

OVERSIGHT INVESTIGATION OF THE DEATH  
OF ESEQUIEL HERNANDEZ, JR.

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A REPORT OF CHAIRMAN LAMAR SMITH

TO THE

SUBCOMMITTEE ON  
IMMIGRATION AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*



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This report contains the findings and conclusions of a Congressional oversight investigation of the death of Esequiel Hernandez, Jr., conducted by the House Judiciary Committee's Subcommittee on Immigration and Claims ("the Subcommittee").<sup>1</sup> Relevant documents are included as appendices to this report.

### *Executive Summary*

Esequiel Hernandez, Jr., an 18-year-old high school student who lived in Redford, Texas, a border town, was tending his family's herd of goats on the evening of May 20, 1997, when he was shot and killed by a team of United States Marines doing counter-drug border surveillance for the United States Border Patrol. The border surveillance mission was coordinated through Joint Task Force Six ("JTF-6"), a Defense Department multi-service organization responsible for providing counter-drug military support to civilian law enforcement agencies.

Hernandez' death was attributable to a series of failures on the part of Justice Department and Defense Department personnel who were negligent in their training and preparation for the border surveillance mission, and who failed to respond adequately to an emergency situation as it developed. After Hernandez' death, agency personnel compounded their previous errors by withholding information and impeding investigations in an effort to avoid accountability that, unfortunately, has been largely successful.

The Marine Corps, to its credit, conducted a detailed internal investigation of the shooting and disciplined a number of officers in the chain of command. However, the four Marines in the team that killed Hernandez suffered no adverse consequences despite significant and disturbing evidence that they may have been guilty of serious wrongdoing. In addition, no JTF-6 personnel were held accountable for errors relating to the Hernandez killing.

Neither the Border Patrol nor its parent agencies, the Immigration and Naturalization Service and the United States Department of Justice, conducted an internal review comparable to that undertaken by the Marine Corps. No Justice Department personnel have been held accountable for negligence or wrongdoing regarding the death of Esequiel Hernandez, Jr.

### *Background*

Redford is a small border town in the Big Bend area of west Texas, about 200 miles southeast of El Paso. It has just over a hundred inhabitants who live along the northern banks of the Rio Grande, directly across from Mexico. The nearest major border crossing point is about 15 miles upriver from Redford, between the

<sup>1</sup>The report was completed with the assistance of Jim Wilson, Counsel for the Subcommittee; B.A., Haverford College; J.D., Harvard Law School; Captain, United States Army Reserve.

larger border towns of Presidio, Texas (pop. 3000) and Ojinaga, Mexico (pop. 24,000).

The Big Bend area is arid and mountainous, with rocky soil and scattered scrub vegetation, and wild animals such as rattlesnakes, scorpions, coyotes and javelinas. The area is very sparsely populated, and it is vulnerable to frequent small-scale drug smuggling and illegal immigration, with their attendant violence and corruption. The law enforcement agency primarily responsible for combating illegal drugs and immigration is the United States Border Patrol, a sub-agency of the United States Department of Justice. The Border Patrol has its Sector headquarters in Marfa, Texas, about 60 miles north of the border, and also maintains a smaller office in Presidio.

In recent years, the Border Patrol has requested and received various kinds of mission-related assistance from the United States Department of Defense. Military personnel have built fences long the border, along with roads to improve access for Border Patrol units; they have provided motion sensors, lights and observation towers to detect illegal border crossings; and they have also provided armed patrols to conduct border surveillance. Much of this assistance has come through coordination with Operation Alliance, a federal multi-agency counter-drug organization, and JTF-6, both of which are headquartered in El Paso, Texas.

In April 1996 Border Patrol officials requested a military listening post/observation post ("LP/OP") mission, scheduled for May 1997, to observe the U.S.-Mexico border in areas near Presidio where they believed drug smuggling occurred.<sup>2</sup> The request was approved by Operation Alliance and forwarded to JTF-6, which designated it as Mission JT414-97A and assigned it to the Headquarters Battery of the Fifth Battalion, Eleventh Marine Regiment, First Marine Division, located at Camp Pendleton, California.

