

1 HEARING TO EXAMINE THE PROSECUTION OF  
2 IGNACIO RAMOS AND JOSE COMPEAN

3 - - -

4 TUESDAY, JULY 17, 2007

5 United States Senate,  
6 Committee on the Judiciary,  
7 Washington, D.C.

8 The Committee met, pursuant to notice, at 10:00 a.m.,  
9 in room SD-226, Dirksen Senate Office Building, Hon. Dianne  
10 Feinstein, presiding.

11 Present: Senators Feinstein, Kyl, Sessions, Cornyn,  
12 and Coburn.

13 OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR  
14 FROM THE STATE OF CALIFORNIA

15 Senator Feinstein. This hearing will come to order. I  
16 want to welcome the witnesses. I want to state the ground  
17 rules.

18 This is an emotional subject. I would request that  
19 everybody keep their composure at all times. This is not a  
20 hearing to judge innocence or guilt. It is a hearing to try  
21 to ascertain fact.

22 With respect to the jurisdiction of the Senate, there  
23 are a few issues involved in this case that are within our  
24 jurisdiction. One of them is a certain law called 18 U.S.C.  
25 924(c). Another is a policy memo of the Department of

1 Justice which will become clear, and, of course, always  
2 limited--excuse me, negotiation for limited immunity with  
3 someone who has trafficked drugs.

4 On October 19th last year, a Federal district judge in  
5 El Paso sentenced Border Patrol Agents Ignacio Ramos to 11  
6 years and 1 day and Jose Alonso Compean to 12 years in  
7 Federal prison. The length of these sentences has raised  
8 concerns about the discretion of prosecutors in the charging  
9 of offenses and the impact of mandatory minimums those  
10 charges carry.

11 Today's hearing is to explore the facts, as I said, and  
12 better understand what transpired. Some of the facts that  
13 we know are not in dispute. A Mexican national named  
14 Osvaldo Aldrete Davila crossed the border illegally into El  
15 Paso, driving a van that contained 743 pounds of marijuana.  
16 That chart shows that 750 pounds of marijuana assembled by  
17 the Border Patrol.

18 When Border Patrol agents started following him,  
19 Aldrete Davila turned back toward Mexico, but crashed his  
20 van and then tried to flee on foot. Aldrete Davila was  
21 stopped. A scuffle took place. He then broke away. He was  
22 then fired upon by Agents Compean and Ramos before he  
23 finally escaped into Mexico.

24 No written report of the shooting, as required, was  
25 made at the time by any of the Border Patrol agents. Later,

1    when an Arizona Border Patrol agent learned of the incident,  
2    he reported it to his supervisor, and an investigation was  
3    opened.

4           A few weeks later, U.S. investigators went to Mexico  
5    and offered Aldrete Davila immunity from prosecution for his  
6    drug smuggling plus medical care in the United States if he  
7    would return to testify against Agents Ramos and Compean.  
8    Agents Ramos and Compean were arrested, and prosecutors  
9    later amended their indictment three times, adding new  
10   criminal charges each time for a total of 12 charges.  
11   Significantly, one of the charges added a firearms offense  
12   under U.S.C. 924(c), which carried a 10-year mandatory  
13   minimum in addition to whatever other penalties the court  
14   would decide to use.

15           The defendants were found not guilty of the most  
16   serious charge--assault with intent to commit murder--but  
17   convicted of all other counts. Agents Ramos and Compean  
18   will remain in prison for more than a decade. Their only  
19   hope is to win appeal or for the President to grant them a  
20   pardon or commute their sentences. Meanwhile, it is  
21   reported that Osvaldo Aldrete Davila has filed a civil  
22   lawsuit in the United States and is seeking \$5 million in  
23   damages based on the shooting.

24           This case has generated strong emotions on both sides.  
25   Critics claim that this is a prosecution that shows how the

1 Government's priorities are out of whack when it immunized a  
2 drug trafficker so that he can testify against the border  
3 agents from whom he admittedly fled. Supporters claim that  
4 rogue agents must be stopped and that cutting a deal with a  
5 wrongdoer who is a key witness is sometimes necessary in  
6 these situations.

7 It is true that the bullet left Aldrete Davila  
8 permanently injured, but it is also true that Aldrete Davila  
9 was not an innocent who was caught in the wrong place at the  
10 wrong time.

11 I asked my staff to give me an idea of what the amount  
12 of marijuana looked like, and, again, you have it there.

13 I find it hard to believe that someone trusted with \$1  
14 million of drugs is simply an amateur drug mule. So I hope  
15 this hearing will help us better understand the facts of the  
16 case as well as 18 U.S.C. 924.

17 We should also look at an Attorney General's policy  
18 rule issued in 2003 that states that Federal prosecutors  
19 must charge and pursue the most serious readily provable  
20 offense or offenses. As I said, while people have argued  
21 both sides, I have not heard many people argue that Agents  
22 Ramos and Compean deserve the length of these sentences.

23 I understand that U.S. Attorney Johnny Sutton has  
24 suggested that he was compelled to file charges that carried  
25 the 10-year mandatory minimum in order to comply with this

1 DOJ policy I have just read. Specifically, that is the  
2 September 2003 rule from then Attorney General Ashcroft that  
3 requires the charging and pursuit of these offenses.

4 I think it will be fruitful for us to explore that  
5 policy today to see if prosecutorial discretion is being  
6 unduly restricted by DOJ policies in an overly rigid reading  
7 of the law. When Congress enacted mandatory minimum  
8 sentences, we certainly knew that the charges filed would  
9 automatically drive the sentence. But Congress never said  
10 that the charges themselves must automatically be filed.

11 The power of the prosecutor has long been heralded as  
12 one of the most significant powers in our Government. In it  
13 lies decisions that can have a huge impact, like in this  
14 case, where one charge can significantly drive up the  
15 sentence by 10 years.

16 I am very concerned about having in place a policy at  
17 the Department that takes discretion away from the  
18 prosecutors and mandates that all cases must be charged to  
19 their fullest without any consideration of the facts and  
20 circumstances and whether any lenience is warranted. We do  
21 not want or expect prosecutors to be robots. Prosecutorial  
22 discretion has been a fundamental part of our criminal  
23 justice system for centuries, and where there are mandatory  
24 minimums, it seems to me that it is even more important for  
25 prosecutors to retain discretion to determine what charges

1 make the most sense in such a case.

2 There are also a number of other issues specific to  
3 this case which are worth exploring. I hope to find out if  
4 the prosecutors considered bringing administrative actions  
5 against Agents Ramos and Compean or asking them to resign  
6 instead of filing criminal charges against them and trying  
7 to put them in prison. If that was not considered, why  
8 wasn't it?

9 I hope to find out why the Government struck the deal  
10 that it did with Aldrete Davila. In particular, I hope to  
11 find out if the Government considered asking Aldrete Davila  
12 to waive his civil claims against the United States as part  
13 of an immunity deal. If not, why not? There are reports  
14 that he is now asking the \$5 million for his injuries. I  
15 would like to learn more about the potential exposure that  
16 our Federal Government faces on that claim.

17 We have also learned that, despite his immunity deal,  
18 Aldrete Davila refused to provide any information on his  
19 drug source and refused to provide the names of others who  
20 talked about putting together a hunting party that would  
21 retaliate for the shooting.

22 I would also like to find out why the Government  
23 entered into an immunity deal in which Aldrete Davila got to  
24 pick and choose which information he provided.

25 I understand the Government argues that Aldrete Davila

1 refused to give information because he was afraid of  
2 retaliation. But that risk is true in any number of cases  
3 in which a person agrees to cooperate. Normally, when a  
4 person is given immunity, he is supposed to cooperate fully.

5 We have also learned that Mr. Aldrete Davila re-entered  
6 the United States on at least ten other occasions between  
7 March and November 2005, and that the documentation provided  
8 by the Federal Government allowed him to cross the border  
9 legally at any time without notifying anyone in the  
10 Government ahead of time.

11 The Government admits that Aldrete Davila crossed the  
12 border at least one time without any notice and, therefore,  
13 was in the United States unsupervised. I would like to hear  
14 more about the policy that allows for this kind of  
15 unsupervised passage into our country and why someone who  
16 was known to smuggle in drugs would be given such  
17 flexibility.

18 I welcome the witnesses and look forward to their  
19 testimony here today, and now I would like to recognize the  
20 distinguished Ranking Member of this hearing, the Senator  
21 from Texas, Senator Cornyn.

22 OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR  
23 FROM THE STATE OF TEXAS

24 Senator Cornyn. Thank you, Madam Chairman. I know we  
25 have Senator Kyl, the Ranking Member of the Subcommittee,

1 here. I have an opening statement, but I would be glad to--

2 Senator Kyl. Go ahead.

3 Senator Cornyn. I want to express my gratitude to you,  
4 Senator Feinstein, and to Chairman Leahy for scheduling this  
5 hearing. We have been hoping that this day would come for a  
6 long time, and I am glad it is here. I know you have taken  
7 a serious interest in this case, as have I, and I look  
8 forward to hearing the testimony today.

9 The United States Senate has just completed two rounds  
10 of debate on comprehensive immigration reform, and I believe  
11 the latest effort failed in large part because the American  
12 people from across the political spectrum simply do not have  
13 confidence in the Government's commitment to enforce the  
14 law, be it at the border, in the interior, or at the  
15 workplace. I think the public's interest in the case of  
16 Border Patrol Agent Ramos and Border Patrol Agent Compean is  
17 symptomatic of that distrust because the public sees two  
18 Border Patrol agents serving long prison sentences while an  
19 admitted drug dealer goes free.

20 So I think this hearing will serve an important purpose  
21 because it will air for the American people for the first  
22 time publicly in this venue the facts of the case so they  
23 can hear them and they can make a judgment for themselves  
24 about the most controversial aspects of the case.

25 We all know that law enforcement officers hold a

1 special place in our criminal justice system. Anyone who  
2 can arrest someone and throw them in jail holds enormous  
3 power and must be held to account when they act improperly  
4 because, of course, no one is above the law.

5 At the same time, it is important to remember that a  
6 law enforcement officer should be treated no worse than any  
7 other citizen before the bar of justice. In other words, no  
8 special breaks, no special burdens by virtue of their status  
9 as a law enforcement officer.

10 It is in this light that I have developed some serious  
11 concerns about the judgment calls made during the  
12 prosecution of this case. I want to find out if the  
13 prosecution offered the drug dealer--find out if the  
14 prosecution allowed the drug dealer to violate the terms of  
15 his immigration agreement without consequences. Did the  
16 drug dealer commit perjury without consequence? Did the  
17 Government feel the need to prosecute these two agents as  
18 opposed to disciplinary action to a degree that they were  
19 willing to provide the drug dealer unlimited and unescorted  
20 parole visas for various 30-day periods to do who knows  
21 what, including possibly transporting additional narcotics?

22 Did the Government use the threat of severe criminal  
23 charges in a vindictive manner? That is, did the Government  
24 bring that charge only after the agents declined to  
25 negotiate a plea agreement? And, ultimately, is this the

1 regular practice at the Department of Justice such that they  
2 could have been made--so that they would have made the cases  
3 against non-police officers?

4       These questions are not designed to quibble with the  
5 jury's decision in the case. Jurors provide a critical  
6 function in our judicial system, and their hard work and  
7 verdicts are to be respected until and unless such time as  
8 they are reversed on appeal. But the jury can only weigh  
9 evidence that they actually hear and are allowed to  
10 consider.

11       I would note that some jurors have since come forward  
12 to state that the evidence that they were prevented from  
13 hearing would have changed that verdict. Rather, my  
14 questions are designed to examine whether the prosecution of  
15 Agents Ramos and Compean was handled the same as other  
16 defendants or were they treated differently because of their  
17 status as law enforcement officers.

18       Madam Chair, I thank you again for your perseverance  
19 and your willingness to convene this hearing, and I look  
20 forward to hearing the testimony from the witnesses.

21       Senator Feinstein. Thank you very much, Senator, and I  
22 look forward to working with you on this as well.

23       Senator Kyl?

24       Senator Kyl. Madam Chair, I have an opening statement,  
25 but respecting the time of my good friends and former House

1 colleagues here, what I would like to do is to have you turn  
2 to them after any other opening statements here. I will  
3 give about half of my opening statement orally when this  
4 panel has concluded and put the rest of it in the record.  
5 And I apologize in advance. I am, as we all are, scheduled  
6 about three different ways this morning, and I may have to  
7 be kind of coming in and out. But I did want to hear the  
8 testimony of these two witnesses, who are among the most  
9 conscientious and dedicated public servants that I have ever  
10 served with, and having worked with both of them in the  
11 House of Representatives, I could tell a lot of stories  
12 about both of them and their dedication to the people of  
13 this country. They are both patriots.

14 Senator Feinstein. Thank you very much, Senator.

15 Senator Coburn?

16 OPENING STATEMENT OF HON. TOM COBURN, A U.S. SENATOR

17 FROM THE STATE OF OKLAHOMA

18 Senator Coburn. I will just submit an opening  
19 statement for the record.

20 Senator Feinstein. Thank you very much.

21 [The prepared statement of Senator Coburn follows:]

22 / COMMITTEE INSERT

1           Senator Feinstein. And now we will turn to the first  
2 panel. I will begin with Congressman Hunter, because he was  
3 here first, Congressman Rohrabacher.

4           Duncan Hunter represents California's 52nd District,  
5 consisting of eastern and northern San Diego County. He was  
6 elected to the House of Representatives in 1980. His first  
7 assignment was to the House Armed Services Committee where  
8 he is presently Ranking Member. Prior to his current  
9 position as Ranking Member, Congressman Hunter served as the  
10 Chairman of the full Committee from 2003 to 2007. He is a  
11 Vietnam veteran, served in the 173rd Airborne and 75th Army  
12 Rangers.

13          I will introduce Congressman Dana Rohrabacher at this  
14 time. He represents California's 46th District, stretching  
15 along the Pacific coastline of Orange County and Los  
16 Angeles. Congressman Rohrabacher is currently in his ninth  
17 term in the House and is serving as Ranking Member of the  
18 Oversight and Investigations Subcommittee of the House  
19 International Relations Committee. Prior to his first  
20 election to Congress in 1988, he served as Special Assistant  
21 to President Reagan. For 7 years, he was one of the  
22 President's senior speech writers. I should mention he was  
23 an editorial writer for the Orange County Register as well.

24          So we welcome you both to the other side, as they say,  
25 and, Congressman Hunter, would 5 to 7 minutes suffice?

1     Fine.   Please proceed.

1                   STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE  
2                   IN CONGRESS FROM THE STATE OF CALIFORNIA

3           Representative Hunter.   Chairman Feinstein and Senator  
4   Cornyn, Senator Kyl, and Senator Coburn, thanks for letting  
5   us come--

6           Senator Feinstein.   Could you press your microphone and  
7   see that it is on and pull it close?

8           Representative Hunter.   Okay.   Thanks for letting Dana  
9   and I come over and talk to you about this case.   I think  
10   you have framed the case extremely well, Senator Feinstein,  
11   the circumstances, and let me just start out by saying I  
12   think that the prosecution and the resultant 11 and 12  
13   years, respectively, for Agents Compean and Ramos comprise  
14   to me the most severe injustice I have ever seen with  
15   respect to the treatment of U.S. Border Patrol agents or, I  
16   might add, the treatment of any uniformed officers.   And I  
17   say that as a guy who has been on the Armed Services  
18   Committee now for 26 years, I have seen lots of prosecutions  
19   under the UCMJ.   But the totality of the circumstances, that  
20   is, the wounding of a drug dealer who has just brought in  
21   750 pounds of narcotics, and the resultant 11- and 12-year  
22   sentences in the Federal penitentiary, which is about 2-1/2  
23   years more than the average convicted murderer does behind  
24   bars, essentially being given murder sentences for this  
25   action, which turns on a split-second judgment--and if you

1 take away all of the underbrush, it turns on a split-second  
2 judgment as to whether or not the drug dealer, when,  
3 according to the agents' testimony, he whirled and had what  
4 looked to them like a gun in his hand, and he claimed,  
5 having been given immunity and being brought back from  
6 Mexico to testify, he claimed he did not have a gun in his  
7 hand. But that split-second judgment basically means the  
8 difference between being given a medal for accomplishment or  
9 for valor or being given 11 and 12 years in the  
10 penitentiary.

11 And so the first thing I would say is that that is not  
12 a burden that we can put on Border Patrol agents, or we are  
13 going to get to the point where no one will volunteer for  
14 this force.

15 Now, let me just offer a couple of things, and I  
16 apologize because I have to leave early, but let me just  
17 offer a couple of thoughts.

18 First, if you believe in full the testimony of the drug  
19 dealer, if you accept his statement as fact throughout, the  
20 11- and 12-year sentences are extremely unjust. Extremely  
21 unjust. You have a wounded drug dealer who, according to  
22 the police documents that I have seen, or the prosecutorial  
23 documents that I have seen, did, in fact, enter the United  
24 States subsequently with another load of narcotics for which  
25 he was not prosecuted. And that brings up two facts that I

1 think you should make a point of inquiry with the  
2 Government.

3 First, the Government always has an obligation when a  
4 conviction turns on the credibility of a witness, and that  
5 credibility of that witness is subsequently impaired by  
6 something that he does--and, in fact, if it is a fact that  
7 this drug dealer brought in a subsequent load of narcotics,  
8 that certainly is a factor that should have been brought to  
9 the attention of the court. And I would recommend that you  
10 ask the Government why they didn't bring this subsequent  
11 load of narcotics--after the drug dealer had been given  
12 immunity, why that was not brought to the subsequent  
13 attention of the court, because it is the trustworthiness,  
14 the credibility of the witness, the drug dealer, which was  
15 utilized to convict Compean and Ramos.

16 The second factor that I would urge that you ask the  
17 Government about is this: I have looked at the statement,  
18 this so-called rebuttal statement by the U.S. Attorney.  
19 Eight times in that rebuttal statement, it states  
20 conclusively that the drug dealer was unarmed. I have read  
21 the transcript of the case. There is nothing in the  
22 transcript that indicates that there is any proof that he  
23 was unarmed. He was never frisked. He was never searched.  
24 And the other Border Patrol agents who were watching this  
25 from afar, the one who testified was watching from hundreds

1 of yards away. So there is absolutely no proof that he did  
2 not have a gun except his own statement. And if you look at  
3 the motivation that he might have, what greater motivation  
4 than being given immunity, being set up for a multi-million-  
5 dollar civil case against the U.S. Government, and being the  
6 key witness in a prosecution that sends the hated Border  
7 Patrol agents to prison.

8 Now, I wanted to tell you, after they went to prison--  
9 that was, I believe, the 17th of January. The day they went  
10 in, I called up Harvey Lappins, who was the head of the  
11 Bureau of Prisons, and he had just gone home, but I talked  
12 to his administrative assistant, and I said, "These guys are  
13 going to get beaten up in prison." The prison has a large  
14 population of drug dealers, they hate the Border Patrol, and  
15 they are going to be beaten up unless you segregate them."  
16 The assistant assured me that he would convey that to the  
17 Director, Mr. Lappins, very quickly, that night.

18 The next day I got a call back from Mr. Lappins' staff,  
19 and they said, "Good news. The Border Patrol agents have  
20 been segregated from the general population, and they will  
21 be safe." And they sent me subsequently a letter--and I  
22 would like to offer this for the record--that says they are  
23 under a special program in which their safety will be  
24 assured. And I would like to offer that to the record,  
25 Senator.

1           Senator Feinstein. That will be included in the  
2 record. Thank you.  
3           [The letter follows:]  
4           / COMMITTEE INSERT

1           Representative Hunter. What Mr. Lappins or his  
2           assistant did not tell me was that a few days later, Mr.  
3           Ramos would be put back in the general population, and he  
4           was promptly beaten up. And it was not guards that stopped  
5           the beating. It was another inmate.

6           So these two agents have now done 6 months in the  
7           Federal penitentiary. I have never seen a case so  
8           compelling for a pardon or a commutation.

9           Now, after they were put in and the President did not  
10          pardon them, I introduced a bill. I had our lawyers come  
11          in, and I asked them if Congress could issue a pardon, if we  
12          could do a bill that would effect a pardon. They researched  
13          the cases, and they said there are some cases that indicate  
14          actually that you can and some that indicate you cannot.  
15          And since they were already incarcerated, I said let us go  
16          ahead and draft one. We have drafted one. We introduced  
17          it. We have at this point precisely 100 cosponsors.

