CONGRESS OF THE UNITED STATES,
Washington, DC, June 18, 2008.

Re Complaint for Prosecutorial Misconduct Against Johnny Sutton, United States Attorney, Western District of Texas

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DEAR COUNSEL JARRETT: As Members of Congress, we write this letter to bring to your attention for investigation what we have concluded to be a serious miscarriage of justice by United States Attorney Johnny Sutton. Mr. Sutton supervised, and has vigorously defended, his office's actions in a case wherein two United States Border Patrol agents—Ignacio Ramos and Jose Alonso Compean—have been convicted, and each are now being punished by imprisonment of 10 years, for a crime that does not exist, and therefore, for a crime that could not have been committed.

Specifically, Mr. Ramos and Mr. Compean were charged with violating 18 United States Code Section 924(c)(1)(A) by the ''knowing[] *discharge*[] [of] a firearm . . . during and in relation to a crime of violence.'' (Emphasis added). There is, however, no such crime. Rather, Section 924(c)(1)(A) makes it a crime to ''use or carry . . . during and in relation to any crime of violence'' or to ''possess a firearm'' ''in furtherance of'' any such crime. And, as the United States Supreme Court recently pointed out, ''discharge'' is only a sentencing factor to be considered by the judge after conviction, not by the jury in the effort to determine whether the law has been violated. *United States* v. *Watson*, 169 L.Ed.2d 472 (2007).

While this distinction might, at first glance, be merely technical, the United States. Court of Appeals for the Fifth Circuit, the circuit in which Mr. Ramos and Mr. Compean were convicted, ruled that an indictment that did not allege that a defendant had so used or carried, or so possessed, a firearm was insufficient to charge an offense under Section 924(c)(1)(A). See *United States* v. *McGilberry*, 480 F.3d 326, 329 (5th Cir. 2007). Indeed, six years before McGilberry, the Fifth Circuit, ruled that ''discharging a firearm during and in relation to a crime of violence'' was not an ''actus reus'' element of the offense defined by 18 U.S.C. Section 924(c)(1)(A), but only a factor to be considered at ''sentencing'' after conviction.'' See *United States* v. *Barton*, 257 F.3d 433, 441–43 (5th Cir. 2001). And one year after Barton (and five years before Watson), the United States Supreme Court agreed, ruling that Section 924(c)(1)(A) did not define ''discharge'' of a firearm as a separate offense, but only as a ''sentencing factor[] to be considered by the trial judge after conviction.'' See *Harris* v. *United States*, 536 U.S. 545, 550–53 (2002).

Notwithstanding these binding precedents in the Western District of Texas, United States Attorney Sutton secured an indictment charging Mr. Ramos and Mr. Compean with the non-existent crime of ''discharging'' a firearm ''in relation to a crime of violence.'' By this charge Mr. Sutton facilitated the conviction of the two border control agents by means of jury instructions that focused the jury's attention upon the ''discharge'' of the agents' firearms, rather than upon the lawfulness of the possession, carrying, and use of such firearms in the ordinary course of their employment. Moreover, by this indictment and these instructions, Mr. Sutton obtained a conviction of an offense that carried a minimum 10-year sentence, as provided by the statute, rather than the lesser sentence for violation of Border Patrol rules and regulations. See also, Brief Amici Curiae of Congressman Walter B. Jones, Gun Owners Foundation, United States Border Control Foundation, United States Border Control, and Conservative Legal Defense and Education Fund, Inc., In Support of Appellants, *United States of America* v. *Jose Alonso Compean and Ignacio Ramos*, No. 06–51489, U.S. Court of Appeals, Fifth Circuit (May 27, 2007).

It is our firm conviction that, by these actions, Mr. Sutton is guilty of prosecutorial misconduct, the effect of which has imposed an irreversible and substantial effect upon Mr. Ramos and Mr. Compean and their families. Prior to the return of the indictment against Mr. Ramos and Mr. Compean, Mr. Sutton must have known that it was impossible for there to be probable cause for a ''crime'' never enacted by Congress, as authoritatively and previously decided by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. According to Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct, a prosecuting attorney is to ''refrain from prosecuting . . . a charge that the prosecutor knows is not supported by probable cause.''

Indeed, the Comments to Rule 3.09 of the Texas Rules of Professional Conduct admonish prosecutors to remember their ''responsibility to see that justice is done, and not simply be an advocate.''

On April 1, 1940, then Attorney General Robert Jackson, speaking to United States Attorneys serving in each federal judicial district across the country, reminded them why justice should be their goal, not winning their cases. ''The prosecutor,'' he said, ''has more control over the life, liberty, and reputation than any other person in America. His discretion is tremendous . . . We must bear in mind that we are concerned solely with the prosecution of acts which the Congress has made federal offenses.''