Further planning and coordination by the Border Patrol, JTF-6 and the Marine unit defined the mission to include four camouflaged LP/OPs manned by eight four-man teams of Marines. Each LP/OP would be manned by one team for 72 hours, then by a second team for another 72 hours. The Marines were instructed to remain concealed in "hide positions" during daylight hours and move to their LP/OPs at night. The Marines were to report border crossings of the Rio Grande and any other suspicious activities.

The Marines and the Border Patrol were to operate on a common secure radio network that would allow the Border Patrol to monitor the Marines' reports and respond to situations requiring apprehension of suspects or emergency assistance to the Marines.

One of the LP/OPs, designated as Hole 3, was located on a ridge overlooking an area of the border known as Polvo Crossing, just south of the town of Redford. Although Polvo Crossing is not a legal border crossing point, the shallowness of the Rio Grande there permits some crossings by vehicle, on horseback or on foot.

The second team of Marines assigned to Hole 3 was designated as Team 7, composed of Corporal Clemente Banuelos, the team leader; Corporal Roy Torrez, the assistant team leader; Lance Cor-

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<sup>2</sup> See memorandum from Chief Patrol Agent Richard Morrissey to Chief Patrol Agent Michael Connell (April 8, 1996), and letter from Chief Patrol Agent Michael Connell to Brigadier General Benjamin Griffin (May 13, 1996), at Appendix A.

poral Ronald Wieler, the radio operator; and Lance Corporal James Blood. Team 7 was placed at Hole 3 from May 17-20, 1997.

*Events Occurring on the Evening of May 20, 1997*

Just before 6:00 p.m. on the evening of May 20th, Team 7 began to move up from their hide position to the LP/OP. The Marines wore camouflage uniforms, guille suits (burlap strips sewn to uniforms to enhance camouflage), and some camouflage face paint. They carried standard-issue M16A2 assault rifles.

At about 6:05 p.m., Banuelos reported by radio that he had arrived at the LP/OP and spotted an armed individual about 200 meters away, herding goats and carrying a rifle.

This individual turned out to be Hernandez, who carried a .22 rifle to ward off wild animals that might attack him or his goats. Hernandez stood on an adjacent ridge line to the west with a number of small buildings along the top of it. A small draw separated Hernandez' ridge line from the one occupied by the Marines.

Many of the events of the following twenty-two minutes are still subject to conflicting accounts and interpretations, but some basic facts are clear from recorded radio transmissions. The recorded transmissions were made on a radio network used by the Marines and Border Patrol to coordinate and carry out their LP/OP missions.<sup>3</sup>

At 6:07, Banuelos reported over the radio, "We're taking fire." At 6:10, he radioed, "We're gonna pull back to a tactical position to try to come to a . . . from our right flank. . . . Right now he's stationary, but he kind of knows the general vicinity where two of my men are. He doesn't have a visual on me."

At 6:11, he radioed, "As soon as he readies that rifle back down range, we're taking him," and the Marine Tactical Operations Center ("TOC") responded "Roger, fire back."

At 6:13, Banuelos radioed, "I have a visual on the suspect, in front of the church. There's a brown building facing us. He's standing in front of it, he's got the rifle out." At 6:14, he radioed, "We have a visual he's kind of moving there at the building, we're not really sure exactly where he's at right now. He's hiding, he's ducking down. . . . He knows we're out here, he's looking for us."

At 6:19, Border Patrol agents advised Banuelos that they were en route to Redford and requested guidance regarding the Marines' location. Banuelos replied that they were at the Polvo Crossing. Regarding Hernandez, he said, "The guy is right out, right out in front of the house. He's looking for us." At 6:20, in response to a question from the approaching Border Patrol agents, Banuelos confirmed that Hernandez was armed with a .22 rifle.

The Marine team did not transmit again for seven minutes. Banuelos handed the radio to Corporal Torrez. At some point, Banuelos aimed his M16A2 rifle at Hernandez and fired one round that entered Hernandez' body just below his chest on his right hand side. The bullet broke into two fragments that traveled through Hernandez' abdomen, causing severe and necessarily fatal damage to his major blood vessels and internal organs. Hernandez died sometime within the next half hour.

<sup>3</sup> See transcripts of radio transmissions at Appendix B.

Torrez radioed at 6:27, "We have a man down. The man . . . the man pointed his weapon down range and we took him out."