18          But I think this is a case which calls out for a pardon  
19          or for a commutation, but especially, Chairman Feinstein, I  
20          would make sure that you get a response from the Government  
21          as to why, after the drug dealer was focused on in an  
22          investigation before bringing in a second load of narcotics,  
23          that fact, which obviously goes to his credibility and his  
24          trustworthiness in this case, in which his testimony was the  
25          key driver of these two convictions, why that fact was not

1     communicated to the court.

2             Now, the Government may say that that did not result in  
3     a conviction. In fact, they did not indict as a result of  
4     that, but I have read the police report with respect to  
5     that. But that certainly does trigger an obligation, a duty  
6     on their part to report an activity which goes straight to  
7     the credibility of the key witness to the Government. And I  
8     do not think they did that.

9             And the second thing that, of course, I think you  
10    should question them on strongly is this: Again, their  
11    statement has seven references to--states conclusively seven  
12    times that the drug dealer was unarmed. And, of course,  
13    that is a key element in this case. There is no evidence  
14    that he was unarmed. He was not frisked. He was not  
15    searched. Nobody was close to him except the two agents,  
16    Ramos and Compean.

17            The last thing I would say--and I appreciate you  
18    letting me go early, Chairman Feinstein. I appreciate your  
19    attention to this case, incidentally. This is a very  
20    critical case. You know, we built that fence in San Diego,  
21    and we had tons of cases just like this--not exactly like  
22    this, but beatings, times when Border Patrol were rocked,  
23    people came across in vehicles. And the separation that we  
24    achieved by having a double fence with a road in between  
25    eliminated those. And we also had an average of eight to

1     ten murders a year right there on the San Diego border.  
2     Most of the time the people being murdered by the gangs that  
3     roamed that border were the people coming in illegally.  
4     When we put the double fence up, the murders went from an  
5     average of eight to ten a year to zero. And incidents like  
6     this on our part of the border went to zero. And if you  
7     look at the border fence that we passed into law, that is  
8     mandated to be constructed in Texas, it appeared to me that  
9     the fence includes this area where you are now having these  
10    drive-throughs like the one which is the subject of the  
11    discussion this morning. It is now the law that we build  
12    all 854 miles of border fence. I think we need to get on  
13    with it.

14           Thank you for allowing me to testify, Chairman  
15    Feinstein, and thank you for your great interest in this  
16    case. And, Mr. Cornyn, I appreciate the hospitality.

17           I apologize for having to leave early, but I wanted to  
18    let you know how strongly I feel.

19           [The prepared statement of Representative Hunter  
20    follows:]

1           Chairman Feinstein. Well, thank you very much for the  
2 testimony, for being here, and I will go to Congressman  
3 Rohrabacher.

1                   STATEMENT OF HON. DANA ROHRABACHER, A  
2                   REPRESENTATIVE IN CONGRESS FROM THE STATE OF  
3                   CALIFORNIA

4           Representative Rohrabacher. Well, first and foremost,  
5   let me thank you, Senator Feinstein. You have my respect  
6   and my appreciation for holding this hearing.

7           As we meet today, it should not escape our attention  
8   that the two veteran Border Patrol agents that we are  
9   speaking about are in their 180th day of solitary  
10   confinement. It just tears at your soul to think that these  
11   two men, who had 5 years and 10 years of service to the  
12   Border Patrol, respectively, these men who put their lives  
13   at risk every day trying to do one of America's toughest law  
14   enforcement jobs, these men are now in solitary confinement  
15   for an activity that stems from their interdiction of a drug  
16   dealer. Both of these men are military veterans; both have  
17   unblemished work records. Officer Ramos, in fact, was  
18   nominated to be Border Patrol Agent of the Year.

19          Then on February 17, 2005, Officers Ramos and Compean  
20   interdicted a drug smuggler who had just penetrated our  
21   border with 743 pounds of narcotics. A high-speed chase  
22   ensued followed by a physical altercation. Agent Compean  
23   ended up on the ground. The drug dealer ran toward the  
24   border, and as he did, he was turning and, according to the  
25   officers, had what appeared to be a shiny object in his

1 hand. And there is no reason to believe that that object  
2 was not a gun. Yet it appears that the word of the drug  
3 dealer was taken over the possibility of the fear of these  
4 two law enforcement officers that they were being put in  
5 great jeopardy.

6 Shots were fired and in the aftermath, certainly--and  
7 we all admit this--the prescribed Border Patrol procedure  
8 was not followed. Ramos and Compean did not do their  
9 paperwork. Ramos and Compean and their supervisors, not  
10 believing the drug dealer had been hit, decided to forego  
11 the hours and hours of laborious paperwork that is required  
12 after shooting incidents. Now, that was a wrong decision on  
13 their part. But it is understandable as well. They did not  
14 think anybody had been hit. They just did not want to spend  
15 6 or 7 hours of their time and the FBI's time and everybody  
16 else's time to go through these procedures. That procedural  
17 violation, that decision, deserved a reprimand. That  
18 decision that deserved a reprimand was turned into a felony  
19 by the U.S. Attorney's Office.

20 Prosecutors in this country are given great discretion,  
21 and who will be granted immunity and who will be prosecuted  
22 is their call. In this case the U.S. Attorney's Office  
23 decided to give immunity to a professional drug smuggler,  
24 accept his word that, even though he was in possession of a  
25 million dollars' worth of drugs, that he was unarmed and

1    then throw the book at the Border Patrol agents, turning  
2    into a felony what should have been addressed, at most, by a  
3    5-day suspension for the violation of procedures.

4           It is totally disingenuous for anyone involved in  
5    prosecuting Ramos and Compean to suggest that they had no  
6    choice. The choice was prosecuting the drug smuggler for  
7    his heinous crimes or prosecuting the Border Patrol agents.  
8    Going after the agents required turning reality on its head,  
9    trying to turn our protectors into bad guys, exaggerating  
10   the importance of not spending the hours muddling through a  
11   shooting report when they thought no one had been hit.

12          The prosecutors decided to go after the good guys and  
13   gave the bad guy immunity. The prosecutors then, let us  
14   note, began to vilify the Border Patrol agents in order to  
15   justify their decision. Mr. Sutton has, for example,  
16   repeatedly referred to the agents as "corrupt" in broadcast  
17   interviews. When challenged about this, he simply defined  
18   "corrupt" in a way that no one else uses the term. Now, we  
19   have heard that before from this administration, and it is  
20   unacceptable, especially when you consider the impact that  
21   that had on the lives of these people, these two Border  
22   Patrol agents, who have unblemished records on their job.  
23   But it was Mr. Sutton who stood by as Congress was lied to  
24   with the claim that these two fine Americans of Mexican  
25   descent supposedly bragged that they wanted to go out and

1 "shoot Mexican" that day. This later was proven to be a  
2 bald-faced lie. Now, who is being prosecuted for lying to  
3 Congress? That was said directly to Members of Congress who  
4 were investigating this incident. This lie was in print on  
5 numerous occasions. Why did Mr. Sutton let such a vicious  
6 lie simply stand? Why didn't he correct the record?

7 Then one must consider that Mr. Sutton has continuously  
8 described the incident as Ramos and Compean shooting an  
9 unarmed man in the back and lying about it. Was Mr. Davila  
10 an unarmed man? No. He was not just a man. He was a  
11 criminal member of a drug cartel. And he was not shot in  
12 the back. He was shot in the buttocks and the entry wound  
13 of the bullet was consistent with the agents' testimony, as  
14 well as that of the army surgeons who removed that bullet,  
15 that he was turned--he was not shot in the back. He was  
16 turned with his hand extended as if something was in his  
17 hand. I wonder what that was. The agents had exactly one  
18 split second to decide if their lives were in danger.

19 And, finally, let us not forget the worst lie of all,  
20 the one that was told to the jury, when the U.S. Attorney's  
21 Office permitted the prosecutor to describe the drug  
22 smuggler as a one-time offender trying to earn enough money  
23 to pay for medicine for his sick mother. Mr. Sutton may use  
24 pejorative words to describe the drug smuggler now, but it  
25 was his prosecutors who insisted to the judge that the jury

1 not be permitted to hear the information directly tying the  
2 drug dealer to a second cross-border drug shipment. Now,  
3 someone is getting railroaded here. The jury was not able  
4 to hear that this drug smuggler had been fingered in a  
5 second drug shipment, and it was the U.S. Attorney's Office  
6 that insisted to the judge that the jury not be permitted to  
7 hear that evidence.

8 This Committee may want to ask Mr. Sutton about the  
9 date of free border crossing pass that was provided by his  
10 office, provided to the drug smuggler, and we might want to  
11 determine if the date on that pass coincides with the date  
12 of the second drug shipment, because those of us on the  
13 House side who have been trying to get to the bottom of this  
14 cannot get an answer out of Mr. Sutton about this.

15 Mr. Sutton's office has stonewalled our investigation  
16 in the House, and that is why, Senator Feinstein, we are so  
17 grateful to you for stepping forward today. Mr. Sutton's  
18 office has even insisted that we obtain a privacy waiver  
19 signed by the drug smuggler before they can release the  
20 information as to the dates that were on the drug smuggler's  
21 pass. I do not know what contempt of Congress is, but that  
22 sounds like it to me.

23 This Committee may want to ask Mr. Sutton if all the  
24 facts remained the same, but instead Mr. Davila turned out  
25 to be a terrorist--let us say instead of all of these

1   narcotics that Mr. Davila was instead smuggling across the  
2   border a van that was filled not with marijuana, but let us  
3   say Mr. Davila had a van that was filled with a dirty bomb  
4   headed for an American city. Ramos and Compean, would they  
5   be sitting in Federal prison right now for violating a  
6   terrorist's civil rights, or would they be heralded as the  
7   true heroes who they are?

8           In summary, the Ramos and Compean case is the worst  
9   miscarriage of justice that I have witnessed in the 30 years  
10   I have been in Washington. The decision to give immunity to  
11   the drug dealer and throw the book at the Border Patrol  
12   agents was a prosecutorial travesty. The whole episode  
13   stinks to high heaven. Two of America's brave Border Patrol  
14   defenders have had their lives and the lives of their  
15   families--and their families are here with us today--  
16   destroyed by what I see as an elitist, arrogant, and  
17   overreaching prosecutor who believes that protecting the  
18   civil rights of illegal alien criminals is worth destroying  
19   the lives of our law enforcement officers for minor  
20   procedural violations.

21           With that, I appreciate at long last the opportunity to  
22   try to do something to help these brave law enforcement  
23   officers. As I say, as we speak, Madam Chairman, they are  
24   in their 180th day of solitary confinement because this  
25   administration that will give Scooter Libby a commutation of

1 his punishment, this administration let Scooter Libby go,  
2 but these two defenders of our border have to go in solitary  
3 confinement. I pleaded with this administration at least go  
4 to the judge and ask him to let these fellows go until their  
5 appeal is heard, because their lives are in danger. That  
6 request was turned down and, I might say, very abruptly and  
7 arrogantly. And as we now see, Scooter Libby can be set  
8 free. Two Border Patrol agents who languish in solitary  
9 confinement, whose lives are in danger, their lives do not  
10 count a bit with this administration. And I appreciate that  
11 you, Senator Feinstein, care about these people as  
12 individuals and are holding this hearing because of that.

13 Thank you very much.

14 [The prepared statement of Representative Rohrabacher  
15 follows:]

1           Senator Feinstein. Thank you very much, Congressman  
2 Rohrabacher.

3           I have no questions. Do other members of the panel  
4 have questions of the Congressman? If not, then, we thank  
5 you for coming over to this side. We excuse you, and we  
6 will proceed with the next panel.

1           Senator Feinstein. I would ask T.J. Bonner to come  
2 forward, and I will introduce the next panel in aggregate,  
3 and then we will go right down the line, if that is  
4 agreeable.

5           Mr. Bonner is currently the President of the National  
6 Border Patrol Council. This is a union within the American  
7 Federation of Government Employees which represents  
8 approximately 11,000 non-supervisory Border Patrol  
9 employees. Mr. Bonner has held this position since 1989 and  
10 has been a Border Patrol agent in the San Diego, California,  
11 area since 1978.

12          Deputy Chief Barker retired from the U.S. Border Patrol  
13 in July 2006 after more than 28 years of service. At the  
14 time of his retirement, he was the national Deputy Chief of  
15 the Border Patrol in Washington, D.C., where he had served  
16 since May of 2005. Prior to that, he served in a number of  
17 key leadership positions in the Border Patrol, including the  
18 position of Chief Border Patrol Agent in the Laredo and El  
19 Paso, Texas, sectors. Before joining the Border Patrol in  
20 1978, he was a police officer and acting detective for 5-1/2  
21 years with the Jersey City Police Department Narcotics  
22 Squad.

23          David Botsford is currently serving as appellate  
24 counsel for Mr. Ramos. We asked the defense attorneys at  
25 the trial if they wished to come and testify on behalf of

1    their clients. We learned that they are prohibited from  
2    doing so by the judge. However, Mr. Botsford has  
3    volunteered to testify. He is a member of the State Bar of  
4    Texas where he received Outstanding Criminal Defense Lawyer  
5    of the Year in 1993, and he has previously served as the  
6    President of the Texas Criminal Defense Lawyers Association.  
7    He has been listed as a "SuperLawyer" and as one of the five  
8    "Go-To" Lawyers in Texas Criminal Defense Practice by the  
9    publication Texas Lawyer. He is also listed in "The Best  
10   Lawyers in America."

11           David Aguilar is not present. Is Mr. Aguilar going to  
12   testify? Oh, he is on the third panel, I guess. All right.

13           So we will proceed with these witnesses at this time.

14   Mr. Bonner, you are first up. Welcome.

1                   STATEMENT OF T.J. BONNER, PRESIDENT, NATIONAL  
2                   BORDER PATROL COUNCIL, CAMPO, CALIFORNIA

3           Mr. Bonner. Thank you. Chairwoman Feinstein, Ranking  
4 Member Cornyn, other distinguished members of the Committee.  
5 The National Border Patrol Council appreciates very much the  
6 holding of this hearing to get to the bottom of this matter.  
7 This is something that has weighed heavily on the minds of  
8 not just law enforcement officers across America but  
9 ordinary citizens who look at the facts of this case and  
10 wonder how two Border Patrol agents who were simply doing  
11 their job and defending themselves against an armed drug  
12 smuggler ended up being prosecuted, convicted, and sentenced  
13 to 11 and 12 years in prison. This is a travesty of the  
14 highest order.

15           The Government claims that it prosecuted these two  
16 agents because they shot an unarmed man in the back, covered  
17 up, destroyed evidence, and filed false reports. All of  
18 that hinges on whether that person was, in fact, unarmed.  
19 In order to reach the conclusion that Osvaldo Aldrete Davila  
20 was unarmed, you have to discard the physical evidence--the  
21 bullet that entered through his body at an angle; you have  
22 to ignore the laws of physics; you have to ignore the sworn  
23 testimony of two law enforcement officers, and place  
24 absolute, complete faith in the word of a career criminal.

25           Make no mistake about it. Osvaldo Aldrete Davila was

1 not a simple mule, as the prosecution tried to claim, who  
2 was looking to earn \$1,000 so that he could care for his  
3 sick mother. The cartels are not that stupid. They do not  
4 throw the keys to a van with \$1 million worth of marijuana  
5 to someone whom they do not know and say, "Just drive  
6 around, kid, and you will figure it out. Someone will pick  
7 you up and escort you into the safe house, and then we will  
8 give you \$1,000." They are not that foolish. And anyone in  
9 our Government and our system of justice who honestly  
10 believes that, you have to really question their  
11 intelligence. And I do not question the intelligence of the  
12 folks in that office. They are far smarter than that.

13 He was armed. In my 29 years of experience as a law  
14 enforcement officer, having captured loads of narcotics and  
15 being familiar with many other loads of narcotics that have  
16 been captured, when you are dealing with that quantity, they  
17 are inevitably, almost invariably armed--perhaps not to  
18 shoot it out with law enforcement officers, but certainly to  
19 protect against being ripped off by the competition.

20 This is a very troubling case, and you will hear the  
21 other prong of the testimony is that they tried to cover  
22 this up. There was no cover-up here. They were required by  
23 policy to orally report the fact that they had discharged  
24 their firearms. They did not do that, for whatever reason,  
25 but that is not a crime. That is an administrative

1 violation that merits no more than a 5-day suspension.

2 Another part of their case rests on the fact that Agent  
3 Compean picked up his shell casings. One of the things that  
4 no one ever did was to test him afterwards to see whether he  
5 was suffering from post-traumatic stress disorder. Everyone  
6 who testified at trial said that Joe Compean was walking  
7 around in a fog, in a haze. He had just been assaulted. He  
8 has just seen his life flash before his very eyes because  
9 someone pointed a weapon at him. And he was clearly  
10 suffering from what used to be called "shellshock," is now  
11 called "post-traumatic stress disorder." No one tested him  
12 for that. He reverted to his training. At the firearms  
13 range, we are taught, after you fire your weapon, you pick  
14 up your shell casings and you throw them into the nearest  
15 receptacle. He looked around, there was no near receptacle,  
16 so he threw them into the drainage ditch. If he really  
17 intended to destroy this evidence, he would have taken it as  
18 far away as possible and completely destroyed it, taken it  
19 to a smelter, had it melted down. There was no intent there  
20 to destroy or to cover up, and there was no filing of a  
21 false report. The Border Patrol firearms policy  
22 specifically precludes agents from mentioning the fact of a  
23 shooting in a written report. That is done by the  
24 investigator.

25 The wrongdoing here was bringing 743 pounds of

1 marijuana into the country. That is a felony. And the  
2 person who did that was granted immunity by our Federal  
3 Government, and when he was subsequently implicated in  
4 another 753 pounds of marijuana, not only was that fact  
5 ignored, but it was suppressed. The Government argued that  
6 the court should not let the jury hear that evidence, and  
7 the jury did not hear that evidence, and it would have had a  
8 bearing on the outcome.

9 In conclusion, the ramifications of this go far beyond  
10 those two agents, far beyond just the Border Patrol where  
11 morale has been decimated and now we are suffering the  
12 effects of that. We cannot hire the number of agents that  
13 the President wants, that the Congress wants. We are  
14 falling so far behind. One of our recruiters relayed to me  
15 that someone came up to him after the standard recruiting  
16 pitch and he said, "You would have to be crazy to join this  
17 outfit. You eat your own."

18 That is a sad commentary that the public has so little  
19 faith in our system of justice, and millions of Americans  
20 have petitioned this President for executive clemency, and  
21 he ignores that.

22 The effects of this are so far-reaching. I would  
23 implore you to use your power to order an investigation,  
24 appoint an independent counsel to look into this, go in,  
25 subpoena, get to the heart of this matter, because the

1 fabric of our system of justice depends on resolving this  
2 matter expeditiously.

3 Thank you very much.

4 [The prepared statement of Mr. Bonner follows:]

- 1 Senator Feinstein. Thank you, Mr. Bonner.
- 2 Former Deputy Chief Barker?

1           STATEMENT OF LUIS BARKER, FORMER CHIEF PATROL  
2           AGENT, EL PASO BORDER PATROL SECTOR, U.S. CUSTOMS  
3           AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND  
4           SECURITY, WASHINGTON, D.C.

5           Mr. Barker. Good morning, Chairman Feinstein, Ranking  
6   Member Cornyn, and distinguished members of this Committee.  
7   Thank you for inviting me to this important hearing. You  
8   went through my biography, but one thing I would like to add  
9   is I was also a military policeman stationed with the U.S.  
10  Army stationed at Fort Bragg, North Carolina. Also, I am  
11  currently providing leadership and integrity training and  
12  anti-corruption training to senior managers or mid-level  
13  managers at CBP under contract, and also I train first-line  
14  supervisors at the Leadership Development Center, again,  
15  under contract with CBP. So I would like the record to  
16  reflect that.

