disclosed by Mr. Sutton's prosecutors to counsel for Ramos and Compean until February 15, 2006, a mere 2 days before jury selection was originally scheduled to begin. Since I became involved in this case, I have been unable to ascertain the ultimate disposition of Davila's claim. This may or may not be a topic of interest to the Committee.

Additionally, Davila testified that Agent Rene Sanchez told him to seek immunity, hire an attorney, and sue the United States and that Sanchez had actually assisted him (Davila) in locating an attorney. However, Agent Rene Sanchez denied telling Davila to do any of these things or in helping Davila locate counsel. Davila also claimed that he had met with Agent Rene Sanchez after the shooting on February 17, 2005, and prior to the trial, whereas Agent Rene Sanchez

denied meeting with Davila after the shooting on February 17, 2005.

In specific response to Mr. Sutton's statements, Agent Ramos respectfully objects to Mr. Sutton's propensity to call facts "undisputed," especially where those "facts" are not relevant. For example, Mr. Sutton claims that it is "undisputed that [Davila's] hands were empty as he crossed the drainage canal." While none of the witnesses present saw anything in Davila's hands while he was crossing the drainage ditch, the ditch has a steep embankment which would have required most people to have utilized their hands to assist themselves in climbing out of it. Thus, if Davila had a gun (or a cell phone) in either of his hands at the time he exited the van on the northern side of the ditch, it would be logical for him to have put that gun or cell phone into his pants pocket or waist band prior to his descent down the steep, north side of the ditch. Additionally, at the time Davila exited his van, he would have seen Agent Compean on the south side of the ditch, holding a shotgun. It evidences extreme naivete for Mr. Sutton to claim that "the time for him to draw (a weapon) was when he was confronted by Agent Compean." It makes more sense that Davila would have pulled the gun (or cell phone) at a time when he was fleeing in order to ensure that his flight would be successful and/or to notify his confederates with the drug organization that his mission had failed and that he needed assistance.

Also, Agent Ramos did not alter any evidence. Although Agent Compean did pick up some of his spent brass shells, this was undoubtedly a function of his training, as he was taught to pick up his spent brass shells at the firing range. In this regard, it should be noted that Agent Compean had been on the firing range on February 16, 2005, the day before this incident, thus reinforcing that protocol in his memory. Additionally, it is impossible for anyone to say for sure whether "a prompt investigation would have cleared them." Indeed, the significance of Compean's spent brass shells is lost upon me, since none of Agent Compean's shots hit Davila. Nevertheless, Mr. Sutton continues to emphasize the fact that the shell casings were picked up and thrown away, asserting that those casings were somehow key and important "evidence" that was denied to investigators.

The casings would have shown at best that they were fired from a certain type of weapon, and the approximate location where the weapon was fired. Yet neither of these things is in dispute. The agents admitted firing their weapons, although the exact number of shots fired by Compean is not precisely known. There is nothing in the record to indicate that the agents were NOT where they said they were when they fired. So, again, the question is, what is so important about the fact that Agent Compean picked up his spent shells?

Regarding Mr. Sutton's claim that neither agent shouted routine warnings to others that Davila was armed, it should be noted that Agent Oscar Juarez

testified that someone yelled "shots" (a warning), but he did not know who made the outcry. Obviously, Agent Ramos (having heard shots while in the ditch) knew that the two agents on the north edge of the ditch (near the van) would have been able to have heard the shots and were in a better position than he to see what was going on while Ramos was in the ditch. Agent Ramos also heard someone from behind him (on the north side of the ditch, where he knew other agents were located) yell "shots" while he was in the ditch. Why then would Agent Ramos feel the need to yell "shots"?