#### *The Marines' Account of Events*

Because Hernandez was unable to talk to anyone before he died, the four Marines were the only persons able to convey eyewitness accounts of the events leading up to the shooting. Although their individual accounts were sometimes mutually or internally inconsistent, for the most part they incorporated the following version of events:

According to the Marines, they were moving to their LP/OP when they spotted a man on horseback on the Mexican side of the Rio Grande, and about the same time they also spotted Hernandez carrying a .22 rifle on the U.S. side. The Marines came to a halt and assumed kneeling positions. Based on their previous mission-related training regarding drug-trafficking organizations, the Marines assumed that the man on horseback and Hernandez might be scouts or smugglers working in tandem for such an organization.

Shortly after the Marines spotted Hernandez, he raised his rifle and fired one or two shots at them. The Marines immediately dropped into prone positions and sought available cover. Hernandez then began moving northeast along the adjacent ridge line. According to Banuelos, Hernandez was bobbing and weaving and seeking cover in a manner that suggested that he was attempting to maneuver to a better vantage point.

Banuelos became concerned that Hernandez was trying to flank his team, perhaps in preparation for a renewed attack. To keep Hernandez in sight, Banuelos moved his team northeast along the LP/OP ridge line, paralleling Hernandez' movement. Banuelos then handed the radio to Torrez and instructed him to remain on the high ground, with its commanding view and superior radio reception, while Banuelos, Wieler and Blood advanced into the draw separating the two ridge lines.

According to the Marines, the weather was windy enough to prevent them from communicating verbally or shouting warnings from a distance. Using hand signals, Banuelos maneuvered his team into the draw separating the two ridges. The three Marines moved forward by individual rushes, covering each other as they moved, with Banuelos in the center, Blood on the right, and Wieler on the left.

When the three Marines had narrowed the distance between themselves and Hernandez to approximately 130 meters, Banuelos saw Hernandez raise his rifle and aim at Blood. To protect his fellow Marine, Banuelos fired one shot at Hernandez, who disappeared from view. Torrez later stated that he saw Hernandez' feet go up in the air after Banuelos shot him.

The Marines continued to approach Hernandez' position, moving tactically in case Hernandez was still capable of posing a threat. After five or six minutes, they spotted Hernandez lying in an old, abandoned well filled up with dirt. The force of Banuelos' shot had apparently knocked Hernandez backwards into the well.

Hernandez was still breathing, and the Marines could not see any bullet wounds or blood on him. Because he looked like he

might have a broken neck, the Marines did not move him or attempt to administer first aid. Hernandez died shortly thereafter.

*Previous Shooting Incident.* It should be noted that shortly after Hernandez' death, the Border Patrol documented a previous shooting incident allegedly involving Hernandez in February 1997. Border Patrol agents James DeMatteo and Johnny Urias wrote memoranda indicating that Hernandez inadvertently fired a number of shots in their general vicinity because he thought that someone or something was threatening his goats.<sup>4</sup> Their accounts implicitly suggested that Hernandez may have been inclined to fire his weapon indiscriminately and thus lent some support to the Marines' account of events. However, it should be noted that Urias stated to investigating authorities that he did not recognize Hernandez as the same individual who was involved in the prior shooting incident, so the connection with Hernandez rests entirely on DeMatteo's statement.<sup>5</sup>

#### *Investigations and Legal Proceedings*

The Hernandez killing aroused a high level of public and media interest, and it led to a number of investigations by various governmental authorities.

*Texas State Criminal Investigation.* The Texas Department of Public Safety immediately initiated a criminal investigation led by the Texas Rangers and conducted in cooperation with the office of the District Attorney for the 83rd District of Texas. The District Attorney, Albert Valadez, presented evidence to a Texas grand jury in July and August 1997. On August 14, 1997, the grand jury decided not to indict Banuelos for the killing. The Subcommittee has not reviewed the Texas grand jury transcripts, which remain confidential, and is thus unable to state conclusions regarding the grand jury's deliberations.