17          Senator Feinstein. Thank you.

18          Mr. Barker. As a senior leader in the Border Patrol, I  
19  was extremely proud of the men and women who serve to  
20  protect this Nation and who I had the honor to lead. Today,  
21  even in retirement, I am still proud of the great work that  
22  these men and women do in defense of the homeland. Day  
23  after day they do this difficult and dangerous job of  
24  securing our Nation's borders under extreme conditions, and  
25  do it with a personal pride and dedication that is to be

1    applauded.  They literally put their lives on the line every  
2    day, yet do great things to make us proud.  They are genuine  
3    heroes and certainly deserving of your support and that of  
4    the American people.

5           To prepare them for the dangers and rigors of the job,  
6    each agent undergoes extensive training, to include firearms  
7    training and the use of force.  This training instills  
8    professionalism and makes every agent understand that he or  
9    she will be held to a higher standard and that they must  
10   obey the laws of the land and of the community in which they  
11   live.  Every agent that entered on duty when I was Chief  
12   Patrol Agent in the El Paso Sector had this reinforced to  
13   them by me before going to the Border Patrol Academy and  
14   again upon their return from the academy and before  
15   reporting to field duties.  They are told about the trust  
16   that is placed in them to enforce the laws within the limits  
17   authorized--a trust that, if violated, has enduring  
18   consequences.  The motto of the Border Patrol is "Honor  
19   First," an ideal that is instilled in every agent from the  
20   day they walk through the door of any sector in the Border  
21   Patrol, and woven into the training and indoctrination at  
22   the Border Patrol Academy.  It is something that has  
23   sustained the Border Patrol.

24           During my tenure as Chief Patrol Agent of the El Paso  
25   Sector, there have been numerous incidents where officers

1 have discharged their weapons, but most of them accidental.  
2 Of these weapons discharges, six were incidents where agents  
3 used deadly force to defend themselves from a threat against  
4 them resulting in two fatalities. The Firearms Policy  
5 mandates the reporting of every shooting incident,  
6 accidental or otherwise, for proper investigation and  
7 disposition. For this reason, the scene must be secured and  
8 proper notification must be made to bring the investigative  
9 resources to bear. Every agent understands the requirement  
10 to notify supervisors of any discharge of a service firearm  
11 and the implications of not doing so.

12 On or about March 4, 2005, we received a memorandum  
13 from an agent in the Tucson Sector informing us of a  
14 shooting incident connected with a narcotic seizure that  
15 occurred in the El Paso Sector on February 17, 2005,  
16 approximately 2 weeks earlier. At that point in time, we  
17 had no recent report of shootings, so the information in the  
18 memorandum was surprising to us. After checking the records  
19 and making some inquiries, we had reason to believe that the  
20 allegations in the memorandum had some merit. We  
21 immediately made the proper notifications and made an  
22 initial report to the Office of Inspector General because of  
23 the seriousness of the allegations. As we all know, the  
24 events of February 17, 2005, resulted in the conviction and  
25 sentencing of former Agents Ignacio Ramos and Jose Compean.

1           Osvaldo Aldrete Davila, "the victim"--and I use it in  
2   quotes because he is not deserving of the title because of  
3   his trade, a trade that supplies nothing but misery to those  
4   who are trapped in the clutches of his product; he deserves  
5   no sympathy and I give him none. Only the circumstances  
6   make this characterization possible. I do, however, feel  
7   for Agents Compean and Ramos and their families for what  
8   they have endured and will endure as a result of the  
9   terrible choices they made on February 17, 2005. Though  
10  there is an emotional connection in this case, those of us  
11  in leadership and those having the responsibility to apply  
12  the rule of law cannot abdicate our responsibilities. Agent  
13  misconduct, even criminal misconduct, does occur despite our  
14  best efforts in selection and training, but we do everything  
15  to deter it and act decisively when it occurs. It saddens  
16  me because had the two agents behaved with the integrity and  
17  honor that we instill, following procedure, disclosing the  
18  shooting, not tampering with the evidence and encouraging  
19  others to do so, the results might have been very different.  
20  In fact, in my experience, almost every agent-involved  
21  shooting is resolved in the favor of the agent without  
22  criminal charges. So to suggest that the Border Patrol  
23  "went after" these agents for administrative violations is  
24  baseless, and I believe the facts of this case support this  
25  premise.

1           Agents Compean and Ramos used deadly force when it  
2   should not have been applied; they shot a person in direct  
3   violation of the policy and contrary to the training that  
4   they have received in this regard. From the statistical  
5   information I gave earlier, it is obvious that this was not  
6   the first time agents used deadly force in the El Paso  
7   Sector. The differences between this case and the others  
8   are glaring: Agents involved in other shooting cases  
9   reported them, cooperated with the investigation allowing it  
10  to run its course, and an investigation which generally  
11  supported the agents' decision to use deadly force. These  
12  agents destroyed evidence, filed an incomplete report on the  
13  incident in an effort to keep this shooting and the  
14  circumstances surrounding it from the leadership.  
15  Additionally, their actions prevented the proper  
16  investigation of this case--an investigation which I said  
17  generally supports the actions of the agents.

18           On April 28, 2005, when Agent Compean came before me to  
19  make his oral reply to the proposal to indefinitely suspend  
20  him, I asked him why he did not report the shooting. He  
21  said, and I quote, "I didn't." He continued to say that he  
22  knew that it was wrong for them not to report and continued  
23  to say that if they thought that the suspect had been hit,  
24  he would have. He also said that he knew that they would  
25  get in trouble--a thought that was confusing to me since I

1 have established that when an action is appropriate, the  
2 investigation invariably proves this absolving the agent of  
3 any liability.

4 This has been a tragedy with emotional undercurrent,  
5 but there should be no mistake about it: It begins and ends  
6 with the actions of Agents Compean and Ramos; not the  
7 prosecutors, not the judge or the jury, as has been  
8 suggested. The "distorted facts" have compounded this  
9 already tragic situation by tarnishing the reputation of  
10 other people who did the right thing. The U.S. Attorney,  
11 through his office in El Paso, has been a strong supporter  
12 of the agents in the El Paso Sector, making it clear, by its  
13 prosecutions, that assaults on agents will not be tolerated.  
14 They have also been on the front lines in those cases where  
15 agents have used deadly force under circumstances that  
16 warranted it or taken actions that have resulted in injury  
17 or death, and they have worked vigorously in supporting the  
18 agent. Conversely, they are also intolerant of official  
19 criminal misconduct or corruption as they should.

20 Finally, it is suggested that this case will make  
21 agents hesitate in situations where deadly force is  
22 warranted. The facts do not support this contention since  
23 in the last 2 months--

24 Senator Feinstein. Would you conclude, please, Deputy  
25 Chief Barker? You are 2 minutes 36 seconds over time.

1           Mr. Barker. I have just three more lines.

2           Senator Feinstein. Thank you.

3           Mr. Barker. The facts do not support this contention  
4 since in the last 2 months agents have discharged their  
5 weapons against assailants in self-defense on three  
6 occasions in El Paso, resulting in injury to one. Agents  
7 have always defended themselves, and I have no doubt that  
8 they will continue to do so when there is a threat.

9           I thank you for this opportunity, and I look forward to  
10 answering any questions that you may have.

11

12           [The prepared statement of Mr. Barker follows:]

1 Senator Feinstein. Thank you very much.

2 Mr. Botsford?

1                   STATEMENT OF DAVID L. BOTSFORD, APPELLATE COUNSEL  
2                   FOR MR. RAMOS, AUSTIN, TEXAS

3           Mr. Botsford. Good morning, Chairwoman Feinstein--  
4           Senator Feinstein. Would you relocate the mike and see  
5   that it is on?

6           Mr. Botsford. That should be on now, Senator.

7           Senator Feinstein. It is on now.

8           Mr. Botsford. Thank you very much. I appreciate the  
9   opportunity to be here very much.

10          Senator Feinstein. If you could move the mike over  
11   directly in front of you.

12          Mr. Botsford. Is that a little bit better?

13          Senator Feinstein. Thank you. Right.

14          Mr. Botsford. All right. First, I appreciate the  
15   opportunity to be here on behalf of Ignacio Ramos. I  
16   represent Ignacio Ramos on appeal only. I was not involved  
17   in the trial. However, I have read all 33 volumes of the  
18   appellate record, read every word, seen every exhibit. I am  
19   here to try to answer questions, and I would like to do so  
20   after making some brief comments.

21          As Cinderella's step-sisters taught us, no good can  
22   come from stuffing a foot into an ill-fitting shoe, and that  
23   is what this case is really about from my perspective. I  
24   have been practicing criminal defense law for 30 years in  
25   Texas. I have seen no greater tragedy than this case.

1           As Representative Rohrabacher said earlier, the truth  
2   is if the driver of this van had been Osama bin Laden or  
3   some terrorist, would we even be here? Would there have  
4   even been a prosecution of Ramos and Compean? I submit no,  
5   of course not. The point is however, we are not in that  
6   position. We are in a position where two agents apprehended  
7   a drug dealer, and I want to address the fact that is  
8   reflected in Mr. Sutton's written testimony that Davila  
9   could not have been prosecuted. This is at page 6 of his  
10  written statement. I take serious issue with that.  
11  Obviously, anybody that practices criminal law knows that a  
12  grand jury will indict a ham sandwich. We have all heard  
13  that phrase. And, in fact, Davila could have been  
14  prosecuted for this first load that he fled across the  
15  river. Why Mr. Sutton says that he cannot be prosecuted  
16  bewilders me because I believe any first-year prosecutor  
17  could get an indictment and successfully prosecute him.  
18  There is independent testimony that he entered the United  
19  States illegally, got into a van laden with 750 pounds of  
20  marijuana, drove into Fabens, Texas, in order to receive  
21  directions to the stash house, was attempted to be stopped  
22  by two and then subsequently three Border Patrol agents, of  
23  which one of them was Mr. Ramos. Davila did not stop. He  
24  fled, high-speed chase, and under the Supreme Court opinion  
25  of Scott v. Harris, decided in April of 2007, we know that

1 the agents were authorized to use deadly force to stop  
2 Davila during that high-speed chase that endangered other  
3 people.

4 They did not do that. They followed him to the border  
5 where Davila got out of his van and encountered Agent  
6 Compean, who was bearing a shotgun. Davila did not stop for  
7 Compean even though he was bearing a shotgun. There was an  
8 altercation. Ramos gave chase down into an 11-foot ditch.  
9 While he was in that ditch trying to get to where the alien  
10 Davila and Compean were in a struggle, there was an exchange  
11 of shots or what Ramos thought was an exchange of shots.

12 Agent Ramos comes out of that ditch and ultimately  
13 fires one shot--and you have heard the testimony before--as  
14 Davila was turned in a turning direction back towards him.

15 You know, the most inept prosecutor in the world could  
16 have prosecuted this case, so I take difference with what  
17 Mr. Sutton has put in his written statement about not being  
18 able to prosecute him.

19 The immunity situation is quite distressing, and I  
20 would offer for the record a copy of the March 16, 2005,  
21 letter of limited use immunity, Senator Feinstein, that was  
22 proffered to Davila, that was signed by him over the  
23 signature of J. Brandy Gardes, Assistant U.A. Attorney.

24 I would like to point out that--and I would ask that  
25 the record receive that.

1           Senator Feinstein. Thank you. That will be the order.

2           Mr. Botsford. Thank you very much, Senator.

3           I take great issue with Mr. Sutton's statement on page  
4   6 of his testimony that the court ruled that the second loan  
5   of marijuana that we have heard allusions to, the October  
6   load, as Mr. Sutton refers to it, was not relevant to the  
7   issues at the trial, and that ties into this immunity  
8   agreement because, in fact, this immunity agreement was  
9   proffered to Davila before he was ever interviewed in the  
10   United States. This was proffered to him after one  
11   telephone conversation between an agent, Chris Sanchez, and  
12   Davila on a cell phone.

13          Now, the immunity agreement is what is called "use  
14   immunity," co-extensive with United States Code Section  
15   6001, et seq. That means that once Davila signed this  
16   agreement, he had an obligation to truthfully testify and  
17   cooperate and provide evidence. Nothing he said could be  
18   used against him.

19          Unfortunately, Mr. Sutton's trial prosecutors  
20   represented to the district court that this immunity  
21   agreement was what would be transactional immunity for the  
22   day of February 17, 2005, only; and, therefore, the district  
23   court ruled that because Mr. Davila could take the Fifth  
24   Amendment as to the second load, the defense attorneys would  
25   not be entitled to cross-examine him on it. It was not that

1 it was not relevant. It was based on a misrepresentation by  
2 trial counsel to the court because once you have use  
3 immunity, as the Supreme Court of the United States  
4 determined back in 1972 in Kastigar, once you have use  
5 immunity you have no Fifth Amendment right left. You have  
6 to testify.

7 Additionally, the trial testimony reflects that Davila,  
8 the alien, the "victim," did not comply with this agreement.  
9 The testimony is clear in the record that he refused to name  
10 where he received medical treatment in Mexico, the names of  
11 the people that picked him up on the other side of the river  
12 once he crossed back to the Mexico side, the names of his  
13 confederates, the names of individuals who were threatening  
14 to seek retribution against Border Patrol agents in the  
15 United States after this came out. For what it is worth,  
16 that immunity agreement was broached by Davila. No question  
17 about it. The record is clear.

18 I will also state that approximately 2 months ago, in  
19 the El Paso Times, Davila was interviewed about the sentence  
20 that was imposed upon Ramos and Compean, and even he said  
21 that it was too harsh. Even he said it was too harsh.

22 The last point I would like to make briefly is that  
23 relating to 924(c), 18 U.S.C., United States Code, that says  
24 that if you use or carry or discharge a gun in the course of  
25 the commission of a crime of violence, you automatically

1 receive a mandatory minimum 10 years stacked on top of the  
2 other sentence for the other offenses. In this case, the  
3 district court had to impose that sentence, but it is the  
4 exercise of judicial discretion--and I believe both Senator  
5 Cornyn and Chairwoman Feinstein talked about prosecutorial  
6 discretion. The original indictment against these gentlemen  
7 did not include that 924(c) count. It was added. And  
8 although I was not personally involved in the communications  
9 at that time between trial counsel and Mr. Sutton's line  
10 prosecutors in El Paso, it is my understanding that a plea  
11 bargain offer was extended to Compean and Ramos, it was  
12 refused, and then the 924(c) count was added.

13 The Supreme Court of the United States in Bordenkircher  
14 v. Hayes and more recently in U.S. v. Godwin has said that a  
15 prosecutor can retaliate against the defendant who wants to  
16 take you to trial and allow the ante to be upped, so to  
17 speak. But the question remains: Is that an intelligent  
18 prosecutorial discretion? I think it sends a terrible  
19 message to law enforcement. You know, if you--924(c) was  
20 originally enacted to try to encourage criminals to leave  
21 their guns at home. When you go out to commit a felony  
22 offense, leave your gun at home, or you are going to get  
23 tagged with a lot of additional time.

24 These agents carry guns in the line of duty. They have  
25 to carry guns. This is a 17-minute long segment of their

1 life from the original dispatch at approximately 1:11 p.m.  
2 on the date in question until when the "all clear" is  
3 broadcast. Seventeen minutes of a high-speed chase ending  
4 up at a ditch near the border, and Ramos, unlike Compean,  
5 does not pick up his brass, does not fire 10, 11, or 12  
6 times. He makes one shot--one shot after hearing what he  
7 believed to be an exchange of gunshots while he is down in  
8 the canal and not capable of seeing what is going on.

9 If we are going to require our law enforcement officers  
10 to stop and investigate who is shooting at whom and what is  
11 going on before they can rely on the actions of their fellow  
12 officers, we send a terrible message out there. A terrible  
13 message. And if I was--

14 Senator Feinstein. Would you conclude, Mr. Botsford?  
15 You are over time.

16 Mr. Botsford. Thank you very much. I will be glad to  
17 try to answer any questions, Senator. Thank you.

18 [The prepared statement of Mr. Botsford follows:

19 / COMMITTEE INSERT

1 Senator Feinstein. Thank you very much.

2 My first question is of Deputy Chief Barker. What  
3 should an agent do if a fleeing drug suspect is told to stop  
4 and does not?

5 Mr. Barker. If the person does not pose a threat to  
6 them, they have to use other than deadly force to try to  
7 stop them. In other words, chase them--

8 Senator Feinstein. And how would they do that?

9 Mr. Barker. To chase them. To chase them on foot.  
10 And--

11 Senator Feinstein. And if they had tried to chase them  
12 and the chase failed and they still were yelling "Stop"?

13 Mr. Barker. That does not authorize them to shoot at  
14 them, Madam Chairman.

15 Senator Feinstein. So, in other words, any drug dealer  
16 on the border who does not obey a command and runs cannot be  
17 shot?

18 Mr. Barker. Yes, ma'am, unless there are other  
19 circumstances. Just for the fact that they are running and  
20 they were drug dealers, they cannot be shot.

21 Senator Feinstein. No wonder so much drugs are coming  
22 across the border. It is--

23 Mr. Barker. Unfortunately, those--

24 Senator Feinstein. --amazing to me.

25 Mr. Barker. Unfortunately, even drug dealing--as you

1 can see from my experience and from my career, I have been  
2 involved in drug enforcement. Even though as despicable as  
3 it is, it is not a capital offense, and agents are limited  
4 in when they can use force. And there are only three  
5 circumstances when they can.

6 Senator Feinstein. Let me debate this, because I have  
7 read 924(c), and it is pretty clear to me that 924(c), which  
8 was additionally charged, is really--the intent of it is for  
9 the person involved in drug trade because it has got various  
10 qualifications. You get a certain amount of time if you use  
11 a machine gun or a destructive device. If you use a short-  
12 barreled rifle, a short-barreled shotgun, or semiautomatic  
13 assault weapon, that is when it is 10 years. So it is  
14 clearly written with the view of being applied to a drug  
15 dealer, to encourage that drug dealer not to carry a weapon.  
16 But in the event someone does, in the event there is a  
17 split-second decision and the arresting officer--or the  
18 officer thinks that individual is armed, my goodness.

19 Mr. Barker. The question was posed of whether the  
20 person is fleeing or not where they posed--

21 Senator Feinstein. He was fleeing. Let there be no  
22 doubt.

23 Mr. Barker. Correct. And--

24 Senator Feinstein. No one disputes that.

25 Mr. Barker. Correct, and I am not familiar with

1 924(c). I am going by the policies that these agents have  
2 to follow in enforcing the law, whether it involves a drug  
3 smuggler or an alien. There are circumstances when they can  
4 use their firearms, use deadly force, and there must be a  
5 threat to them, must be a threat to their partner, must be a  
6 threat to an innocent third party, they can use deadly.  
7 Other than that they cannot. Unfortunately, that is just  
8 the way it is.

9 Senator Feinstein. Thank you very much.

10 Mr. Botsford, you mentioned that use immunity,  
11 transactional immunity is for one day only, and that an  
12 individual normally has their Fifth Amendment right  
13 suspended when that kind of immunity is evoked. I did not  
14 understand it. Could you explain that once again, please?

15 Mr. Botsford. Certainly, Your Honor--I am sorry.

16 [Laughter.]

17 Senator Feinstein. That is all right.

18 Mr. Botsford. I am just so used to talking to judges,  
19 Senator. What can I say.

20 Senator Feinstein. It is rare around here you get that  
21 kind of compliment. Thank you.

22 Mr. Botsford. The Government represented to the  
23 district court that this immunity agreement bestowed upon  
24 Davila applied only to the day of the events, February 17,  
25 2005, and that, therefore, he did not have immunity as to

1 this alleged second load.

2       Unfortunately, that is not accurate. The immunity  
3 agreement that was given to Davila, which is use immunity,  
4 co-extensive with the statutory grant of use immunity  
5 contained in 18 U.S.C. Section 6001 through 6003, when you  
6 have that use immunity, that means everything you say in a  
7 court of law is protected. None of it can be used against  
8 you. And, therefore--

9       Senator Feinstein. Does that mean you can continue to  
10 bring drugs in and you have immunity?

11       Mr. Botsford. No. That just means that he, Davila,  
12 could not take the Fifth Amendment on that second load and  
13 that, therefore, the defense attorney should have gotten to  
14 cross-examine about that second load. Therefore--

15       Senator Feinstein. Did you find any information that  
16 they knew about the second load at the time?

17       Mr. Botsford. Your Honor, there are certain sealed  
18 materials that I cannot address.

19       Senator Feinstein. I am aware. That is why I asked  
20 you. Do you have any information?

21       Mr. Botsford. Yes, separate from--I am not going to  
22 talk about any sealed materials, but there are clear  
23 indications in the record and hearings held during the  
24 course of the trial, colloquies whereby the defense did want  
25 to cross-examine Davila about the allegations of a second

1 load. The Government line prosecutors in the courtroom  
2 represented to the court that he, Davila, should not be  
3 forced to answer questions about that second load because  
4 his immigration agreement did not cover that second load.  
5 That, unfortunately, is not accurate, as reflected by the  
6 immunity agreement.