Moreover, it has been my experience that investigations of an officer who has discharged his or her weapon are often contentious and adversarial. The fact of the shooting was not hidden: Agent Juarez and Agent Vasquez both heard shots and when Agent Ramos arrived back on the north side of the ditch, one of the agents (among the group) was talking about the shots. Apparently no one reported it to a supervisor, including Agents Juarez and Vasquez, who had absolutely no potential exposure to anything since they had not fired their weapons. Why would Agent Ramos' failure to report the shots be viewed any differently from the other agents' failure to report the shots? Agent Compean told two agents that he had fired his weapon. Agent Ramos, upon returning to the north side of the ditch, was very "pumped up" and full of adrenalin. He had been engaged in a high speed chase from Fabens to the ditch, and then down and through the ditch to help Agent Compean, only to have to pull his weapon and fire it at Davila. When he came back to the van on the north side of the ditch, the other agents on the scene had already discovered the large quantity of marijuana and undoubtedly the seizure was the topic of focus. It should not come as a surprise that someone in an excited emotional condition might not have the presence of mind to verbally claim, without any questions or prompting: "I saw a gun, I was in fear of my life, that's why I fired my gun." Among fellow agents, it can safely be assumed that they would have known that neither Agent Ramos nor Agent Compean would needlessly fire their weapons. Again, it should be noted that this was not a situation where Agent Ramos was asked to give a detailed rendition of the events. And since Agent Ramos did not believe that Davila had been hit, there would have been little if any reason to say anything about the incident unless specifically asked. Indeed, I feel confident that if Agents Ramos and/or Compean had loudly proclaimed that "Davila had a gun," "we only fired because we were in fear of our lives," or any type of similar statement, the Government would have viewed those statements as totally inappropriate and hence false, as no agent would have logically claimed that he had been shot at or was in fear of his life without any questions about "what happened" or "why did you fire your weapon."

Among Mr. Sutton's "red herrings" is his continued emphasis on the fact that the agents did not mention until much later the fact that Davila had produced what may have been a weapon. That, too, is easily understood in the law

enforcement community. It would make absolutely no sense to try to hide the fact that a shooting had occurred, and then say "but if one did, the other guy may have had a weapon." It appears that the disclosure of the concern that Davila may have had a weapon was made contemporaneously with Compean's admission that he had discharged his weapon, all of which was on the evening of his arrest. Agent Ramos, when arrested, elected to obtain counsel and did not make a statement.

Accordingly, for all of the foregoing reasons, I believe a rational person would necessarily conclude that Davila was not credible and capable of belief under oath (particularly if aware of the October 2005, "second load").¹ On the other hand, there was abundant evidence that Agents Ramos and Compean were truthful and believable under oath. Only three people were in a position to see what occurred on the far side of the levee road and could address whether Davila had a weapon: Agents Ramos and Compean, and Davila himself. We know Davila lied to Agent Chris Sanchez -- Sanchez so testified -- and it appears uncontroverted that Davila also lied under oath at trial. Agents Ramos and Compean did not lie prior to trial and did not lie under oath during the trial.

Question 2: I am aware of no evidence to support the conclusion that Mr. Sutton has "some troubling motive(s) to go after" Agent Ramos. I am aware that one of Mr. Sutton's trial prosecutors in the case, Ms. Debra Kanof, had a prior dealing with Agent Ramos wherein he had been assaulted by an alien who he had detained. In that case, Ms. Kanof declined to prosecute the alien for the assault. I am also aware that Agent Ramos had previously been involved in domestic disputes (none of which resulted in a state court conviction) and that Mr. Sutton's trial prosecutors in the Ramos/Compean case unsuccessfully attempted to use those domestic disputes against him at trial. However, I cannot state whether Mr. Sutton was aware of those domestic disputes prior to the trial or whether they had any impact upon the decision to actually take the case to trial. Of course, the existence of a prosecutorial motive is immaterial because the point remains that a grave injustice occurred and it should be corrected.

Question 3: It has been my experience that absent unusual circumstances, federal prosecutors typically do not indict for less serious charges and then, without additional evidence, increase the severity of the charges. However, I have seen federal prosecutors obtain "superseding indictments" with additional charges, including more serious charges, particularly after a defendant has rejected a formal and/or informal prosecutorial offer to resolve the case on a negotiated basis.

Question 4: Initially, let me state that I believe the actions of both Agents Ramos

¹ At least some of the jurors have publicly stated that had they known about the "second load," they would not have voted guilty.

and Compean were fully justified under the standard adopted by the Supreme Court in *Graham v. Connor* (governing the reasonableness of an officer's use of force), and that no criminal charges should have been brought against either of them. Indeed, administrative sanctions for the failure to report the discharge of the weapons were clearly available and sufficient.