*Defense Department Investigations.* JTF-6 promptly initiated an AR 15-6 investigation, a standard procedure used to investigate serious incidents, on the day after the killing. The JTF-6 AR 15-6 report addressed a number of issues relating to the Hernandez killing,<sup>6</sup> but the Marine Corps determined that it did not address all the facts and issues required by Corps regulations. Thus, in July 1997 the Marine Corps appointed retired Major General John Coyne to conduct a more thorough and detailed investigation of events related to the killing. Major General Coyne assembled a team of investigators and submitted his final report ("the Coyne Report") on April 7, 1998.<sup>7</sup>

*Federal Civil Rights Investigation.* After the Texas grand jury concluded its business in August of 1997, the Justice Department's Civil Rights Division began its own investigation to determine

<sup>4</sup> See memorandum from Border Patrol Agent James DeMatteo to Marfa Sector Chief Patrol Agent (May 29, 1997), and memorandum from Border Patrol Agent Johnny Urias to Marfa Sector Chief Patrol Agent (May 29, 1997), at Appendix C.

<sup>5</sup> See Federal Bureau of Investigation FD-302 report of interview with Border Patrol Agent Johnny Urias (August 27, 1997), page 3, included at Appendix T.

<sup>6</sup> See AR 15-6 report and addendum thereto at Appendix D.

<sup>7</sup> Due to its size, the Coyne Report has not been included in the appendices to this report, but it has been made available to the press and public, upon request, by the Defense Department. While the Subcommittee does not necessarily concur with all of the Coyne Report's findings and conclusions, it does find the Coyne Report to be thorough, well-researched, and an indispensable reference regarding the Hernandez killing.

whether any of the Marines had committed criminal violations of Hernandez' civil rights. The investigation was led by Special Litigation Counsel Barry Kowalski, who was the lead attorney in the successful federal civil rights prosecution of the Los Angeles Police Department officers responsible for the beating of Rodney King. Mr. Kowalski's federal prosecutors were assisted by FBI investigators.

Justice Department investigation regarding the killing began shortly after it occurred and assumed prominence when the civil rights investigation began in August 1997. Mr. Kowalski and his subordinates worked closely with Major General Coyne and his investigative team. The civil rights team presented its evidence to a federal grand jury in Pecos, Texas, in December 1997 and January 1998, with the last session occurring on January 9th. No indictments were handed down by the grand jury, and on February 11, 1998, Mr. Kowalski recommended to the Attorney General that the case be closed.<sup>8</sup>

*Texas State Criminal Investigation (Renewed).* After the close of the civil rights investigation, the Justice Department made available evidence it had gathered, including grand jury transcripts, to District Attorney Valadez in Texas. Mr. Valadez presented evidence to another Texas grand jury that decided on August 11, 1998 not to indict anyone. Again, the grand jury proceedings remain confidential, and the Subcommittee has no information explaining the inability to secure an indictment.

*Civil Tort Action.* On July 14, 1997 the Hernandez family filed a tort claim against the Defense and Justice Departments, alleging negligence and damages relating to Esequiel, Jr.'s death. The Defense and Justice Departments settled the claim on July 25, 1998 by promising to make a series of payments to the family with a present value of approximately one million dollars, without, however, admitting any fault on the part of the government.

*Congressional Oversight Investigation.* The House Judiciary Committee has primary oversight jurisdiction over Justice Department operations and related activities. Beginning in June 1997, the Subcommittee repeatedly requested from the Justice Department detailed information regarding the Hernandez killing, including oral briefings, answers to written questions, documents and interviews with agency personnel. However, the Justice Department consistently refused to provide most of the requested information.

Beginning in August 1997, the Justice Department took the position that its lack of cooperation with the Subcommittee's investigation was justified by the pendency of the federal criminal investigation of the Hernandez killing, which might be prejudiced by premature disclosure of information. By letter dated August 15, 1997, Assistant Attorney General Andrew Fois, writing on behalf of the Justice Department, stated that "[o]nce the Department's investigation is completed, we will be in a better position to comply with your request for more detailed information about the shooting."<sup>9</sup>

The Subcommittee deferred to the Justice Department's stated concern by canceling a scheduled public hearing and forbearing

<sup>8</sup> See memorandum from Special Litigation Counsel Barry Kowalski to Attorney General Janet Reno (February 11, 1998) (redacted by Department of Justice).