Mr. Sutton has manipulated the federal criminal code to obtain a conviction against two U.S. Border Patrol agents, preferring to win at all costs over his duty as a United States Attorney, and his duty under the Texas Rules of Professional Conduct. This is a matter which your office has a duty to investigate and, on the basis of what we now know, to remedy.

Sincerely yours,
WALTER JONES,
TED POE,
VIRGIL GOODE,
DANA ROHRABACHER,
LOUIE GOHMERT,
JOHN CULBERSON,
DONALD A. MANZULLO,
Members of Congress.

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Oregon (Mr. DEFAZIO) is recognized for 5 minutes.

(Mr. DEFAZIO addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Indiana (Mr. BURTON) is recognized for 5 minutes.

(Mr. BURTON of Indiana addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

OPERATION STREAMLINE

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. CULBERSON) is recognized for 5 minutes.

Mr. CULBERSON. Speaker CUELLAR, it's perfectly appropriate that you're in the chair today because you and I have served together in the Texas House, and we have worked together, Mr. Speaker, in cooperation with our friend, Congressman CIRO RODRIGUEZ of Del Rio. You and I and CIRO have worked together to successfully implement a program that I want to single out for praise tonight.

In the Laredo sector and the Del Rio sector, the immigration laws of this country are being enforced with a zero tolerance in a program called Operation Streamline. With the full support of the local community that you represent, Mr. Speaker, because the crime rate in Laredo has dropped 70 percent—excuse me; in Del Rio we have seen a 70 percent drop. I think you have seen about a 60 percent drop in the crime rate in the Laredo sector as a direct result of simply enforcing existing law in a team effort, Mr. Speaker, between the Border Patrol, the U.S. Marshals, the prosecutors, the judges, the magistrates, and the sheriffs, with their local Congressman, Congressman CUELLAR. You, Mr. Speaker, CIRO RODRIGUEZ, and myself on the Appropriations Committee, we have been able to bring together that team approach in a bipartisan way that has resulted in a dramatic decline in the crime rate. The illegal crossings in the Del Rio sector are now at the lowest level they have been since the Border Patrol started keeping statistics in 1973.

I bring this to the attention of the House tonight, Mr. Speaker, first of all, to congratulate and praise those fine men and women in the law enforcement community of the Border Patrol in Del Rio and Laredo, also in the Yuma sector, where this is working so well. In particular, in the Laredo and Del Rio sectors we have seen real success because of the teamwork of those law enforcement officers and the judges and the cooperation we have seen at an unprecedented level between members of both parties in making sure the community and the Nation are safe in those sectors.

I am working with you now, Mr. Speaker, as well as with the local Members of Congress in rolling out Operation Streamline, it's called, the zero tolerance program, in the Rio Grande Valley sector. So that the goal is, of course, from the mouth of the Rio Grande now, up through the Del Rio sector, Lake Amastad, that the border will be secure.

Unfortunately, Mr. Speaker, it is a very different story in Tucson, Arizona. In Tucson, Arizona, the local U.S. Attorney refuses to enforce existing law, and in Tucson, if you are arrested by the Border Patrol, for example, in Del Rio or Laredo, you have a 100 percent chance of being prosecuted and serving some time in jail, obviously

with the exception of women and children. The officer will use their good judgment and their good heart.

But if you're arrest in Del Rio or Laredo, you're going to jail. If you're arrested in Tucson, Arizona, Mr. Speaker, carrying less than a quarter ton of dope, you have a 99.6 percent chance of nerve going to jail, and you will probably be home in time for dinner.

It's an unbelievable and outrageous situation that I have worked on behind the scenes as quietly as I can with the Department of Justice, with the U.S. Attorney out there, Diane Humetewa, who refuses to met with me, who refuses to talk to me, who refuses to cooperate. She, to this day, Mr. Speaker, refuses to do anything to improve the prosecution rate in the Arizona sector of the border. As a result, those officers' lives are in danger. As a result of her refusal to enforce the law, the lives of the people of Arizona are in danger. This Nation is in danger because of the refusal of the U.S. Attorney in Arizona, Diane Humetewa, to do her job.

Frankly, I am sick and tired of it, and it needs to be brought to the attention of the American people here on the floor because we have found a bipartisan solution to this. We have found a solution that people on the border support.

You represent the Laredo sector, Mr. Speaker. I know your community, the people you represent are thrilled with the reduction in the crime rate. It has been a team effort. There are no party labels when it comes to Texans. My good friend, SHEILA JACKSON-LEE, will be speaking in a moment, and we are Texans first. There are no party labels when it comes to what is good for Texas and the Nation.

We have found a solution, Mr. Speaker, in Operation Streamline and the Zero Tolerance Program, enforcing existing law with existing resources and existing personnel in a unified team effort, and it's about time for the U.S. Attorney in Arizona to get with the program and recognize that she has an essential role in protecting this Nation.