Nevertheless, given the facts reflected in the question,² it is my opinion that Agent Ramos should not have been prosecuted with the same charges as Agent Compean and that similar sentences should not have been sought. By way of explanation, I tender the following for your consideration.

Agent Compean went to trial on a total of eight counts or charges, as follows: three counts of assault, one count of discharge of a weapon in relation to a crime of violence, three counts of tampering with an official proceeding, and one count of deprivation of rights under color of law. Agent Ramos went to trial on a total of seven counts or charges, the only difference being that he was charged with two counts of tampering with an official proceeding. Agent Compean's tampering counts were based upon two factors: (1) his failure to orally report the discharge of a weapon on February 17, 2005; and (2) his actions in picking up the spent brass shells from his weapon and/or asking Agent Arturo Vasquez to pick up any spent brass shells he might find on the levee road. Agent Ramos' tampering counts were both based on his failure to orally report the discharge of a weapon.

As noted above, while I do not believe that either Agent Ramos or Agent Compean should have been charged with any crime(s), I do believe that the following facts (in addition to those included within the question) should have been considered and justified the non-prosecution of Agent Ramos and/or a less severe sentence: (1) Agent Ramos' entitlement to rely on what he heard while he was in the ditch and then his observations after he exited the ditch and saw Agent Compean on the ground and Davila turning back towards him with a gun in his left hand; (2) Agent Ramos' decision not to use deadly force to attempt to stop the fleeing felon during the high speed chase, despite his clear entitlement to do so; (3) at least two other witnesses, Agent Arturo Vasquez and Agent Oscar Juarez, heard the discharge of weapons and allegedly did not report them; and (4) Agent Oscar Juarez testified that someone yelled "shots" (a warning), thus meaning that it is very likely that other agents and/or supervisor(s) who had arrived at the scene behind Agents Ramos, Juarez, and Vasquez also heard the shots or the warning.

² I want to point out that due to the huge differential in elevation between the location where Compean discharged his weapon and where Agent Juarez was standing on the north side of the ditch, it appears physically impossible for Agent Juarez to have seen Compean from the waist up, firing and then reloading his weapon.

Senator Feinstein's Questions To Botsford:

Question #1: Neither Agent Ramos nor myself have filed a formal request seeking a pardon or commutation of his sentence. I was retained to represent Agent Ramos in connection with his direct appeal to the United States Court of Appeals for the Fifth Circuit and thus, my engagement does not technically include the process of applying for a pardon or commutation. 28 C.F.R. Sections 1.2 and 1.3 outline the eligibility requirements for filing a petition for pardon and/or commutation of sentence. Agent Ramos does not appear to meet those eligibility requirements because judicial relief is still available and the five year period (from the release of the petitioner from confinement) has not yet run. I would note, however, that a petition for commutation of sentence might be considered under 28 C.F.R. Section 1.3 due to "exceptional circumstances," although that term is not defined. However, it is my understanding (although I have not verified it by obtaining the appropriate forms from the Pardon Attorney at the Department of Justice, as required by 28 C.F.R. Section 1.1) that a petition seeking pardon or commutation would require an admission of guilt that Agent Ramos cannot truthfully make. Even if my understanding is incorrect in this regard, I believe that if a new trial is granted by the United States Court of Appeals, Mr. Sutton's prosecutors would attempt to any such petition against Agent Ramos at a retrial.

I would also note that when I was retained, I was already aware from the extensive publicity surrounding this case that many members of Congress had already requested President Bush to pardon and/or commute the sentences of Agents Ramos and Compean. I believed then, and currently believe, that President Bush has the power to pardon and/or commute their sentences even without a formal pardon/clemency petition. In fact, it is my understanding (based upon what I have heard) that President Bush commuted Lewis "Scooter" Libby's penitentiary term even though a formal clemency request had not been filed by Mr. Libby and/or his counsel. Additionally, prior to Mr. Libby's commutation, I did not realistically anticipate that President Bush would seriously entertain a request for pardon or commutation prior to the expiration of the direct appeal process. This appears to be supported by the second paragraph of the July 2, 2007, written "Statement By The President" outlining his reasoning for Mr. Libby's commutation. Given the letter Senator Cornyn and Senator Feinstein jointly authored on July 18, 2007, seeking the immediate exercise of President Bush's Executive clemency powers, and previous and subsequent letters to President Bush by other members of Congress also calling for Executive clemency, I fully believe that if President Bush was inclined to grant Executive clemency, he certainly could do so even absent the submission of a formal petition by Agent Ramos and/or his counsel.