7 The court ruled that Davila could take the Fifth  
8 Amendment as to the second load and, therefore, would not  
9 allow the defense attorneys to cross-examine him in the  
10 presence of the jury because then Davila would be taking the  
11 Fifth Amendment in the presence of the jury, which is kind  
12 of a no-no from a Federal judge's perspective, and it would  
13 have been unfair.

14 So there are definitely indications in the record that  
15 the defense counsel did want to question him and that,  
16 unfortunately, the Government line prosecutors  
17 misrepresented, in my opinion, what that immunity agreement  
18 was all about.

19 Senator Feinstein. And why would that information be  
20 sealed?

21 Mr. Botsford. Your Honor, you would have to--well,  
22 actually I believe there is an ongoing investigation. That  
23 is what Mr. Sutton has told us in his testimony, and I am  
24 not going to take issue with that statement at all.

25 Senator Feinstein. That was begun at that time?

1           Mr. Botsford.   Yes, Your Honor.   Yes.

2           Senator Feinstein.   Okay.   Senator Cornyn?

3           Senator Cornyn.   Thank you.

4           Mr. Botsford, in your brief that you have filed with  
5 the Fifth Circuit, you have talked about the message that  
6 this prosecution sends to other Border Patrol agents, other  
7 law enforcement officials working along our border.   You  
8 said that this prosecution sends a message to every law  
9 enforcement agent that if you shoot in the line of duty and  
10 you cannot prove that you are justified in using deadly  
11 force, regardless of whether you were mistaken in that  
12 belief, you will be prosecuted and receive at least 10  
13 years' incarceration under 18 U.S.C. Section 924(c) stacked  
14 on top of other sentences--this despite the fact that  
15 Section 924(c) was never intended by Congress to be used to  
16 punish law enforcement officers who use their weapons in the  
17 line of duty.

18           Do you believe that the use of this mandatory minimum  
19 sentence against a law enforcement officer is misplaced?

20           Mr. Botsford.   I do, Senator, particularly as to the  
21 law enforcement officer that is on the job, engaged in the  
22 line of duty, and who in good faith believes a gun is being  
23 pointed at him.   Remember, the law does not require that he  
24 be correct.   If he has a good-faith mistaken belief that  
25 Davila had a gun, then he is entitled to use deadly force.

1 I have no problem with 924(c) being used against the rogue  
2 cop that off duty puts on a service revolver and goes out  
3 and helps drug dealers import marijuana or commits rapes or  
4 any other type of crime. But for our law enforcement  
5 officials that are on the job doing their darnedest to do  
6 their job and who may have made a mistake--maybe they made a  
7 mistake. I was not there. But certainly it sends a  
8 terrible message to those folks. I would imagine that many,  
9 many officers are going to be hesitant to ever pull their  
10 guns.

11 Senator Cornyn. Well, this mandatory minimum prison  
12 sentence under Federal law for illegally possessing or  
13 brandishing or using a firearm in commission of another  
14 crime, does it logically--if, in fact, the rationale is to  
15 dissuade criminals from using a firearm in the first place  
16 and committing other crime, does it make any sense to apply  
17 that law to a police officer, including a Border Patrol  
18 agent, who, by virtue of their job, must possess, use,  
19 brandish, and occasionally discharge a firearm in the course  
20 of their official duties?

21 Mr. Botsford. Senator, I do not think it does, and I  
22 do not think anybody would suggest it does, and quite  
23 candidly, it is a tragedy that it was used in this  
24 situation.

25 From what I have read of the legislative history, it

1 really was not designed to apply to law enforcement officers  
2 in the first instance, ever. But it has been applied, and  
3 there are issues raised on appeal, which I do not want to  
4 talk about here today, that talk about whether these agents  
5 had fair notice that if they made a mistake in pulling their  
6 guns and ascertaining whether they could use deadly force to  
7 apprehend a fleeing felon, that they would ever be subjected  
8 to this type of prosecution. It is an absence of fair  
9 notice.

10 Senator Cornyn. Let me ask you, Mr. Botsford, about  
11 the indictments that were rendered in this case. The  
12 original indictment was dated April 13, 2005. It contains  
13 three counts, none of which include a count for violating  
14 the firearms statute. Correct?

15 Mr. Botsford. That is correct. Yes, Senator.

16 Senator Cornyn. There was a second superseding  
17 indictment that, instead of three counts, now is eight  
18 counts, which does include the firearm counts. That was on  
19 September 28, 2005. There was a second superseding  
20 indictment filed December 21, 2005, and then a third  
21 superseding indictment filed January 25, 2006.

22 Is it your impression or belief that these subsequent  
23 indictments, which, unlike the original indictment, include  
24 the 924 firearm violation which got these two defendants a  
25 10-year mandatory minimum sentence on top of their other

1 sentence, is it your belief or impression that the  
2 succeeding indictments, which included that charge, were  
3 used in an inappropriate or perhaps even vindictive way once  
4 the plea bargain offered by the Government was turned down?

5 Mr. Botsford. Yes, Senator, I do. There was  
6 continuing dialogue I have been informed of--again, I was  
7 not there, but I view it as the Government upping the ante  
8 trying to put more pressure on these two citizens to plead  
9 guilty to something in order to dispose of the case, which  
10 is not untypical, but I believe it is vindictive, and in  
11 this case inappropriate.

12 Senator Cornyn. We talked about the power that a  
13 prosecutor has, and is it your experience that prosecutors,  
14 once a plea bargain is turned down by a person charged with  
15 a crime, that a prosecutor will vindictively up the ante in  
16 a way that increases the likelihood of a disproportionately  
17 long sentence in order to punish the defendant for turning  
18 down the plea bargain?

19 Mr. Botsford. I suggest, Senator, that it all depends  
20 on the individual line prosecutor involved in the case.  
21 Some prosecutors, no. Some prosecutors, yes. I do not know  
22 the back-door scenes behind the decisions to up the ante in  
23 this case. I cannot address that. Maybe Mr. Sutton can, if  
24 he was involved in them. But sometimes that definitely does  
25 happen.

1           Senator Cornyn. Deputy Chief Barker, let me ask you,  
2   in the case of Agent Ramos, who was down in this ditch when  
3   he heard the shots discharged by Agent Compean, it is fairly  
4   safe to say that he knew that Mr. Davila was in the country  
5   illegally, that he was associated with illegal drug traffic.  
6   He knew that there had been a high-speed chase. He had  
7   heard his fellow agent, Agent Compean, shoot on multiple  
8   occasions. He knew that there had been an altercation;  
9   that, despite carrying a shotgun, that Davila and Compean  
10   had had an altercation that Agent Compean had hit the  
11   ground; and he saw the person fleeing, and there was  
12   testimony that he saw a shiny object in his hand which he  
13   thought was a weapon.

14           Are you telling us that it is unjustified for Agent  
15   Compean under those circumstances to discharge his weapon  
16   and injure this drug deal?

17           Mr. Barker. Absolutely not. Under those circumstances  
18   they could, if they see a shiny object. Again, it has been  
19   said before that we do not put--we do not supersede an  
20   agent's decision to use deadly force when the agent believes  
21   that there is a need to do so. So if all those  
22   circumstances are there, yes.

23           The issue here--and being involved with the case from  
24   the beginning--there was nothing that said initially when  
25   this case happened that this person was armed. That creates

1 the issue here. Because there was a period of time--because  
2 if an agent is--if a person is armed, an agent finds that  
3 the situation is dangerous, he lets other agents know this.  
4 One of the first things that would be said if a person uses  
5 deadly force is, "I thought the person was armed." That was  
6 never said on that day.

7 Senator Cornyn. Well, let us say the agent is just  
8 mistaken, with their heart pumping, adrenaline flowing. We  
9 know there has been firearms discharged. We know that there  
10 is a drug dealer there who is fleeing from law enforcement  
11 agents. Let us say a Border Patrol agent is just mistaken,  
12 thinks they see a gun, and the price of their being wrong  
13 that there is a gun and they do not try to defend themselves  
14 or discharge a weapon is they could be dead.

15 Mr. Barker. Correct.

16 Senator Cornyn. Why isn't it appropriate for a Border  
17 Patrol agent, law enforcement official, to exercise their  
18 discretion under those circumstances and--

19 Mr. Barker. They do.

20 Senator Cornyn. --use that deadly force?

21 Mr. Barker. They do, and in those circumstances the  
22 agent gets the benefit of the doubt. And that is the way it  
23 always turns out.

24 Senator Cornyn. So what happened here is there was a  
25 factual dispute as to whether there was a weapon.

1           Mr. Barker.   Yes, sir.

2           Senator Cornyn.   And you believe the jury did not  
3 believe that there was actually a weapon.

4           Mr. Barker.   Correct, and, in fact--

5           Senator Cornyn.   Would that account for a mistaken  
6 belief in good faith that there was a weapon?

7           Mr. Barker.   Yes, sir.   In fact, I would have to  
8 confess that, being involved in the case from the beginning  
9 and the facts surrounding the events on that day, I believe  
10 that there was no gun.

11          Senator Feinstein.   Senator Sessions?

12          Senator Sessions.   Thank you, Madam Chairman.

13          I do not think, Mr. Bonner, you or anyone would dispute  
14 this rule that exists, has been established for quite a long  
15 time now, that a police officer of any kind is not entitled  
16 to shoot someone who is fleeing if they think they are not  
17 in danger or may be in danger.   Isn't that just a standard  
18 rule that every officer in virtually every jurisdiction in  
19 America is taught?

20          Mr. Bonner.   It is.   And, you know, to be clear about  
21 this, it really has no relevance whether that was 750 pounds  
22 of marijuana or whether it was 750 pounds of food and  
23 clothing for orphans.   The reason they shot was they  
24 believed that that individual had a weapon and was pointing  
25 the weapon at them.   That is what justified the shooting.

1           Senator Sessions. Well stated, and I think that is  
2   important. Now, is there any dispute, Mr. Botsford, that  
3   this guy had a shotgun? Was that suggested? Was a shotgun  
4   ever recovered?

5           Mr. Botsford. Agent Compean was holding a shotgun as  
6   Davila got out of his van, ran down through and up the ditch  
7   towards him, Compean yelling "Stop," along with agents on  
8   the other side yelling, "Stop." Davila did not stop. He  
9   came up and tried to--actually got into an altercation with  
10   Compean when Compean was armed with a shotgun. I mean, I  
11   think the man was dangerous. He obviously was not going to  
12   stop. He obviously had fled and led the officers in a high-  
13   speed chase from downtown Fabens back to the border. He was  
14   intent on getting away and not being apprehended.

15          Senator Sessions. And what is the Supreme Court ruling  
16   on high-speed chase and the use of force?

17          Mr. Botsford. The most recent case was decided in  
18   April of this year, and it is by the name of Scott v.  
19   Harris. The Supreme Court determined that an officer could  
20   use deadly force to stop a fleeing felon who was in a car  
21   driving in a dangerous manner. That is a follow-up to the  
22   Supreme Court opinion in Graham v. Connor back in 1987 that  
23   talked about the use of deadly force in a seizure.

24          Senator Sessions. Well, you know, this thing strikes  
25   me--you used the phrase "tragedy," and I think that is a

1 good word for it. It is almost Kafka-esque. Event after  
2 event after event broke against the officers to the point  
3 that we have ended up with a judgment that I think is  
4 excessive based on the error that they perhaps undertook and  
5 made. It is just really, really unusual.

6 First of all, 924(c) is designed to deal with criminals  
7 who carry firearms during the commission of felonies and  
8 crimes of violence, and drug offenses specifically. And I  
9 have used it one time against a police chief who sold drugs  
10 out of his car. I charged him with carrying a firearm  
11 during the--selling dope.

12 But this is quite different from that. These officers  
13 came to work with no criminal intent, no mind-set to commit  
14 any crime. Indeed, their mind-set was to enforce the law  
15 and try to create a lawful society. And in the course of  
16 this altercation and the series of events that occurred,  
17 weapons are discharged, and someone is hurt, and we end up  
18 with this extraordinary punishment.

19 Now, I suspect, Madam Chairman and others, that I can  
20 divine some of the thinking that goes on here, and that is  
21 that somebody somewhere concluded that some discipline  
22 needed to be applied to Border Patrol agents, that we cannot  
23 have Border Patrol agents just shooting people right and  
24 left, and that this case is particularly troublesome  
25 probably to the prosecutor because there was an attempt to

1 cover up, apparently, and it was not reported properly  
2 through all the channels. And then to get into those cases-  
3 -and I have been to them. It seems sometimes the  
4 prosecutors get more angry with a law enforcement officer  
5 who asserts all his rights and privileges than he would a  
6 dope dealer because they assume that they would do so. And  
7 it gets to be personal and things, and they ended up with  
8 this kind of sentence. So I am just heartbroken about it  
9 and not really--and I wonder about what we should do.

10 I would suggest, Madam Chairman, that the 924(c)  
11 provisions, as Senator Cornyn and you have suggested are not  
12 appropriate in this instance, is correct. It has been used  
13 in this fashion in my experience for civil rights violations  
14 where the essence of the civil rights violation is to use  
15 the weapon and then charge it again for double the sentence.  
16 It has been used, or at least I recall it being discussed  
17 about arson, the destructive device is one of the weapons  
18 covered by 924(c). And so you double-charge, you get a  
19 double penalty, arson itself and using a dangerous device,  
20 and then you charge them with carrying a dangerous device  
21 during a crime of violence--that is, arson.

22 That is sort of a double-charging event that I would be  
23 prepared to look at and see if we cannot clarify that law.

24 Senator Feinstein. Senator Cornyn and I were just  
25 discussing that. It has been used against a police officer.

1 I found at least one case, U.S. v. Acosta, which involves  
2 two New York police officers. I do not know the date of  
3 that, but I think it is pretty clear, if you read the law,  
4 that it was designed to be used against drug traffickers to  
5 try to encourage the drug trafficker not to carry a weapon.

6 Senator Sessions. Right.

7 Senator Feinstein. And here it is used in a different  
8 way.

9 Senator Sessions. Well said, and I think that is  
10 pretty clearly the intent, and I would support a  
11 clarification.

12 How did it get to be 10 years instead of 5 years under  
13 924(c)?

14 Mr. Botsford. Senator, my memory of the sentencing--

15 Senator Sessions. It says--924(c), was it a 10-year--

16 Mr. Botsford. It was 10 years because the gun was  
17 discharged as opposed to carrying. Carrying a gun is 5  
18 years.

19 Senator Sessions. Right.

20 Mr. Botsford. Discharging is 10, and then where injury  
21 occurs, and if death occurs, it is an even higher mandatory  
22 minimum.

23 Senator Sessions. Right. With regard to the--my time  
24 is up, Madam Chairman.

25 Well, it is an unfortunate series of events. Obviously

1 this became a very intense prosecution, and the dice were  
2 rolled, and it came out all against these officers who  
3 otherwise had been doing fine work, it appears, and I hope  
4 that we can figure out some way to be helpful to them.

5 Senator Feinstein. Thank you very much, Senator.

6 Senator Cornyn?

7 Senator Coburn. Quite a compliment. Thank you.

8 [Laughter.]

9 Senator Feinstein. Excuse me. Senator Coburn.

10 Senator Coburn. Thank you. And, again, let me thank  
11 Senator Feinstein for having this hearing. It is conducted  
12 in the type of format we should. I have a couple of  
13 questions.

14 One, is there anybody on this panel that knows--was  
15 there any pre-existing experience with Compean and his  
16 knowledge of Davila? Did he have any pre-existing knowledge  
17 of this individual or any thought--did he know this person?

18 Mr. Bonner. No.

19 Senator Coburn. There is no knowledge of him at all.

20 Mr. Bonner. No.

21 Senator Coburn. Okay. Deputy Chief Barker, as you sit  
22 back and look at this, we have what we have today, we have  
23 great rules, a great group of people that work for the  
24 Border Patrol. If you were to extract yourself back and  
25 say, "What do we need to change so this does not happen?" is

1    there anything that needs to change? Or is this just an  
2    unfortunate set of circumstances that was brought on by the  
3    Border Patrol agents not carrying out the procedures they  
4    should? Or should something really change?

5           You have to admit there is something that does not  
6    smell right with this case in proportion to the punishment  
7    for what the actions actually were. And so my question to  
8    you: Having had all this experience, what needs to change?  
9    Should we ever experience this again, what needs to be  
10   changed in terms of policy, format, procedure, so that we do  
11   not have this again?

12          Mr. Barker. From the standpoint of policy, I cannot  
13   think of anything that needs to be changed, and I do not  
14   disagree that the penalty is disproportionate. There is no  
15   disagreement there. But the unfortunate thing is the system  
16   that we have, it worked. It stems from decisions that were  
17   made that day. And we have heard about whether this would  
18   have been a 5-day suspension or removal. It cannot be--it  
19   is not as simple as that. It is just not a simple thing of  
20   not reporting an event. It is the seriousness of it. This  
21   person was shot, and there was a requirement to do so. So  
22   from a procedural, from an administrative standpoint, I  
23   cannot see what needs to be changed. These agents are  
24   trained to know the circumstances when they should and  
25   should not use a weapon.

1           Senator Coburn. Well, let me ask you this: It was not  
2 just the two agents that knew guns were fired.

3           Mr. Barker. Correct.

4           Senator Coburn. All right. So everybody knew that was  
5 there that guns were fired. You could hear them.

6           Mr. Barker. Yes, sir. But the sequence of events  
7 brought people there are different times. And some did,  
8 some did not. There was a reference that the supervisors  
9 knew. The supervisors did not know that the weapon was  
10 discharged. And we heard the amount of time that it takes  
11 to report a discharge. It does not take 6 hours. It takes  
12 a memorandum to say that "I fired my weapon," simply. And  
13 if the agent makes an oral reply, it is incumbent upon the  
14 supervisor to make the formal--or to make the written report  
15 because the policy does not require--in fact, it prohibits  
16 the agent from making a written report on a shooting.

17          Senator Coburn. Can you see a plausible explanation--  
18 there is a difference of opinion on the facts. In your  
19 position, could you have seen a plausible explanation that  
20 was proffered by the defendants in this case that that, in  
21 fact, could have been fact and not other than fact, if you  
22 take away the fact that they did not do the reporting as  
23 required?

24          Mr. Barker. If those agents, the minute this occurred,  
25 said, "We thought he was armed," we would not be here today.

1 We would not be here today because, again, we take the word  
2 of agents. That was never said. The fact that they tried--  
3 they did not report it. The fact that they tried to keep it  
4 away from the leadership leads us to believe that there was  
5 something wrong, and there is nothing that has been said so  
6 far that leads us to believe that that is--or leads us to  
7 believe that this was just a simple mission or they did--it  
8 was an accidental shooting.

9 Senator Coburn. Thank you.

10 Senator Feinstein. Thank you very much. This  
11 completes this panel. If I may, I thank you very much for  
12 being present, and we will now turn to the last panel.

13 Senator Sessions. Madam Chairman, could I ask one more  
14 question?

15 Senator Feinstein. Yes, of course.

16 Senator Sessions. So that the bullet that hit the  
17 individual came from Ramos?

18 Mr. Botsford. That is what was stipulated to at trial,  
19 Senator, yes.

20 Senator Sessions. So he heard shooting. Could he tell  
21 who was firing, which one was firing?

22 Mr. Botsford. He testified he believed there was an  
23 exchange of gunfire while he was down in the ditch, but  
24 clearly he didn't know who was firing at whom. He knew that  
25 shots were being exchanged, or at least that is what he

1 thought. He comes out of the ditch, sees Davila running  
2 around, Davila appears to be pointing a gun at him, takes  
3 one shot, as opposed to Compean's 14 shots.