Frankly, Mr. Speaker, if the U.S. Attorney in Arizona will not enforce the law and live up to her oath of office, I think she ought to find another job. It's about time for her to just step aside. It's unacceptable for a U.S. Attorney to refuse to enforce the law. Those officers' lives are in danger.

We on the Appropriations Committee, I serve on the Homeland Security subcommittee, Mr. Speaker, we sent 40 additional U.S. Attorneys, prosecutors to the southwest border with specific instructions that those attorneys be used to prosecute border crime. The U.S. Attorney in Arizona got 21 of them, and she will not use them to protect the border or this Nation.

Mr. Speaker, we have done great work in Laredo and Del Rio, and the U.S. Attorney in Arizona needs to get with the program and enforce the law with zero tolerance or find another job.

The SPEAKER pro tempore. Under a previous order of the House, the gentlewoman from Ohio (Ms. KAPTUR) is recognized for 5 minutes.

(Ms. KAPTUR addressed the House. Her remarks will appear hereafter in the Extensions of Remarks.)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from New Jersey (Mr. PAYNE) is recognized for 5 minutes.

(Mr. PAYNE addressed the House. His remarks will appear hereafter in the Extensions of Remarks.)

ENERGY

The SPEAKER pro tempore. Under the Speaker's announced policy of January 18, 2007, the gentleman from New York (Mr. TOWNS) is recognized for 60 minutes as the designee of the majority leader.

Mr. TOWNS. I want to talk about the energy situation tonight. When I go back to my district, the number one subject today is that people are talking about the cost of fuel. Of course, the other one is affordable housing. But when you look at it, they are all connected.

Of course, when you talk to the taxi drivers, they are saying we cannot make a living because of the fact that gasoline is so high. The bus drivers, the same thing. Hardworking people are finding it almost impossible to make it today because of the price of fuel.

Of course, this is something that has happened all of a sudden. In 2005, gasoline was $2.20 per gallon in December of 2005. Now, today the price of gasoline is $4.10 per gallon. That is June 19, 2008, according to the Energy Information Administration, the agency that collects official energy statistics for the United States Government. In other words, gas is just creating a tremendous problem in this Nation.

Now I know people will say, Well, here's the solution. But let me just say to you there is no silver bullet here, that there is no single solution to this problem. But I think the worst thing in the world to do is to continue to ignore the problem.

You have people saying, Well, ethanol is the solution. Then you have others will say that the fact that ethanol might not be the solution, but we need to make certain that we create cars that will go further. All these things are good, but when we are dealing with a problem like this, whenever you make a decision or make an adjustment, there's always something else that is going to happen.

Hybrid cars. People are coming in now saying that, Look, we are having problems. The blind, in particular. We travel by sound. We can't hear. We are getting knocked down in the parking lots. Senior citizens are getting knocked down.

So we need to look at all these things to be able to bring about safety, but at the same time we have to be able to make certain that the fuel prices come down so people don't have to make a decision as to whether they buy gas or whether they buy food. I mean that is where we are. People who have been volunteering, providing care for seniors, driving them to the shopping mall and driving them to various places, are now saying, I can't do it any more because of the price of gasoline. That, to me, is a shame and a disgrace in one of the wealthiest countries in the world, that we are not paying more attention to our seniors, and of course, as a result, things are getting worse.

What I would like to do now is to yield some time to the gentlewoman from Texas, who has been very involved in these issues over the years. Of course, it's my pleasure to yield to her because she understands how important this issue is, the gentlewoman from Texas, SHEILA JACKSON-LEE.

Ms. JACKSON-LEE of Texas. I want to thank my distinguished friend, Congressman ED TOWNS. I think it's important to note of his leadership on the Energy and Commerce Committee for any number of years. We have joined together on understanding this issue as it impacts our very broad communities.

The distinguished Congressman, as I note, my good friend from Georgia, is on the floor as well. We all come from different districts. He comes from an urban-centered northeastern district that has mass transit very deeply, but as well it's interesting to note that the cost of gasoline impacts all of our constituents.

I come from a broad, if you will, expensive district in the State of Texas that has not only a fledgling metro system, a metro system that we are just beginning to build, mass transit, but as well it is a community that uses its cars.

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We carpool. We carpool to work. We live very far apart. It is a very large district. Therefore, the cost of gasoline is very, very costly. So we have to come together to address this question from the perspective of how will the consumer feel? We know there has been a question, a bracelet everybody used to wear asking the question how would a certain heavenly person feel about a question. We now ask, how does the consumer feel?

So I rise today to say that I think it is important for this Congress to come together and to be able to push forward an energy agenda that really gets down to the real individuals that are burdened by this cause. So let me explain, Mr. TOWNS, what I believe is important.

First, let me applaud the leadership for their new direction in energy. It is an important direction. It is a greening direction. It focuses on alternatives. It focuses on creating green jobs and getting a sense of understanding about the smallness of the resources that are