Question #2: Mr. Ramos was placed in a Special Housing Unit (SHU) (i.e.,

solitary confinement in a small, 6 by 12 foot cell with 23 hour "lock down") after he was viciously assaulted by other inmates on Saturday, February 3, 2007. This assault occurred at the Yazoo City Federal Correctional Complex in Mississippi. Although Mr. Ramos was placed in SHU (solitary confinement) for his own protection, he has been deprived of the normal privileges (visitation, phone, showers) typically afforded to an inmate in "general population." Stated otherwise, incarceration in SHU (solitary confinement) is typically considered "punitive" and constitutes a form of punishment for misbehavior. Thus, while Agent Ramos did absolutely nothing to have his privileges suspended, he has been deprived of many of the normal privileges due to the fact that he is the victim of the assault. Recently, Agent Ramos was transferred to the Federal Correctional Complex in Phoenix, Arizona. Although he is still incarcerated in SHU (solitary confinement), we are hopeful that in the not too distant future, his full privileges as an inmate may be reinstated. Incarceration in solitary confinement is extremely unfair; the loss of normal visitation and telephone privileges severely impacts upon his ability to communicate and see his family.

Question #3: The 924(c) charge is entirely circular: no separate underlying crime of violence was allegedly committed by either Agent Ramos or Agent Compean, unrelated to the discharge of the gun(s). Rather, the 924(c) charge was tied to four different counts in the third superseding indictment, to wit: counts 1 through 3, which alleged that Agents Ramos and Compean had "assaulted" Davila (under three different statutes) and counts 11 and 12, which were separate civil rights violations (one each against Ramos and Compean). The 924(c) gun count was used unfairly (in my opinion) to bootstrap one act into several different statutory violations and was included in the superseding indictment (the third charge against the Agents) despite what appears to be the clear Congressional intent to discourage criminals from arming themselves and not to sweep within it situations where the use or discharge of the weapon is itself the "underlying offense." While this issue does not appear to have been raised at the trial court level prior to trial, it has been raised in the appellate briefs to the United States Court of Appeals for the Fifth Circuit.

Senator Feinstein's Question To All Witnesses:

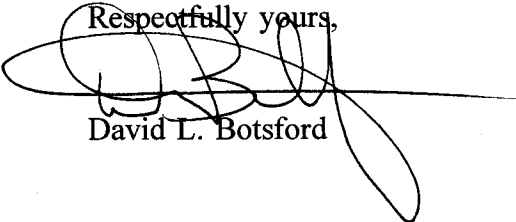
Question #1: The clearest lesson is that this prosecution has sent a message to law enforcement officials: if you use your gun in the line of duty, you too may be prosecuted and incarcerated for no less than 10 years. In order to remove the terrible message sent to law enforcement by virtue of this prosecution, Congress should seriously consider amending Section 924(c) to include a exemption from criminal prosecution for law enforcement officials acting in the line of duty and/or ensure that the use or discharge of a gun itself cannot be both the primary offense and the 924(c) offense. Furthermore, because the Supreme Court has not yet

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addressed the use of force against fleeing suspects at the border, Congress might want to consider whether the heightened interest in protecting our borders justifies the creation of a defense for law enforcement officials acting in the line of duty against prosecution for assault and/or for civil rights violations.

Senator Leahy, I apologize for the length of this letter, but I have attempted to answer each of the questions as thoroughly as possible. I deeply appreciate the opportunity to attempt to be of assistance and if any of my responses raise any additional questions, please do not hesitate to contact me.

Respectfully yours,



David L. Botsford