4 Senator Sessions. And Compean did not hit, apparently  
5 did not hit this individual.

6 Senator Feinstein. Senator, would you yield for a  
7 minute?

8 Senator Sessions. Yes.

9 Senator Feinstein. Isn't Compean on the ground at this  
10 point?

11 Mr. Botsford. Yes, Senator, it appears that Compean is  
12 on the ground when Ramos comes out of the ditch. He has  
13 obviously been in an altercation.

14 Senator Feinstein. And so Ramos cannot see what  
15 happened to Compean, if I understand this correctly.

16 Mr. Botsford. That is correct.

17 Senator Sessions. So his brother agent, as far as he  
18 is concerned, is in serious trouble, and a life-and-death  
19 situation is occurring, and he performed what he felt was  
20 the right thing to do, and now somebody has come back in  
21 hindsight and concluded it was not.

22 Mr. Botsford. That is correct, Senator, and I will  
23 point out also that there were at least three other officers  
24 that heard shots that did not orally report them. And by  
25 the time Ramos got back to the north side of the ditch

1 through which he had come through, there were nine officers  
2 there, and his testimony at trial was that he heard a  
3 discussion of the shooting and, therefore, there was no need  
4 for him to orally report that shooting.

5 The duty to report exists for 1 hour. He has got to  
6 report it within an hour orally to a supervisor. But he  
7 believed, quite candidly, that the supervisors on the scene  
8 were well aware of it.

9 Senator Sessions. And there was no dispute that a  
10 physical altercation of some kind occurred.

11 Mr. Botsford. Between Compean and Davila, that is  
12 correct, Senator.

13 Senator Sessions. Thank you.

14 Senator Feinstein. Thank you. And I am sorry, I have  
15 one other question. There was a cell phone found in the  
16 car. Clearly, Mr. Davila had to call someone to have  
17 himself picked up by the side of the road. Is there any  
18 evidence of what time that pick-up was, how long it took  
19 place after the shooting, and whether quite possibly what he  
20 had in his hand could have been the cell phone?

21 Mr. Botsford. Senator, the time sequence is not well  
22 established, but it appears that he was picked up on the  
23 Mexican side of the Rio Grande by one vehicle and then  
24 subsequently a second vehicle within approximately 5 minutes  
25 after he had crossed the river, which would have been

1 approximately 6 to 7 minutes after the altercation there  
2 near the border on the American side.

3 Senator Feinstein. But he had to have called someone  
4 to pick him up.

5 Mr. Botsford. Exactly. And one of the defense's  
6 theories at trial, Senator, was that, in fact, the shiny  
7 thing that Compean thought was a gun could have been a  
8 second cell phone. But we will never know--unless you  
9 believe Davila.

10 Senator Feinstein. Was the cell phone that was in the  
11 van removable from the van?

12 Mr. Botsford. It was, Your Honor--I mean, I am sorry,  
13 Senator, yes. It was. There was also an indication there  
14 had been a second cell phone, one in the van to accompany  
15 the van to the stash house, and one with Davila himself.

16 Senator Feinstein. I see. All right. Which was never  
17 recovered.

18 Mr. Botsford. Correct.

19 Senator Feinstein. Thank you very much. Thank you,  
20 everybody. We appreciate it.

1           Senator Feinstein. Our next panel will be composed or  
2   comprised of U.S. Attorney Sutton and David Aguilar. I will  
3   begin by introducing the United States Attorney, Johnny  
4   Sutton. He is currently serving as United States Attorney  
5   for the Western District of Texas. He serves as the  
6   Chairman of the Attorney General's Advisory Committee of  
7   United States Attorneys, which plays a significant role in  
8   determining and implementing policies and programs within  
9   the United States Department of Justice.

10           Prior to becoming U.S. Attorney, Mr. Sutton was an  
11   Associate Deputy Attorney General for the Department of  
12   Justice in Washington, D.C., and served as the Criminal  
13   Justice Policy Director for then-Governor George W. Bush.  
14   Before his service in the Governor's office, Mr. Sutton  
15   spent 8 years as a criminal trial prosecutor with the Harris  
16   County D.A.'s Office in Texas.

17           David V. Aguilar is Chief of the United States Border  
18   Patrol. He is the Nation's highest-ranking Border Patrol  
19   agent. Chief Aguilar currently directs more than 12,700  
20   Border Patrol agents and is expected to preside over the  
21   largest Federal law enforcement agency in the Nation, with a  
22   total of over 18,000 agents by the end of 2008.

23           Chief Aguilar brings to the job more than 28 years of  
24   distinguished service with the Border Patrol. While Chief  
25   Aguilar was Chief Border Patrol Agent of the Tucson,

1 Arizona, Sector, the sector was recognized with the  
2 Commissioner's aware for antiterrorism operational  
3 achievements.

4 So, if we could, we will begin with Mr. Sutton. Please  
5 proceed. But before you do, I have some statements I would  
6 like to enter into the record: one on behalf of Senator Kyl  
7 and one on behalf of Senator Feingold. Those will be made  
8 part of the record.

9 Please proceed, Mr. Sutton.

1                   STATEMENT OF JOHNNY SUTTON, UNITED STATES  
2                   ATTORNEY, WESTERN DISTRICT OF TEXAS, SAN ANTONIO,  
3                   TEXAS

4           Mr. Sutton. Thank you, Chairman. Chairman Feinstein,  
5   Senator Cornyn, members of the Committee, thank you for this  
6   invitation to discuss the importance of enforcing the law,  
7   even against those who are sworn to uphold the laws and the  
8   Constitution of the United States.

9           The prosecution of Jose Compean and Ignacio Ramos has  
10   been the subject of widespread media attention and heated  
11   debate. The prosecution, however, was not about illegal  
12   immigration or illegal drug smuggling or even support for  
13   agents who patrol our border. It is about upholding the  
14   law, plain and simple, a duty which our Nation's Federal  
15   prosecutors take very, very seriously. The overwhelming  
16   majority of Federal agents and police officers represent the  
17   best of America, and they show it every day through their  
18   bravery, their dedication, and their self-sacrifice. But  
19   experience has shown us that occasionally some law  
20   enforcement officers step over the line and commit crimes.  
21   When lawmen break the law, we must hold them to account.

22           There has also been some debate--brought on in part by  
23   this case--about enforcing gun laws that have been passed by  
24   Congress. The fact is that it is a crime to discharge a  
25   firearm during a crime of violence, and we will continue to

1 bring those charges where the law and the evidence warrant.

2 While these convictions are currently pending on  
3 appeal, I would still like to try to set the record straight  
4 by discussing the facts that are in the public record.

5 The facts of what occurred near Fabens, Texas, on  
6 February 17, 2005, can be found in the trial record, the  
7 transcript of which I have posted on the website of the U.S.  
8 Attorney's Office for the Western District of Texas. In  
9 short, the evidence proved that former Border Patrol agents  
10 Compean and Ramos fired 15 shots at an unarmed Mexican  
11 marijuana smuggler as he ran away from them towards the Rio  
12 Grande River. After striking him once and seriously  
13 injuring him, they holstered their weapons and turned and  
14 walked away, leaving him where he fell. Compean disposed of  
15 some of the empty shell casings, destroying evidence of the  
16 shooting, while another agent later assisted by picking up  
17 the shell casings that he had missed.

18 To further this cover-up, Compean and Ramos failed to  
19 report their shooting as required and then filed a false  
20 report. Their actions after the shooting show that they  
21 knew that the shooting was illegal and destroyed the  
22 credibility of their later claims that the drug smuggler  
23 appeared to have a weapon as he ran away. The jury that  
24 heard their testimony at trial rejected their belated  
25 justifications.

1           To excuse their crimes, they have since claimed that  
2   they were only doing their jobs. But the job of United  
3   States Border Patrol agents is to protect the American  
4   people and to enforce the laws of our country, not commit  
5   crimes such as assault, obstruction of justice, and  
6   violation of civil rights.

7           I do not take lightly the decision to prosecute law  
8   enforcement agents for using a gun. By design, the law  
9   gives great deference to agents, recognizing that they must  
10   often make split-second decisions, life-and-death decisions  
11   under great stress. As a general rule, if an agent has any  
12   reasonable basis for fearing for his immediate safety or the  
13   safety of another, use of deadly force is justified. During  
14   approximately the last 6 years, there have been at least 14  
15   reported shootings by Border Patrol agents in the El Paso  
16   Sector. In three of these shootings, the agents killed the  
17   suspects. In each of those shootings, the Border Patrol  
18   agent was cleared and the shooting was ruled justified.  
19   None of these agents were prosecuted or even disciplined  
20   because their actions were reasonable under the  
21   circumstances.

22           However, agents having no reasonable fear of imminent  
23   harm who intentionally shoot at an unarmed, fleeing suspect  
24   and then cover up the shooting should be prosecuted.  
25   Requiring law enforcement officers to obey the law is not

1 unreasonable and is not a deterrent to the use of deadly  
2 force when lives are at risk.

3 I know that we demand a lot of our Border Patrol  
4 agents. They have difficult jobs. They work in harsh  
5 conditions, in isolated areas, and they encounter dangerous  
6 people, some of them who will not hesitate to harm them. I  
7 admire Border Patrol agents, and I have said on many  
8 occasions in recent months that I believe that they are  
9 American heroes. But the sad fact is that a small  
10 percentage of law enforcement agents, including some Border  
11 Patrol agents, cross the line. Agents Compean and Ramos  
12 crossed the line. They are not heroes. They deliberately  
13 shot an unarmed man in the back without justification,  
14 destroyed evidence to cover it up, and lied about it. These  
15 are serious crimes. When Border Patrol agents commit  
16 crimes, as the jury believed Compean and Ramos did,  
17 faithfulness to the rule of law requires us to bring them to  
18 justice.

19 I really thank you all for the opportunity to testify,  
20 and I look forward to answering your questions.

21 [The prepared statement of Mr. Sutton follows:]

- 1 Senator Feinstein. Thank you, Mr. Sutton.
- 2 Chief Aguilar?

1           STATEMENT OF DAVID V. AGUILAR, CHIEF, OFFICE OF  
2           BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION,  
3           U.S. DEPARTMENT OF HOMELAND SECURITY, WASHINGTON,  
4           D.C.

5           Chief Aguilar. Good morning, Chairwoman Feinstein,  
6           Senator Cornyn, Senator Sessions, and Senator Coburn has  
7           just walked out. I thank the Committee for holding this  
8           hearing, which provides us the opportunity to answer your  
9           questions, and more importantly, to clarify some of the  
10          issues relating to the Ramos-Compean case, which has caused  
11          a tremendous amount of emotional stress for our country, our  
12          organization, the Department, and ultimately, our country's  
13          criminal justice system.

14          It is important for me to begin this testimony by  
15          acknowledging the outstanding work the men and women of the  
16          United States Border Patrol are doing for this country on a  
17          daily basis. The men and women of our organization face  
18          tremendous challenges, dangers, and harsh environments every  
19          day. Last year our agents arrested over 1.1 million illegal  
20          aliens. Over 150,000 of these had criminal records. Over  
21          90,000 were other than Mexicans attempting to enter this  
22          country illegally. And all of these arrests were between  
23          official ports of entry. In addition, our agents  
24          interdicted over 1.3 million pounds of narcotics coming into  
25          this country and kept it from reaching our streets, our

1 schools, and our communities. There is work yet to be done  
2 to gain control of our Nation's rough and remote borders,  
3 but I am proud to say that the commitment of the men and  
4 women of the United States Border Patrol to continue  
5 expanding our efforts and making this country safer is  
6 extremely high and at a level of dedication that this  
7 country can be proud of. And I am personally proud of them  
8 and the difficult job that they do. The attitude,  
9 fortitude, diligence, and desire of the men and women of the  
10 United States Border Patrol, along with the resources and  
11 support that is being furnished by Congress, will provide  
12 for operational control of our Nation's borders.

13       Unfortunately, a developing trend, as we expand our  
14 control of the border, is a dramatic increase in border  
15 violence against our agents. We have experienced a dramatic  
16 and increasing trend of violence against our officers. I  
17 attribute this increase in violence to the fact that the  
18 Border Patrol's achievements in gaining greater control and  
19 expanded control of our borders has resulted in greater  
20 reluctance of entrenched criminal organizations to give up  
21 areas in which they have historically operated in the past.  
22 They have a reluctance to give up areas where they have  
23 established them and re-established themselves in reaction  
24 to our increased enforcement efforts.

25       Border violence incidents are perpetrated against our

1 agents on an all too frequent basis. In just the first 4  
2 days of last week during the time period of July 8th to July  
3 12th, there were a total of 11 assaults against our  
4 officers: two rockings, two shootings, one where our  
5 officer returned fire, one vehicular assault, and five  
6 assaults where our officers were physically injured.

7 When assaulted or threatened, our officers are trained  
8 to respond with the appropriate level of force required to  
9 stop the threat or the assault. Officer safety is of  
10 paramount concern, and this is a main focus of our training  
11 at the Border Patrol Academy and in our field training  
12 programs. In all cases, our agents must be able to justify  
13 that such actions were taken in defense of themselves, a  
14 partner, or an innocent third party. Following an incident,  
15 there are clear and delineated protocols that must be  
16 followed when our agents use force to stop or deter an  
17 assault, whether it is deadly force or less lethal force.  
18 These actions must be taken to preserve evidence, including  
19 the scene of the incident. These protocols must be followed  
20 for many reasons, to include protection of the officer.

21 From February 1, 2005, through June 30, 2007, there  
22 have been 1,982 incidents where Border Patrol Agents have  
23 been assaulted. These assaults include rockings, physical  
24 assaults, vehicular assaults, as well as shootings and  
25 assaults with other weapons.

1           In response to these assaults, Border Patrol agents  
2   have responded with the use of deadly force on 116  
3   occasions, with 144 agents discharging their weapons during  
4   these 116 incidents. These incidents that I outline are  
5   exclusive of the Compean-Ramos or the Corbett case that is  
6   ongoing now. Thirteen assailants died as a result of agents  
7   having to defend themselves through the use of deadly force;  
8   15 incidents ended with the assailants being wounded. Of  
9   the 144 agents involved in the 116 shooting incidents since  
10   February 2005, investigations were conducted, internally as  
11   well as by independent agencies, and not a single agent has  
12   been criminally prosecuted for their actions during these  
13   incidents.

14           The job of our agents is not an easy one. It requires  
15   our agents to operate under very stressful and sometimes  
16   very dangerous conditions. That is the reason why our  
17   officers are trained and equipped to the degree that they  
18   are. The foundational training at the Border Patrol Academy  
19   and recurring in-service firearms training, firearms  
20   qualifications, and the "use of force continuum model" are  
21   instrumental in ensuring that when our officers take action,  
22   at any threat level, they revert to their training and do so  
23   based on this enforcement model. Under threat conditions,  
24   our officers are required to make split-second decisions to  
25   diminish or stop the threat. These decisions are based on

1 their perception of the conditions they face. They are  
2 trained to then follow through with protocols, policies, and  
3 guidelines relative to each of the actions that they take.

4 Madam Chairwoman, I want to make myself absolutely  
5 clear on the following: I am in no way condoning,  
6 supporting, or siding with Aldrete Davila, the smuggler of  
7 narcotics into this country, the individual that made a  
8 conscious decision to break our laws. Aldrete Davila is a  
9 poster child for why United States Border Patrol agents and  
10 law enforcement officers throughout this country risk their  
11 lives every day--to protect our Nation and the American  
12 people from criminals like him. Our men and women protect  
13 our families, our society, and our way of life from  
14 individuals like Aldrete Davila. Perhaps that is one of the  
15 reasons why this case has caused such havoc. As Americans  
16 we expect to see individuals like Aldrete Davila behind  
17 bars.

18 Those of us in the law enforcement profession must  
19 strive to remain apolitical. Our job is to uphold and  
20 enforce the law. Sometimes these duties may not be popular,  
21 but our society and our justice system demand certain levels  
22 of neutrality and impartiality from its law enforcement  
23 officers.

24 The Border Patrol's mission is a difficult one, which  
25 is subject to intense public scrutiny. Much is asked of us

1 as Federal law enforcement officers. I am immensely proud  
2 of the men and women of the Border Patrol. I have and  
3 always will support each and every agent who performs his or  
4 her duties in accordance with the high standards that we  
5 have always sought to uphold.

6 Chairwoman Feinstein, other members, this is an  
7 emotional and heart-wrenching case. This is a case where  
8 every Border Patrol agent that serves today and has ever  
9 served wishes had not turned out the way that it did.  
10 However, the facts of the case, the facts of the matter are  
11 that this incident did happen, an allegation was made, an  
12 investigation was initiated, the investigating agency's  
13 findings were presented to the United States Attorney's  
14 Office, the United States Attorney's Office presented the  
15 evidence to a grand jury, the grand jury indicted, the case  
16 was tried in a court of law, a jury found the defendants  
17 guilty, and they were sentenced by the judge. All of these  
18 independent components of our justice system performed their  
19 duty; they upheld their sworn obligations independent of  
20 each other. All of the players in this case had an  
21 obligation to carry out their duty, as they were sworn to  
22 do, trained to do, and responsible for doing.

23 I thank you for this opportunity, and I look forward to  
24 answering any questions that you may have of me. Thank you.

25 [The prepared statement of Chief Aguilar follows:]

1           Senator Feinstein. Thank you very much.

2           If I understand the charging, Mr. Sutton, correctly, I  
3 would like to go through it. Count 1 was assault with  
4 intent to commit murder and aiding and abetting. Count 2  
5 was assault with a dangerous weapon and aiding and abetting.  
6 Count 3, assault with serious bodily injury and aiding and  
7 abetting. Count 4, discharge of a firearm in relation to a  
8 crime of violence. Count 5, use of a firearm in relation to  
9 a crime of violence. Then there are five counts--Count 6 to  
10 Count 10--of tampering with an official proceeding, of which  
11 two were dismissed. And then Count 11, deprivation of  
12 rights under color of law; and Count 12, deprivation of  
13 rights under color of law. A total of four counts was  
14 dismissed. The defendants were found not guilty of the  
15 strongest of those--assault with intent to commit murder and  
16 aiding and abetting. And then either one or the other or  
17 both were given sentences on the others, as I understand it.  
18 Is that correct??

19           Mr. Sutton. Yes, ma'am.

20           Senator Feinstein. Now, the reason they received such  
21 long sentences is because they were charged with 924(c),  
22 which carries a 7-year minimum for brandishing a firearm in  
23 connection with a crime of violence and a 10-year minimum if  
24 the firearm is discharged.

25           Now, I think both Senator Cornyn and I have problems

1 with this law because in my reading of it, it presupposes an  
2 underlying crime, whereas this is the underlying crime. And  
3 I think there is a difference.

4 Let me begin with this question: How many charges were  
5 pending when you charged 924(c)?

6 Mr. Sutton. I believe three.

7 Senator Feinstein. Three. And why did you decide to  
8 charge 924(c)?

9 Mr. Sutton. Because--let me back up. Can I back up  
10 for a second and explain those? The original three charges--  
11 --or it may have been four--

12 Senator Feinstein. 1, 2, and 3.

13 Mr. Sutton. --were a place holder to do an indictment.  
14 The time, the clock starts running on us once we arrest  
15 somebody, so we did an initial indictment. I believe it was  
16 three assault counts. The trial team got the case. They  
17 began to review it. They began to investigate it. And it  
18 is not uncommon at all for them to put on further  
19 indictments, which is what they did. They put on the  
20 924(c), and the reason for that, it was an obvious--

21 Senator Feinstein. Did they consult with you before  
22 they put on 924(c)? Answer yes or no.

23 Mr. Sutton. The answer is no, they did not. We have a  
24 deliberative process that goes on inside our office that I  
25 can describe, but the answer is no.

1           Senator Feinstein. So someone can charge in your  
2 office a 10-year mandatory minimum without consulting with  
3 the U.S. Attorney in charge?

4           Mr. Sutton. Yes, ma'am.

5           Senator Feinstein. Was there any consultation by  
6 anyone with Main Justice?

7           Mr. Sutton. No, ma'am.

8           Senator Feinstein. At any time during this case--

9           Mr. Sutton. Yes, ma'am.

10          Senator Feinstein. --on the charging, there was no--

11          Mr. Sutton. Nothing with regard to the 924(c). The  
12 only consultation that is required, and in this case it is  
13 just a consultation requirement with regard to the two civil  
14 rights charges, but no consultation requirement with regard  
15 to anything else.

16          If I could maybe just take a brief second, if I can, to  
17 explain the interoffice procedure. This came out of the El  
18 Paso Division. My district covers 93,000 square miles. We  
19 have seven divisions. The chief of that El Paso division  
20 reviews that indictment, so the trial prosecutors decide  
21 what the facts and the evidence are, they present the  
22 indictment to their chief, and then she approves or  
23 disapproves that indictment. That was the initial--

24          Senator Feinstein. It is just that it is rather  
25 strange. We have just been through U.S. Attorney hearings

1 where Main Justice got involved in a lot of things, and yet  
2 here in the charging of something that is very unusual, Main  
3 Justice does not know anything about it.

4 Mr. Sutton. Well, since I have been U.S. Attorney, we  
5 have prosecuted 33,000 defendants for felonies. We are one  
6 of the highest-producing districts--

7 Senator Feinstein. How many times has 924(c) been  
8 charged?

9 Mr. Sutton. A great number of times.

10 Senator Feinstein. A great number of times?

11 Mr. Sutton. Obviously a small percentage of that  
12 33,000, because that 33,000 is basically 85 or 90 percent  
13 drugs and immigration because that is what we do. But we  
14 have charged it on a number of occasions. We charge the  
15 most serious, readily provable offense based on the facts  
16 and the evidence.

17 Senator Feinstein. All right. Now, it has been  
18 written that Ramos and Compean were offered plea bargains  
19 approximately eight times. The last offer was for 1 year in  
20 prison and reimbursement to the Governor for \$35,000 in  
21 medical bills for the treatment of the drug smuggler. True  
22 or false?

23 Mr. Sutton. We do not discuss plea bargain  
24 negotiations. The reason we do that is to protect the  
25 defendant's rights and future defendants in the future who

1 are going to come and say, Look, I need to have this  
2 confidential, these discussions. So I cannot talk about  
3 those things.

4 What I would like to point out, though--and I think it  
5 is important because--

6 Senator Feinstein. Well, I have not finished my  
7 question.

8 Mr. Sutton. I am sorry.

9 Senator Feinstein. In addition, Mary Stillinger,  
10 Ramos' lawyer, told my staff that the final plea bargain  
11 offer was 18 months for Agent Ramos and 24 months for Agent  
12 Compean, but that it was a package deal. Is this true?

13 Mr. Sutton. I cannot--I do not know the answer to  
14 that, and we do not discuss plea bargain offers. Those--

15 Senator Feinstein. Do you deny that plea bargains were  
16 offered?

17 Mr. Sutton. Oh, not at all. We certainly plea  
18 bargained--or attempted to plea bargain in this case. We  
19 were very much--

20 Senator Feinstein. And how many plea bargain offers  
21 were made?

22 Mr. Sutton. I would have to consult with the trial  
23 team. I can that the part I was involved in the plea  
24 bargaining, we were definitely very interested in plea  
25 bargaining. We are in 95 percent, maybe more, of our cases

1 work out in plea bargaining. That is standard operating  
2 procedure, and plea bargains were certainly offered in this  
3 case.

4 I guess the point, if I could make it, is that no plea  
5 bargain offers were made before the 924(c) was put on.  
6 There has been an inference that we made a plea bargain  
7 offer and they did not take it and so we said, okay, we are  
8 going to whack you with this 924(c). That is not correct.

9 Senator Feinstein. So 924(c) was added to the list of  
10 counts prior to any plea bargain being offered?

11 Mr. Sutton. That is my understanding from the trial  
12 team.

13 Senator Feinstein. Did the defendants understand that  
14 there was a mandatory minimum in 924(c)?

15 Mr. Sutton. They had four very aggressive, competent  
16 lawyers. I am sure that they were told at the time when  
17 they rejected any plea bargains that if they went to trial  
18 and lost, that that 10-year mandatory minimum would come  
19 dropping on top of whatever other sentence they got. I  
20 wasn't in those discussions, obviously, but I know these  
21 lawyers are very thorough, and I cannot imagine that the  
22 defendants would not have known that if they went to trial  
23 and lost that that 10-year sentence was coming down on them.

24 Senator Feinstein. I wanted to ask you one other  
25 question. We have also learned that Mr. Aldrete Davila re-

1 entered the United States on at least ten other occasions  
2 between March and November of 2005 and that the  
3 documentation provided by the Federal Government allowed him  
4 to cross the border legally at any time without notifying  
5 anyone in the Government ahead of time and without any  
6 Government supervision while in-country.

7 My question is: Is that right? Was he allowed to  
8 enter the U.S. without supervision? Wasn't he required to  
9 notify anyone when he came across the border?

10 Mr. Sutton. What happened in this case--and it is the  
11 standard procedure in all cases. As you can imagine, a huge  
12 percentage of our cases are made with cooperative witnesses.  
13 We are generally trying to go into cartels. We will arrest  
14 the mule, flip them, arrest the stash house, flip them, and  
15 then move up towards the cartel. So, often, we will deal  
16 with witnesses who are part of the crime organization or at  
17 least not legally allowable in this country.

18 When we need a witness, we tell our agent, our case  
19 agent, that we need a witness, and then that case agent goes  
20 to the CBP, you know, Customs people, to get the kind of  
21 border crossing that they need. That is something that is  
22 handled by that agency. They are in charge of those  
23 witnesses, just like they would be in charge of a  
24 confidential informant. And that was done in this case.

25 Senator Feinstein. Yes, but you were not going after

1     cartels in this case. You were going after Border Patrol  
2     agents.

3             Mr. Sutton. That is correct.

4             Senator Feinstein. So the bad guy was suddenly your  
5     good guy, and I have a hard time that you know somebody is  
6     trafficking in large amounts of narcotics, large amounts,  
7     and yet he is free to come and go from the United States.

8             Mr. Sutton. It is very regrettable. I mean, I would  
9     love to be sitting here--under normal procedure, Aldrete  
10    would be locked up like we lock up all these other mules.  
11    We led the Nation last year in drug prosecutions. We are  
12    number one in going after people like Aldrete--dope dealers,  
13    bad guys. Unfortunately, the only reason that we are here  
14    today is because those two agents, Compean and Ramos,  
15    committed a number of serious crimes, and they are the ones  
16    that brought us to this point.

17            I was faced and my team was faced with a terrible  
18    dilemma, which is we had a known drug smuggler on the other  
19    side of the border in Mexico with no possible way to prove a  
20    case, and I beg to differ with Mr. Botsford. If we charged  
21    Aldrete with a crime, Mr. Botsford would be the first one to  
22    run into court and say, "You have absolutely no evidence  
23    against this guy. You have no case. There is not one shred  
24    of evidence connecting him."

25            Senator Feinstein. But just a second. Agent Compean

1 is on the ground. Ramos is in a place where he cannot see  
2 him on the ground. Shots have been fired. I would think  
3 Agent Ramos does not know whether Compean is shot or not.  
4 And he fires his weapon to a fleeing suspect after he has  
5 said "Stop" at least twice that I read. And there is no  
6 extenuating circumstance in that set of circumstances?

7 Mr. Sutton. No, and that is one of the unfortunate  
8 dilemmas of this case, is that the misinformation or the big  
9 lie has been told over and over and over again, and that is  
10 that--

11 Senator Feinstein. Are you saying Agent Compean was  
12 not on the ground?

13 Mr. Sutton. Yes. He was not on the ground. And that  
14 is the difficulty in having a discussion like this, is that  
15 we had a 2-1/2-week jury trial, all these people testified,  
16 including Agents Compean and Ramos. There was another  
17 Border Patrol agent who was standing right there at the--  
18 standing with Agent Ramos on the ditch. He testified at  
19 trial. He observed the entire confrontation. He observed  
20 Agent Compean go over the levee. He testified at trial  
21 under oath that there was--that Agent Compean never even  
22 touched Aldrete, their bodies never even touched, that  
23 Aldrete--that Compean tried to strike Aldrete in the head  
24 with a shotgun. Aldrete ducked. Compean fell head first  
25 into a ditch, and then Aldrete takes off like a rabbit over

1 the levee. And he--

2 Senator Feinstein. You are saying Compean falls into  
3 the ditch. The ditch was 11 feet deep.

4 Mr. Sutton. Right. He fell straight head first down  
5 into that ditch. Aldrete, the drug smuggler--

6 Senator Feinstein. So he was on the ground.

7 Mr. Sutton. He was on the ground, but what Mr.  
8 Botsford was talking about is what Compean testified at  
9 trial. Compean's testimony was that he took a header into  
10 the ditch, was able to get up, run back up the ditch, catch  
11 Aldrete, wrestle with him. He fell to the ground. That is  
12 absolutely false.

13 Senator Feinstein. Who fell to the ground?

14 Mr. Sutton. Compean.

15 Senator Feinstein. Okay.

16 Mr. Sutton. But what the agent at the scene saw was  
17 Compean fall, the smuggler take off like a rabbit over the  
18 levee, and said he was halfway to Mexico by the time Compean  
19 got over the levee, and then never went to the ground,  
20 lowered--you know, got in a position to shoot and shot a  
21 number of times at the drug smuggler as he is running away.  
22 Never fell down. Their bodies never even touched. And that  
23 is the difficulty of explaining this in a very short amount  
24 of time, is we had a full-blown, 2-1/2-week jury trial where  
25 all these people testified, all the agents at the scene.

1 Many of them were involved in the conspiracy to cover this  
2 up. And the evidence was overwhelming against these two--  
3 against Compean and Ramos.

4 And the biggest, most damning piece of evidence is if--  
5 you know, Mr. Bonner says, well, of course he was armed.  
6 That is just not true. The jury heard all the evidence.  
7 All the evidence pointed the other way, just like Chief  
8 Barker said. If that drug smuggler/illegal alien was armed,  
9 there is no jury in America, or grand jury, that is going to  
10 indict those two agents for what they did. They have a  
11 perfect right to kill him dead.

12 Senator Feinstein. Did the jury know that this 924(c)  
13 carried a 10-year minimum sentence to be added on top of the  
14 others?

15 Mr. Sutton. No, ma'am.

16 Senator Feinstein. Thank you.

17 Senator Cornyn?

18 Senator Cornyn. Mr. Sutton, I do not want to retry the  
19 jury trial, but I do want to ask you about what you knew and  
20 your involvement in this case. You did not try this case,  
21 correct?

22 Mr. Sutton. No, I did not.

23 Senator Cornyn. It was your staff or deputies who did  
24 that?

25 Mr. Sutton. Yes, sir.

1           Senator Cornyn. And was it your staff that made the  
2 decision to offer the drug dealer immunity?

3           Mr. Sutton. Yes, sir. There is a level--there is a  
4 variety of approvals on that.

5           Senator Cornyn. Did you have to approve that?

6           Mr. Sutton. I did not have to approve that.

7           Senator Cornyn. And was that Debra Kanof or is Debra  
8 Kanof one of your deputies?

9           Mr. Sutton. The trial team was Debra Kanof and Jose  
10 Luis Gonzalez.

11          Senator Cornyn. And while the letter--it is called  
12 "Letter of Limited Use Immunity," which is March 16, 2005--  
13 suggests that this was, as it says, limited use immunity, it  
14 is a fact, is it not, that on page 51 of Volume 1 of the  
15 statement of facts, that Debra Kanof tells the court, "And  
16 so we basically gave him blanket immunity for any drug or  
17 immigration crime that he might have been committing on that  
18 day." Is that correct?

19          Mr. Sutton. Yes, sir.

20          Senator Cornyn. So this drug dealer got blanket  
21 immunity, and I want to ask you a little bit about the  
22 terms, even of the limited use immunity, which--the letter  
23 that was signed, I think Mr. Botsford alluded to this  
24 earlier, by J. Brandy Gardes. Is that correct?

25          Mr. Sutton. Yes, sir.

1           Senator Cornyn. Assistant U.S. Attorney. That letter  
2 of immunity required Mr. Aldrete Davila to testify  
3 truthfully and completely. It said that he must neither  
4 attempt to protect any person or entity nor falsely  
5 implicate any person or entity. And it said,  
6 "Notwithstanding this agreement, testimony given you under  
7 oath may be used against you in prosecution for perjury."

8           How common is it in your experience, Mr. Sutton--and I  
9 know you are an experienced prosecutor--to give blanket  
10 immunity to a person who has committed a crime without  
11 requiring them to plead guilty to at least some lesser  
12 offense?

13          Mr. Sutton. It is not uncommon at all on the border.  
14 Many of the cases that we make, we are put in the dilemma of  
15 the evidence that we have, we are trying to get inside a  
16 cartel to go up the chain and knock down the biggest members  
17 of it. So oftentimes we are faced with having to make deals  
18 with other people. Usually we try to get a plea. That is  
19 certainly our preference, is to put the lower fish in prison  
20 and then flip them to go against the bigger fish. But it is  
21 not unusual, I believe, in our experience to give it.

22          I mean, obviously we do not give it every day. You  
23 hate--a prosecutor hates to give immunity because you are  
24 giving up something. In this case, I felt we gave up very  
25 little because we did not have a case against Aldrete.

1     There was no way that we could have made a case against him  
2     on the facts that we had.

3             We gave him use immunity. What it actually ended up  
4     being was transactional--it is called "transactional  
5     immunity." When Debra describes that as "blanket immunity,"  
6     it means that on that day for that load where he got shot,  
7     we cannot prosecute him for that crime. But we can  
8     prosecute him for any other crime that happened before or  
9     after that day.

10            Senator Cornyn. Why didn't you revoke his immunity  
11     when he testified--refused to cooperate and provide the  
12     names of other witnesses and other individuals during the  
13     course of the trial?

14            Mr. Sutton. I believe it was the opinion of the trial  
15     team that he was cooperative, that he was helping and being  
16     honest as best he could.

17            Senator Cornyn. When requested to identify other  
18     individuals in his activities, he refused to provide that  
19     information, did he not?

20            Senator Feinstein. The people who picked him up.

21            Senator Cornyn. The people who picked him up, Senator  
22     Feinstein reminds me.

23            Mr. Sutton. I would have to look at--you know, I want  
24     to be exactly right on the details. What I believe happened  
25     is Aldrete, the smuggler, illegal alien smuggler, pointed

1 out to law enforcement that these threats--or there were  
2 threats being made. So that came from him. The agent then  
3 put out a nationwide report to all Border Patrol to be  
4 careful because of this. I believe from the opinion of the  
5 agent and the opinion of--

6 Senator Cornyn. That had to do with the issue of  
7 whether there was going to be some retribution against  
8 Border Patrol agents because of this shooting, right?

9 Mr. Sutton. That was to protect--that was to put a  
10 warning to the line to make sure that the line knew to be  
11 careful because this threat had gone out that this--that the  
12 smuggler, our witness, was saying there is talk on the  
13 Mexican side of retaliation.

14 Senator Cornyn. But then Aldrete Davila, when asked  
15 who were those individuals who threatened to retaliate  
16 against Border Patrol agents, he refused to tell and  
17 violated his immunity, didn't he?

18 Mr. Sutton. To be exactly honest on that, I believe  
19 that he did--refused to say or did not know. He probably--I  
20 would double-check that, and I will get back to you. I  
21 believe he did refuse. But in the opinion of the agent and  
22 the trial team, that was not in violation of the agreement.  
23 Remember, at that point we were faced with two agents who  
24 had shot somebody and covered it up, and a mule who was on  
25 the Mexican side where we had no evidence to make a case on

1 him. And he is not coming back to America to help us, so we  
2 can either let these agents just slide on by and nothing  
3 happens to them, or we can make that unfortunate choice to  
4 give him immunity to bring him back to find out what the  
5 details are. And we made that choice.

6 Senator Cornyn. And Mr. Aldrete Davila also gave  
7 testimony at the time of trial that conflicted with that of  
8 Rene Sanchez.

9 Mr. Sutton. That is correct.

10 Senator Cornyn. And do you believe Aldrete Davila over  
11 a law enforcement officer of the United States?

12 Mr. Sutton. You know, I was not in the courtroom to  
13 observe those two witnesses testify. I do not know either  
14 one of those men. What I can say is we had a 2-1/2-week  
15 jury trial where everyone testified, including agents that  
16 were involved in the conspiracy. And all the evidence came  
17 forth, the very damning evidence on Compean and Ramos. And  
18 in my opinion, there was a million things--I know we do not  
19 have time to go into them, but the fact that they covered up  
20 this shooting was just insurmountable.

21 Senator Cornyn. Well, I understand that, but my  
22 question has to do with whether this drug dealer was held to  
23 the terms of his immunity agreement to testify truthfully  
24 and completely and to not attempt to protect any other  
25 person. And it seems to me that the record is pretty clear

1     that he violated that in those two respects, and perhaps  
2     others.

3             I know time is limited. Let me ask you one other  
4     question, if I may, about the visa that this drug dealer was  
5     given. Were you involved in the decision to give him an  
6     unlimited parole visa based on humanitarian concerns?

7             Mr. Sutton. No, sir.

8             Senator Cornyn. That was made by somebody below you?

9             Mr. Sutton. It was, but, you know, I am certainly--you  
10    know, I am defending--and I think our decisions in all this  
11    case--I mean, you can criticize some. I stand--

12            Senator Cornyn. I understand your--

13            Mr. Sutton. I stand by my people. I have done it very  
14    publicly. I--

15            Senator Cornyn. I understand your role here. You did  
16    not make a lot of these decisions. They were not brought to  
17    you, but you are here defending your people, as you put it.

18            Mr. Sutton. Well, and again, I do not want to give the  
19    wrong impression. This was a big case. I was very much  
20    involved in this case. It was very important to me. I knew  
21    it was a tough case, especially with regard to plea  
22    bargains. I was very much involved in that.

23            The procedure in this case and in every other case is  
24    when we need a witness, we tell the agent, "We need this  
25    witness"--for medical treatment, for debriefing. They go

1 get them. They have a procedure that is set in place by CBP  
2 that makes those evaluations.

3 Senator Cornyn. I understand that. But the trial  
4 transcripts show that there were no practical conditions  
5 placed on Davila's visa that prevented him from entering the  
6 country basically any time during the period of that visa  
7 for whatever reason he wanted to come and go. Is that  
8 correct?

9 Mr. Sutton. I believe that is correct. Now, up until  
10 the time, obviously, there was an allegation made that he  
11 might have been involved in some other criminal activity,  
12 the minute that happened, obviously his card got pulled.

13 Senator Cornyn. You say you could not prove that he  
14 was--you could not convict him of a crime of drug dealing,  
15 but you knew with all--I mean, in all--maybe you could not  
16 have proved it in a court of law--that this guy was a drug  
17 dealer, right?

18 Mr. Sutton. You are talking about--obviously, he  
19 testified in court that he was a drug dealer. He had a--I  
20 mean, once we got him immunized and brought him back, pulled  
21 the bullet out of his leg and matched it to Ramos' gun, you  
22 know, then we got him to the scene, and once he admitted to  
23 us that that was him who got shot, obviously he is a doper  
24 and--

25 Senator Cornyn. But your staff knew at the time that

1    they approved the issuance of a humanitarian visa that  
2    allowed him to travel back and forth unfettered before the  
3    trial that this guy was a drug dealer.

4           Mr. Sutton.   Yes, sir.

5           Senator Cornyn.   And does it concern you that--does  
6    that decision concern you?   Do you agree with that decision?

7           Mr. Sutton.   I think looking back on that with 20/20  
8    hindsight that probably was not a very wise move, obviously.  
9    I guess to give you a little fuller explanation, we  
10   prosecute about 6,000 defendants a year.   About half of them  
11   come out of El Paso.   I have got 31 lawyers that have the  
12   largest caseloads in the world for Federal prosecution, and  
13   they are moving fast, and the resources we have are great.  
14   We have been given a lot of good resources.   But we are  
15   moving fast, and we need witnesses, and we tell our agents,  
16   "Go get those witnesses."   And we do not have an agent who  
17   can sit on every witness that we bring across that border  
18   and say, you know, you are coming across with an agent.   And  
19   if we want to do that, I mean, we will need about 20,000 new  
20   agents in El Paso.

21          Senator Cornyn.   Mr. Sutton, I know you guys are  
22   working hard, and I know you got a lot of cases and you are  
23   understaffed, and I wish Congress would do more to help and  
24   to give you the resources and staff necessary to handle the  
25   incredible demands that are placed on law enforcement

1 personnel. I feel the same way about Chief Aguilar. And we  
2 have not done our job here in Congress to provide the Border  
3 Patrol with an adequate number of boots on the ground and  
4 resources to secure our border. That is the reason why  
5 people are very upset across the country, in Texas and  
6 elsewhere, not because you guys, Chief, are failing to do  
7 your job. It is that Congress has not done its job. And we  
8 have got to step up.

9 But my last question, Mr. Sutton, for this round has to  
10 do with the fact that during the time that Mr. Aldrete  
11 Davila was traveling back and forth unfettered based on a  
12 humanitarian visa approved by your subordinates, there is,  
13 Madam Chairman, a public document that is a report of an  
14 investigation by the Drug Enforcement Administration that  
15 documents a Cipriano Ortiz statement that Mr. Aldrete Davila  
16 transported another marijuana load to his house on October  
17 22, 2005. I would ask, Madam Chairman, that that report be  
18 made a part of the record.

19 Senator Feinstein. So ordered.

20 Senator Cornyn. And so I guess I would just ask:  
21 Knowing what you know now, Mr. Sutton, was it a mistake for  
22 your subordinate to approve this humanitarian visa without  
23 conditions, unescorted, unfettered, and to facilitate, in  
24 essence, inadvertently perhaps but to facilitate a drug  
25 dealer from transporting additional loads of drugs into the

1 United States?

2 Mr. Sutton. Well, just to clarify, what you are  
3 talking about is what has come to be known as the "October  
4 load." It is the allegation that was made at trial that  
5 Aldrete, the drug smuggler, ran another load of dope between  
6 when he got shot and when the trial happened. There has  
7 been a lot said today that is wrong, and that is that  
8 somehow that was covered up or somehow that the judge or the  
9 defense attorneys did not know about that.

10 All of that information was presented to the judge.  
11 She knew about that. The defense attorneys were very  
12 anxious to get that into evidence to cross-examine the  
13 smuggler on it. We argued about it. The judge ruled that  
14 it was inadmissible. Obviously, that decision will be a big  
15 part of David's appeal, and the Fifth Circuit will decide if  
16 that was an error or not. But I guess that is under  
17 investigation. It is hard to imagine that there is anybody  
18 in America that would want to prosecute that case more than  
19 me. But I am bound by the law and the facts.

20 Senator Cornyn. But knowing what you know now, do you  
21 agree it was a mistake to issue a humanitarian visa to a  
22 known drug dealer without escort, without conditions, that  
23 facilitate, perhaps unintentionally but apparently did  
24 facilitate his shipment of another load of drugs into the  
25 United States?

1           Mr. Sutton. The question--and, again, not to be  
2 argumentative--assumes that Aldrete ran another load of dope  
3 in October.

4           Senator Cornyn. So you doubt the DEA report that--

5           Mr. Sutton. Well, we do not know--I mean, and, again,  
6 it is all under seal so it is very difficult to talk about  
7 it. It is an ongoing investigation, and the more I say  
8 about it, the more difficult I make it on my people to  
9 actually prosecute when we bring a case.

10          Senator Cornyn. Well, it is in the public record.

11          Senator Feinstein. If you would yield, all he is  
12 asking--the question is not that. The question is: Do you  
13 believe it was a mistake to give this kind of humanitarian  
14 ongoing parole visa to a drug dealer?

15          Mr. Sutton. I guess what I would say is if it turns  
16 out he--

17          Senator Feinstein. The answer is yes or no, Mr.  
18 Sutton.

19          Mr. Sutton. If it turns out he ran another load of  
20 dope, obviously it is a huge mistake. If he did not run  
21 another load of dope, it is not a mistake. You know, the  
22 bottom line is we do not know yet whether he ran another  
23 load of dope. My team is trying to figure that out, and as  
24 soon as we get competent, admissible evidence to charge him,  
25 we would. And I would love to charge him this minute--I

1 would have loved to have charged him a year and a half ago  
2 when we were debating this. But the fact is we do not  
3 charge people until we have competent, admissible evidence  
4 to prove it in court.

5 Senator Cornyn. Well, my time has long run over, and I  
6 will end here. But you understand--I know you do, Mr.  
7 Sutton--the concern that people have that they feel like  
8 these two law enforcement agents could not get a break, got  
9 an extraordinarily long prison sentence for what they did  
10 and what the jury found them guilty of, and that this drug  
11 dealer is getting all the breaks. I think that creates a  
12 huge concern about whether justice has been done here, and  
13 that is obviously why we are here.

14 Mr. Sutton. Madam Chairman, if I could just briefly  
15 answer that.

16 Senator Feinstein. Yes, please.

17 Mr. Sutton. The reason all of this mess happened is  
18 because Agents Compean and Ramos shot an unarmed guy running  
19 away and covered it up. If they had not done that, they  
20 would still be out on the line doing their job. And even if  
21 they told us and it was a bad shoot, you know, we do not  
22 know where we would be. They would probably still be okay.  
23 But when they shoot an unarmed guy and cover it up, there is  
24 no one to blame in this country for what happened but them.  
25 We had a full-blown jury trial. They testified at that jury

1 trial. It was not just the word of a drug dealer against  
2 them. It was everybody in that case, including a number of  
3 Border Patrol agents, and all kinds of evidence that pointed  
4 very, very directly that that guy was unarmed and they were  
5 shooting to kill, and they knew that they hit him. Agent  
6 Compean did a handwritten statement saying, "We thought that  
7 he was hit because he started limping"--I am paraphrasing  
8 that. So they knew that they had just shot a guy and he had  
9 gotten across the line. And as far as they know, he is  
10 bleeding out in a bush on the other side. And instead of  
11 reporting it like they are duty-bound to do, they covered it  
12 up. They got their buddies to help them. They picked up  
13 the shell--you know, Compean picked up the shell casings he  
14 found and threw them in the river, asked Agent Vasquez to go  
15 back, pick up the shell casings he missed, throw them in the  
16 river. And when asked by their buddies who are in the  
17 conspiracy what happened, they did not say, "The guy pointed  
18 a gun at me and I shot him." They said, "He threw dirt in  
19 my eyes."

20 Now, that is very damning evidence, and that is what  
21 the jury heard, and that is why a West Texas jury convicted  
22 these guys, because West Texas juries do not commit cops  
23 easily. And that is why of all those shootings and all  
24 those killings, we cleared every one of those officers. And  
25 there have been three shootings where they shot people in

1 the last 2 months just in El Paso. I think two have been  
2 cleared; maybe one is still in the pipeline. The point is  
3 we give these guys the benefit of the doubt. They have  
4 dangerous jobs. They have got guns. They are allowed to  
5 use them. We do not wait for them to get hit in the head  
6 with a rock or a pipe. If they use deadly force, no  
7 problem. But explain to us that you had a reasonable fear  
8 that you were about to get hurt or killed. And if you have  
9 that, you are going to be cleared. But if you shoot an  
10 unarmed guy running away in the back and cover it up--

11 Senator Feinstein. You keep saying "unarmed guy." How  
12 about saying "unarmed drug dealer"?

13 Mr. Sutton. "Doper," I call him. I mean, you know--

14 Senator Feinstein. Well, you do not say that when you  
15 talk about it.

16 Mr. Sutton. Well, I said on "O'Reilly"--and, again, I  
17 guess my problem, I am so--I apologize for my emotion. It  
18 is just we--my team has taken a real beating over this, and  
19 this is my one opportunity to try to get the facts to the  
20 American people. And I really apologize to you for my  
21 passion. But this is really my one opportunity, and I thank  
22 you so much for this opportunity to answer your questions.

23 Senator Feinstein. Well, we thank you, too.

24 Senator Sessions?

25 Senator Sessions. Well, Mr. Sutton, I think you are

1 entitled to have your side of the story stated, and things  
2 do get twisted out of reason sometimes. And there was a  
3 jury trial here that heard all of this. It is unfortunate,  
4 I think, that it could not have been resolved short of this  
5 full trial. It is unfortunate that some of the mandatory  
6 sentences that 924(c) mandated this heavy an offense.

7 I do think that your staff deserves some credit.  
8 Looking at firearms prosecutions in the Southern District of  
9 California, Ms. Carol Lam--we had a little matter about her  
10 removal--in 2006, she prosecuted ten firearms cases, whereas  
11 you in Texas prosecuted 894 criminals carrying guns. And  
12 also, on immigration offenses, you have prosecuted almost  
13 twice the number of the Southern District of California.

14 You know, you are not in the El Paso office. Where is  
15 your main office?

16 Mr. Sutton. My main office is in San Antonio. We have  
17 seven--we actually have eight offices. One is not staffed.  
18 I cannot get anybody to live in Pecos. But we have seven  
19 offices, and our Pecos office is staffed out of Alpine, and  
20 they drive 105 miles to court to go to Pecos when they have  
21 got to go to court. But 93,000 square miles, 660 miles of  
22 border, and we have seven offices: San Antonio, Austin,  
23 Waco, Midland, El Paso, Del Rio, Alpine, and Pecos.

24 Senator Sessions. That is a good explanation of why  
25 you may have to delegate prosecutorial authority to

1 assistants. But they do not have to come before the United  
2 States Senate and answer. They do not have to go on  
3 O'Reilly or listen to those challenges. And sometimes they  
4 get a little big for their britches, I think. So I think it  
5 is a good lesson that the civilian authority--you--does have  
6 to maintain control over your cases. And when you are  
7 charging law enforcement officers, you have to deal with  
8 hundreds of them. And their morale is important to you.  
9 You know, it is important that you be involved.

10 I guess you did tell us, did you not, that you did  
11 attempt and worked personally to negotiate a plea bargain  
12 you thought was acceptable?

13 Mr. Sutton. Yes, sir. I was trying to approve plea  
14 bargains, and obviously I cannot talk about those, and I do  
15 not want to betray any confidences. Obviously, the  
16 defendants can say whatever they want. But, yes, I was  
17 involved in approving plea bargains in this case.

18 Senator Sessions. I do not understand the idea that  
19 you say you did not have a case against Davila. I think you  
20 could convict him on those facts. I mean, the guy is  
21 fleeing. Flight is evidence of guilt. He is stopped. His  
22 vehicle has got dope in it, and he runs off. I think that  
23 is a slam-dunk.

24 Mr. Sutton. Are you asking me a question? Well, the  
25 facts are--remember, again, we did not know anything about

1     it until weeks later, so DEA treated the van as an abandoned  
2     load. They just take it off to a warehouse, and it is  
3     treated completely different. Had they told us that they  
4     had shot at the guy, it would be a whole different ball  
5     game. But both agents said they could not ID him. There  
6     were no fingerprints linking him to the load. The  
7     registration on the van came back to a dead end. There was  
8     no evidence, no physical evidence, no testimonial evidence,  
9     that said this guy was driving this van. And he was over in  
10    Mexico with the most important piece of evidence, that  
11    bullet just under the skin of his right thigh. But he was  
12    not coming back.

13           Senator Sessions. So at the time, when he called in or  
14    the word came in that he was prepared to give evidence, you  
15    did not know even his name at that point?

16           Mr. Sutton. I think maybe the agents knew--may have  
17    known his name, but we definitely knew he was not coming  
18    forward.

19           Senator Sessions. Did they know his name before the  
20    word came from him?

21           Mr. Sutton. No. The first contact came from the  
22    smuggler's family contacting a friend who had a son-in-law  
23    who was a Border Patrol agent in Arizona, and then that  
24    agent did what you are supposed to do. He reported it to  
25    his supervisor and an investigation began. So we were faced

1 with a Mexican doper on the other side of the line refusing  
2 to cooperate, refusing to come back, and we could not--you  
3 know, normally we would file a case against him and try to  
4 extradite him or maybe get a lure approved. And, again, I  
5 do not want to tell you too much about how we do things  
6 because I do not want the bad guys to learn. But we had no  
7 case that we could file that we could go and bring him out  
8 of Mexico. And he was refusing to cooperate.

9 So we did not have a thing that we could put on him at  
10 that point, even though we were, you know, dadgum one sure  
11 he was the doper who was in that van.

12 Senator Sessions. But until you got that contact, had  
13 you in some way identified him by name?

14 Mr. Sutton. I believe they--I would have to double-  
15 check that, but I believe once that agent in Arizona found  
16 out the guy got shot--because he knew that family--I think  
17 we probably got his name.

18 Senator Sessions. Through that--

19 Mr. Sutton. Through his family telling that other  
20 agent.

21 Senator Sessions. I could have convicted myself, if  
22 you had had him back before the jurisdiction of the court.  
23 Of course, getting him before the court if he is another  
24 country is not easy to do.

25 Mr. Sutton. We did not have one piece of evidence

1 linking him to that van. That was our problem. There was  
2 nothing. The agents could not ID him. The agents had  
3 destroyed the crime scene. The van had been treated as an  
4 abandoned load. DEA had taken it off and treated it in a  
5 different way. We had nothing linking him to that load, and  
6 they could not ID him.

7 So the only thing--so that is why when we gave him  
8 immunity, we did not feel like we were giving up that much,  
9 although, you know, we hated to do it because he is a doper  
10 that should have been in prison. And had these guys done  
11 their job, he would have been in prison. But they did not.

12 And, frankly, I was thinking about that terrorism  
13 example that--I am not sure which witness gave that. But I  
14 was thinking about imagine if a terrorist did pretend they  
15 were a dope dealer and had a big load, but had a bomb in the  
16 car, and our agents shot at him--in fact, shot him and knew  
17 they had hit him, and then lied about it, covered it up,  
18 destroyed the crime scene. I mean, I do not think they  
19 would be American heroes. That is exactly the reason we do  
20 not have officers who shoot at people and cover it up. It  
21 makes it so we cannot investigate it.

22 If our agents had come to us and said, "A doper just  
23 pointed a gun at us and we shot at him 15 time," we would be  
24 moving mountains to go and get that guy. But because they  
25 covered it up and the very first word we heard of a gun was

1 a month later when Compean finally gets arrested, and then  
2 we first hear about this shiny object, a gun--he told nobody  
3 else, even his co-conspirators, about a gun. And that is  
4 why the jury rejected that in trial because it was not  
5 credible.

6 Senator Sessions. Well, it is the kind of thing that--  
7 most of the civil rights police overreaching that I have  
8 seen, for reasons I have not quite understood, tend to be  
9 after high-speed chases. The guys are pumped up. They are  
10 really emotional. There is a struggle of some kind, and the  
11 guys maybe overreacted.

12 What about other persons who were involved on the  
13 scene? Has any discipline been taken on others?

14 Mr. Sutton. I believe they have. The Chief would  
15 probably be--I do not want to violate any of the policies of  
16 the Border Patrol, but I know that there was some discipline  
17 taken. I am not sure how public that is, Chief. You can  
18 probably address that better. But there was obviously a lot  
19 of bad behavior beyond what Compean and Ramos did. But it  
20 was much less egregious. None of those guys shot anybody.  
21 There were a couple of agents who participated in the cover-  
22 up.

23 Senator Sessions. Has there been any action taken?

24 Chief Aguilar. Yes, Senator. There were three other  
25 individual agents that were involved on the scene

1 immediately following. One of the individuals resigned in  
2 lieu of termination, and the other two were terminated. In  
3 fact, the last one, I believe, was 2 days ago.

4 Senator Sessions. Thank you, Madam Chairman. This is  
5 a painful situation.

6 Senator Feinstein. Senator Coburn?

7 Senator Coburn. Thank you.

8 Mr. Sutton, does your office have discretion on whether  
9 or not to file a 924 charge?

10 Mr. Sutton. Yes, sir.

11 Senator Coburn. Why did you file that in this case?

12 Mr. Sutton. Because we felt it was a very serious  
13 situation, a serious crime, that it was readily provable in  
14 this case. You know, I have kind of said publicly that once  
15 everybody knows the facts of this case, you know, when you  
16 get past the American heroes going to prison and a drug  
17 dealer being set free and you learn what the jury learned,  
18 you know that these guys committed serious crimes and they  
19 should be prosecuted. But I have conceded that the  
20 punishment in this case, the sentence is very serious, and  
21 that is a lot of time.

22 What I can say is reasonable people can argue about  
23 that. Some say it is just too much time, and I have some  
24 sympathy for that. But there are other people who say if we  
25 do not send down a clear marker to our law enforcement when

1 they literally step out of their position as law enforcement  
2 officers and become what I would say is judge, jury, and  
3 executioner--remember, the whole narrative of he has a gun  
4 is false. That is what they testified to. The jury  
5 rejected that. All the evidence pointed the other way.

6 In fact, Mr. Bonner said that the mules always carry  
7 guns. In fact, our experience in El Paso is exactly the  
8 opposite. We went back a year before and just in the Fabens  
9 station, which is about 30 miles east of El Paso, from  
10 January 2004 to March of 2005, the Border Patrol made 155  
11 seizures, 43,000 pounds of marijuana seized. In all of  
12 those seizures, there was not one gun recovered.

13 So we went back to October of 2001, from October of  
14 2001 to, I think it was--let me make sure of my date--  
15 February of 2006, 496 seizures of dope, most of it  
16 marijuana; I think over 131,000 pounds of marijuana that  
17 Border Patrol seized--again, just in Fabens--496 seizures,  
18 one gun.

19 Now, that does not mean that in this case--that does  
20 not prove it in this case, but I guess what I am saying is  
21 that that narrative is false.

22 Senator Coburn. Here is the point I want to get to: I  
23 believe the sentence for these individuals is too heavy. I  
24 think the vast majority of the American people do. You had  
25 to know what the results were, if you want a conviction,

1     that you are going to tack 10 years on, and yet you did that  
2     anyway.

3             So I believe there is a lack of balance in what has  
4     happened here. I do not dispute your testimony. I have  
5     listened to you. I have read the facts on it. You know,  
6     because I am not 100 percent on the side of these two Border  
7     Patrol agents, I get blasted a lot from Oklahoma. But I  
8     have actually tried to find out what the facts are.

9             But I still think, my personal opinion is that the  
10    discretion with the 924 charge, I think was in error. I  
11    think that you were going to get a conviction anyhow, and  
12    they would have had a conviction based on the facts as I  
13    have read and studied them.

14            I want to ask two other questions that I think the  
15    American people want to know. Number one is: Why is it  
16    wrong for a Border Patrol agent who has stopped a van that  
17    is full of drugs and the guy is running, why is it wrong for  
18    him to shoot him after they told him to stop? Why is that  
19    wrong? Answer that question for the American people. Here  
20    is somebody obviously in the midst of a felony, driving a  
21    van that is loaded with drugs, told to stop, had an  
22    encounter. Why is it wrong for them to shoot him if they  
23    won't stop?

24            Mr. Sutton. Well, the first answer is that the Supreme  
25    Court of the United States says it is illegal to do that.

1 You cannot--

2 Senator Coburn. Under the Fourth Amendment--

3 Mr. Sutton. Under the Constitution, you cannot just--  
4 if somebody is not causing you fear, you cannot just shoot  
5 them because you are trying to stop them or you are angry at  
6 them or you want to teach them a lesson.

7 Now, again, we could probably maybe change the rules,  
8 although that is a Supreme Court decision. It may be hard  
9 to get around it. And you could say to cops, "Hey, just  
10 shoot them."

11 Senator Coburn. No, I am talking on the border. I am  
12 talking on our border where we have a big problem with  
13 drugs, if, in fact, the message was if you come across here  
14 with drugs and we interdict you and you do not stop, we are  
15 going to wing you, we are going to shoot you, and that  
16 message by itself would do a lot to stop a lot of this,  
17 number one.

18 Number two is--and I go back to Senator Sessions'  
19 question, you know, I do not think there ought to be anybody  
20 we do not try to prosecute that comes across here. And I am  
21 willing to help put the resources in it. I do not like plea  
22 bargains on this stuff because what happens is you can plea  
23 bargain it and somebody else may get flipped, but you are  
24 not. So you continue the behavior.

25 The other question I have for you, if, in fact, this

1 notice was put out that there was going to be violence  
2 against the agents, no one--that this guy had been shot, was  
3 there not the connection made that maybe he is not just a  
4 one-time mule, maybe he is really connected, and the fact  
5 that if he got shot and now it is raised a whole level that  
6 maybe he is involved with them to a greater degree than just  
7 being a mule this one time?

8 Mr. Sutton. Obviously, I am in the business of putting  
9 guys like Aldrete in prison. I mean, that is almost all we  
10 do, is immigration. In El Paso, 95 percent of what we do is  
11 putting guys like Aldrete in prison. I mean, we whack them  
12 and we whack them hard. And the great irony of this  
13 situation is that my district, we have a program in Del Rio  
14 called "Operation Streamline." since 2005, we prosecuted  
15 20,000 illegal immigrants, the first time across. When you  
16 come across the line and we catch you, you go to jail and  
17 you get an X on your back, okay? And, of course, you know,  
18 our numbers are going down.

19 Senator Coburn. Yes.

20 Mr. Sutton. I guess the reason I bring that up is to  
21 defend my team who we are really on the leading edge of  
22 aggressive enforcement. You know, again, my colleagues  
23 everywhere else are working hard under the circumstances  
24 they are under, but we are incredibly aggressive, and in one  
25 area we have a zero tolerance policy, which actually does

1    what you do. There are some difficulties why that cannot go  
2    nationwide, which we can talk about afterwards. But I guess  
3    my point is, look, I would love to be here with him in  
4    prison like all the rest. And Mr. Botsford would say,  
5    "Sutton does not cut many deals. Those guys are way too  
6    hard. They want a chunk of flesh out of every drug dealer  
7    and guy that has a gun. They are too tough in West Texas."  
8    And we are tough, but we are tough because there are  
9    criminals coming across our border, and we are body-slamming  
10   them the best we can with the resources we have.

11        I would make a quick point because Senator Cornyn kind  
12   of implied that I did not think we have enough resources.  
13   We have been given a lot of resources. We really have.  
14   Could we use more? You know, every Federal agents thinks  
15   they need more. But I have been given a lot and Border  
16   Patrol has been given a lot. We have a lot down there. So  
17   I do not want to leave this place with the impression that  
18   we have not been given the resources. We have been given a  
19   lot.

20        Could we do more? Of course. I mean, it is a  
21   challenge.

22        Senator Coburn. I want to go back to my original  
23   question, and this will be the end of it. And, Chief, I  
24   would love for you to comment.

25        The Supreme Court decides. We can pass laws. They

1 would have to say--why shouldn't it be the policy of this  
2 country that if you are felon coming into this country with  
3 drugs and you are seen and attached to those drugs, and you  
4 are running way, why we shouldn't send a signal that we are  
5 going to do everything we can to catch you, and if we cannot  
6 catch you, we are going to try to wing you? Why would we  
7 not want to send that message to drug smugglers across this  
8 country?

9 Mr. Sutton. I think we do send that message, and that  
10 is why this case has been unfortunate, and some of the  
11 rhetoric and some of the things that people have said on  
12 national TV are so unfortunate, because, really, I mean,  
13 Border Patrol are American heroes. They arrest a million  
14 people a year. Somehow they are able to do that without  
15 shooting them in the back. And the problem is in these  
16 kinds of cases, at the time they are unloading their .40  
17 calibers on this guy, they don't know he is a drug dealer.  
18 They don't know he is an illegal alien. Now, they got a  
19 dadgum good suspicion that he is. They smell these guys a  
20 mile away. But they could be wrong.

21 And when we let our agents just open fire, shooting to  
22 kill--they both said, "We were shooting to kill," and they  
23 both knew that he was hit. Okay?

24 We give these guys the benefit of the doubt, but if  
25 that is the rule, then some innocent person is going to get

1     gunned down execution style by a cop, and there is a going  
2     to be an outcry. I mean, I used to be a death penalty  
3     prosecutor in Houston. I tried 17 murder cases. Seven of  
4     them were capital murders. I put three people on death row.  
5     You jump through a lot of hoops to get somebody convicted  
6     and all the way down the line take them to execution. There  
7     is a lot of due process involved. And if we want to change  
8     the rules that the agents on the line can make those  
9     decisions about who lives or dies, we can. But I guess what  
10    I would say is it is asking for trouble.

11           Having said that, if our agents feel fear, if you throw  
12    a rock at us, if you hit us in the head with a rock, that is  
13    a serious danger. We are going to shoot back. Okay? And  
14    if they can explain, "Look, this guy was throwing a rock  
15    that could kill me, and I shot back with my .40 caliber,"  
16    there is no Texas jury that is going to have any trouble  
17    with that. But when you shoot a guy that is unarmed and you  
18    lie about it, that is a problem.

19           And I agree with you, people can second-guess our  
20    decisions about the 924(c). We prosecuted 33,000 defendants  
21    just since I have been U.S. Attorney. We make a lot of  
22    decisions, and 99.9 percent are right. I think my team did  
23    the right thing in this case, and that is why I have  
24    defended them so strongly.

25           Senator Coburn. Would you object to a lessening of

1     that sentence if it was lessened?

2             Mr. Sutton. Well, what I think you are asking me is  
3     what is my opinion on commutation, and obviously that is a  
4     separate procedure that is within the Department of Justice.  
5     There is a very elaborate procedure where all that  
6     information is brought together, the witnesses, the facts--

7             Senator Coburn. I did not ask you that. What I asked  
8     you was: Would you object to a lessening of the sentence?

9             Mr. Sutton. I cannot say--I cannot answer that  
10    question because I am here to enforce the laws and to apply  
11    the laws as they are given to me. My team makes decisions.  
12    Sometimes we bring 924(c); sometimes we do not. We use good  
13    judgment. We thought this was a serious situation. We  
14    thought what these agents did was really, really bad, it was  
15    a very serious crime, and they needed to be held to account.

16            We plea bargained. They said no. They had four good  
17    lawyers that were very aggressive at trial. They knew that  
18    if they lost, they were going to get 10 years put on top of  
19    whatever else they get.

20            And, by the way, the judge made a dramatic departure  
21    from the sentencing range to get them down to 1 and 2 so  
22    they are at 12.

23            So what I am telling you is 924(c) is a great thing.  
24    It is good for law enforcement. It is good for putting the  
25    bad guys away.

1           Senator Coburn. You testified earlier that the jury  
2 did not know that 924(c) would add 10 years. Why did the  
3 jury not know that? Are they precluded from knowing that?

4           Mr. Sutton. Yes, sir. All the jury decides is whether  
5 these guys did it or not, have we proved beyond a reasonable  
6 doubt are they guilty, and then the judge does the  
7 sentencing. So those are totally separate things.

8           Senator Coburn. In your opinion, do you think that  
9 would have influenced jurors had they known that?

10          Mr. Sutton. It is so hard to know. I mean, that is a  
11 thing--you know, not to confess in front of Congress that  
12 maybe in my earlier days listened at a jury room door.  
13 Let's say hypothetically I did. It is always amazing what  
14 juries are talking about back in the back. That did not  
15 really happen, but my point is you don't know.

16          Senator Coburn. You bet.

17          Mr. Sutton. You don't know what they are doing. I  
18 can't get inside their mind. It is a lot of time, but what  
19 I would say is you can argue that round and you can argue it  
20 square. I think there are a lot of people in this country  
21 that think cops who did with these guys did deserve to be in  
22 prison for a long time.

23          Senator Coburn. Chief, did you want to add anything?

24          Chief Aguilar. I am sorry, Senator?

25          Senator Coburn. Did you want to add anything in terms

1 of my question about giving you greater authority on the  
2 border in terms of suspected drug dealers?

3 Chief Aguilar. Senator, the border needs to be brought  
4 under control, but I do not believe Americans would want law  
5 enforcement officers summarily executing individuals.

6 Senator Coburn. Wait a minute. Let's don't twist  
7 words. That is not what I said at all. What I said was if  
8 you see them known with drugs coming across, to say stop and  
9 they don't stop, they run, that is what I said. That is not  
10 summarily executing anybody.

11 Chief Aguilar. Well, Border Patrol agents are taught  
12 to stop the threat, up to and including killing an  
13 individual, and that is done when there is a means,  
14 opportunity, and intent for that individual to hurt either  
15 the agent, an innocent third party, or his or her partner.  
16 That is the way that we operate today.

17 It is a tough situation, Senator. The border needs to  
18 be brought under control, but I do not think we are there  
19 yet as a country to take those kinds of actions.

20 Senator Coburn. Okay. Thank you.

21 Senator Feinstein. The time is running out. I would  
22 like to thank both of you very much, and I would like just  
23 to share with you my observations from this hearing.

24 I am going to look at 18 U.S.C. 924(c). I think it  
25 needs to be clarified. As I read it, there has to be an

1 underlying crime, and I do not see the underlying crime  
2 here. I think this really is a case of prosecutorial--oh,  
3 how to put it. Overreaction in the charging?

4 I am hard pressed to see why these two men, despite the  
5 fact that they did not file a report, despite the fact that  
6 they did not tell the truth--this was still a drug dealer  
7 who was shot fleeing, shot in the rear end fleeing, and he  
8 was not an innocent person. And by his subsequent activity,  
9 I believe he has shown he was not an innocent person, and  
10 yet he was given unprecedented--at least it seems to me  
11 unprecedented immunity, to come back and forth across the  
12 border. And the officers are serving 11 and 12 years in  
13 prison.

14 We are going to take a good look at this section of the  
15 code and see if there is any amendment that might be  
16 considered.

17 Mr. Sutton, you said because they covered it up, they  
18 got 11 and 12 years. That is a huge penalty. I agree with  
19 Mr. Hunter when he said it is more than most people serve  
20 for murder. And maybe this points out the real problem with  
21 mandatory sentencing. But what I cannot believe is that  
22 somebody in this instance would charge this, never consult  
23 with their superior, and their superior would never consult  
24 with Main Justice, when we know that there are these  
25 consultations back and forth with Main Justice on lesser

1 cases all the time.

2 I am one who believes this sentence is  
3 disproportionate. Now, what we can do about that remains  
4 another subject, and Senator Cornyn and I will have to  
5 discuss this as well as with other members. But at least  
6 those are my views.

7 Senator, do you have a comment you would like to make?

8 Senator Cornyn. Thank you, Senator Feinstein. I just  
9 have a couple more questions.

10 Mr. Sutton, we talked a little bit earlier about Mr.  
11 Aldrete Davila's obligations under the immunity agreement,  
12 and I want to get to that in a second. You said there was  
13 not any evidence with which to try and convict Mr. Aldrete  
14 Davila for running a load of drugs, but I would like to,  
15 Madam Chairman, offer as part of the record a Homeland  
16 Security Memorandum of Activity dated March 14, 2005, if I  
17 may.

18 Senator Feinstein. So ordered, and I would like to  
19 add to that a number of investigative reports, if I might.  
20 Thank you.

21 Senator Cornyn. This document, which I do not know if  
22 you have had a chance to see or not, Mr. Sutton--admittedly,  
23 it is a Homeland Security Office of Inspector General  
24 document. It is the notes, investigative interview of Rene  
25 Sanchez, a Border Patrol agent, conducted by Chris Sanchez,

1 no relation, in which Rene Sanchez, who was apparently  
2 somehow distantly related, I guess, to Mr. Aldrete Davila,  
3 where Mr. Aldrete Davila admitted to him that he was afraid  
4 to come forward because he had been transporting a load of  
5 marijuana and he was afraid the U.S. and/or Mexican  
6 authorities would put him in jail.

7 Why wouldn't that kind of evidence, together with the  
8 circumstantial evidence of flight and others, provide you  
9 the evidentiary basis upon which to convict Aldrete Davila  
10 of a crime?

11 Mr. Sutton. If I may, Madam Chairman, if you would  
12 indulge me for just one second just to clarify, and then I  
13 will answer the question.

14 With regard to approval on the 924(c), the supervising  
15 chief in the El Paso Division must approve that charge, and  
16 then all those indictments are just like we would every  
17 other indictment, and nobody gets indicted without approval  
18 from--

19 Senator Feinstein. You are speaking about 924(c)?

20 Mr. Sutton. I am talking about all indictments,  
21 including the 924(c) indictment.

22 Senator Feinstein. Aren't you the person in charge?

23 Mr. Sutton. Yes, ma'am. I--

24 Senator Feinstein. And you didn't approve it?

25 Mr. Sutton. I did not. I delegate much of the

1 authority for that to my criminal chief and to my division  
2 chiefs. Remember, I have seven offices over 93,000 square  
3 miles. But I wanted to clarify that those chiefs, who I  
4 have a lot of confidence in, who are career DOJ employees,  
5 make those decisions, and then they are reviewed by my  
6 criminal chief. And in some of the very serious cases, they  
7 are reviewed by me. In fact, those cases are not even  
8 indicted--

9 Senator Feinstein. So this is not a serious case.

10 Mr. Sutton. It is a serious case, but as a practical  
11 matter, we looked at this as just another one of our, you  
12 know, shootings, and we prosecute a number of Border Patrol  
13 agents and law enforcement officers. You know, we--it is  
14 serious, obviously, but it is something that we do  
15 routinely. Even though 99.9 percent of them are doing it  
16 right, there are a few that go wrong, and we prosecute them.

17 Rene Sanchez, I believe, is no relation--

18 Senator Cornyn. People might have forgotten the  
19 question. Let me just restate it since you changed--since  
20 you were answering Senator Feinstein's previous question.  
21 In this document that is made part of the record, it is a  
22 report of Chris Sanchez, the Office of Inspector General of  
23 the Department of Homeland Security. He talked to Rene  
24 Sanchez, who told him that Aldrete Davila admitted to him  
25 that he had been running a load of drugs, and that is the

1 reason he had not come forward. And my question is: If you  
2 had been able to--why weren't you able to use that  
3 admission, that evidence of what Aldrete Davila told Rene  
4 Sanchez together with circumstantial evidence in order to  
5 convict Aldrete Davila of some crime?

6 Mr. Sutton. It was the opinion of career prosecutors  
7 who had tried many, many of these cases--and, again, the  
8 trial team has 35 years of Federal prosecutorial experience  
9 between them and 85 jury trials between them. It was their  
10 opinion that that evidence--first of all, we were not sure  
11 if it was admissible. There was a question of its  
12 admissibility. But assuming that it was admissible, that  
13 was not enough, a telephone conversation over the border is  
14 not enough to say that he is connected, because there is  
15 nothing else to corroborate that. And that is the great  
16 irony of the situation, is I am attacked because I have not  
17 been able to indict on the alleged October load. The  
18 reason--and I do not want to go into too many details--is  
19 we--you are right, I do not like to--we cannot go on the  
20 testimony of just a dope dealer because they are not  
21 credible. You have got to corroborate what they say,  
22 because a defense attorney like David Botsford will come in  
23 and destroy them on the witness stand. So if that is all  
24 you have, that is not a provable case. That is not enough  
25 to make a case in a courtroom, and that was the opinion of

1 my team.

2 Senator Cornyn. Well, what about the bullet that the  
3 doctor pulled out of Aldrete Davila, which came from his  
4 gun?

5 Mr. Sutton. Again, we did not get the bullet until we  
6 convinced him to cooperate and come back, because under your  
7 scenario--let's say you try to indict him for that telephone  
8 admission. That is all you have got, and if the grand jury  
9 would even indict, and assume that they would, you would  
10 have to extradite him from Mexico. And I do not think you  
11 could do it, and I certainly do not think you could prove up  
12 a case in court based on that, because we did not have the  
13 bullet. And for all we know, he might have said it was time  
14 to remove this bullet, or we might never have seen him.

15 Senator Cornyn. My last couple of questions relate to  
16 the fact that in violation of his immunity agreement, Davila  
17 refused to cooperate and actually--and he was required to  
18 testify truthfully, but Davila testified under oath that  
19 Special Agent Rene Sanchez counseled him to demand immunity,  
20 sue the Government, and even helped refer him to an  
21 attorney. Agent Rene Sanchez denied that under oath. So my  
22 question is: Why haven't you prosecuted Aldrete Davila for  
23 perjury?

24 Mr. Sutton. Well, it is like every jury trial I have  
25 ever been in, and I have been in a lot. I was not in this

1 one, but witnesses' stories conflict, and that is the beauty  
2 of the jury system, is we have 12 people that we pick from  
3 the community that live there to look them in the eyes and  
4 decide what the truth is.

5 Senator Cornyn. I understand that.

6 Mr. Sutton. I don't know what the truth is on that.

7 Senator Cornyn. Everybody understands it is the jury's  
8 job to decide who is telling the truth and who is not. But  
9 why didn't you present that to a jury and let the jury  
10 decide are they going to believe a law enforcement officer,  
11 Rene Sanchez, or a dope dealer?

12 Mr. Sutton. It is my understanding that both of those  
13 guys testified, and that part of the testimony was  
14 contradictory.

15 Senator Cornyn. Right.

16 Mr. Sutton. So, you know, the jury heard that and saw  
17 that, so they evaluated that when they were making their  
18 decision.

19 Senator Cornyn. But not on a perjury allegation  
20 because you did not charge Aldrete Davila with perjury.

21 Mr. Sutton. Right. That would not be the case that we  
22 would charge with perjury because we would not have been  
23 able to prove it. I mean, it is not uncommon for a witness  
24 to say this happened and the other witness to say, no, it  
25 happened this way.

1           Senator Cornyn. So you cannot try and convict someone  
2 for perjury based on the statement--

3           Mr. Sutton. No. We could--

4           Senator Cornyn. --relating to the agent?

5           Mr. Sutton. No. I think we could, but our evaluation,  
6 at least the trial team's evaluation, was that that was not  
7 a provable crime. I have not specifically asked them that  
8 question, but I guess my point is that it is not unusual for  
9 that--

10          Senator Cornyn. I do not understand what you mean--you  
11 say it is not a provable crime. If, in fact, you can  
12 convict someone of perjury based on the sworn testimony that  
13 is believed by the jury, then why couldn't you do that here  
14 based on the testimony of Rene Sanchez which contradicted  
15 directly what Aldrete Davila testified to at trial?

16          Mr. Sutton. I guess we could try. The opinion--my  
17 opinion is we would not be able to do it. My opinion is--

18          Senator Cornyn. Because the jury would not believe it?

19          Mr. Sutton. Well, because it is just--you know, who  
20 knows? Maybe they are remembering wrong all these other  
21 things. In order to make a perjury trial, you have to have  
22 a very--you have to have some really solid evidence, and  
23 people saying, look, this is what was said and I can  
24 document it, versus, oh, my memory is wrong or different.

25          Again, you know, we did not consider that. I could

1 talk to the trial team and see what their opinion is and get  
2 back to you on it, if you would like for me to. But the  
3 jury heard all that and that was part of their decision.

4 Senator Cornyn. Thank you, Madam Chairman. Thank you  
5 very much.

6 Mr. Sutton. Thank you.

7 Senator Feinstein. Thank you.

8 I would ask you this question once again. Your office  
9 had discretion as to whether to charge 924(c), correct?

10 Mr. Sutton. Yes, ma'am.

11 Senator Feinstein. Thank you.

12 Thank you both very much. The hearing is adjourned.

13 [Whereupon, at 1:00 p.m., the Committee was adjourned.]

14

15

16

17

18

19

20

21

22

23

24

25

C O N T E N T S

| STATEMENT OF:                                                                                                                                                          | PAGE |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Hon. Duncan Hunter, A Representative in Congress from<br>the State of California                                                                                       | 14   |
| Hon. Dana Rohrabacher, A Representative in Congress from<br>the State of California                                                                                    | 23   |
| T.J. Bonner, President, National Border Patrol Council,<br>Campo, California                                                                                           | 33   |
| Luis Barker, Former Chief Patrol Agent, El Paso Border<br>Patrol Sector, U.S. Customs and Border Protection,<br>U.S. Department of Homeland Security, Washington, D.C. | 39   |
| David L. Botsford, Appellate Counsel for Mr. Ramos,<br>Austin, Texas                                                                                                   | 47   |
| Johnny Sutton, United States Attorney, Western District<br>of Texas, San Antonio, Texas                                                                                | 79   |
| David V. Aguilar, Chief, Office of Border Patrol, U.S.<br>Customs and Border Protection, U.S. Department of<br>Homeland Security, Washington, D.C.                     | 84   |