<sup>9</sup> See letter from Assistant Attorney General Andrew Fois to House Immigration and Claims Subcommittee Chairman Lamar Smith (August 15, 1997), page 2, at Appendix F.

from compelling the production of testimony and documents. On September 9, 1997, Attorney General Janet Reno told Subcommittee Chairman Lamar Smith that the Justice Department's investigation would probably be concluded by mid-September.<sup>10</sup>

However, the Department's investigation lasted much longer than the Attorney General represented. As noted above, it continued until February 1998. Moreover, the Department provided no additional information after its investigation concluded on February 11, 1998, despite its previous representations and despite repeated requests in writing from the Subcommittee.

On May 21, 1998, the Subcommittee executed Congressional subpoenas duces tecum compelling the production of all records relating to the Hernandez killing held by the Justice Department and the Defense Department.<sup>11</sup> Unlike the Justice Department, the Defense Department was not subpoenaed due to a long-standing failure to cooperate with Congress; rather, both agencies were served with identical subpoenas so that the Congressional investigation might proceed expeditiously after long delay.

During the following months, both agencies produced tens of thousands of responsive documents to the Subcommittee, but they also withheld two categories of responsive documents: (1) grand jury materials and (2) attorney-client materials.

Congressional subpoenas impose a legal obligation of compliance upon the parties named therein, but the law recognizes a limited exception for grand jury materials.<sup>12</sup> While this exception is narrow<sup>13</sup> and may not legitimately apply to the documents withheld by the Justice and Defense Departments, the Subcommittee has not disputed the agencies' claims on this point.

However, the agencies' claims of attorney-client privilege are baseless, as that privilege is without legal force against a Congressional subpoena and has never been so applied.<sup>14</sup> Some of the withheld attorney-client documents were generated by Banuelos' defense counsel, Mr. Jack Zimmerman, an experienced private attorney retained by the Justice Department and paid with government funds. The Justice Department obtained those documents when a number of Department attorneys led by Stephen Doyle, a trial attorney in the Department's Torts Branch, assisted Zimmerman in Banuelos' defense.

It is troubling that Justice Department attorneys from the Torts Branch, which was responsible for contesting the Hernandez family's tort claim, assisted in Banuelos' criminal defense at the same time that other Justice Department attorneys investigated Banuelos' possible criminal liability for purposes of prosecution. These opposing representations created at least the appearance of a conflict of interest.

<sup>10</sup> See memorandum from Assistant Attorney General Andrew Fois to Attorney General Janet Reno (undated), at Appendix G.

<sup>11</sup> See Subpena Duces Tecum from House Judiciary Committee Chairman Henry Hyde to Attorney General Janet Reno (May 21, 1998), and Subpena Duces Tecum from House Judiciary Committee Chairman Henry Hyde to Defense Secretary William Cohen (May 21, 1998), at Appendix H.

<sup>12</sup> See Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* (1995) (Congressional Research Service Report No. 95-464), at 29-31 and cases cited therein.

<sup>13</sup> See, e.g., *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1303-06 (M.D. Fla. 1977).

<sup>14</sup> See Rosenberg, *supra*, at 43-56.

It is additionally troubling that although both agencies initially attempted to assert numerous other legally baseless privileges to withhold documents—i.e. “deliberative process,” “work product,” “third agency,” and the pending tort claim—they soon produced all documents except those designated as attorney-client. The continued withholding of relevant documents without legal justification creates the strong impression that the agencies are concealing crucial facts. Regarding the attorney-client documents, the Subcommittee continues to oppose the agencies’ wilful non-compliance with its subpoenas.

*Problems with Training and Preparation for Mission 414-97A*

Since World War II, United States military personnel have patrolled international borders throughout the world, from the Warsaw Pact to Korea to the Balkans. Experience has shown that border missions are often dangerous, difficult, and delicate, but they can be performed successfully by properly trained personnel. Proper training must include detailed instruction in the military, civilian, and diplomatic aspects of the mission, as well as frequent drilling in emergency procedures.

The Coyne Report, based on a thorough investigation of the training and preparation conducted for Mission 414-97A, concluded that both were inadequate for the mission at hand. Poor planning and execution of mission-related training were found at the Marine Corps divisional, regimental, battalion and battery levels. The central problem was that the chain of command regarded the mission primarily as a training opportunity for Marines, rather than as a complex real-world mission involving significant risk.

This attitude persisted even though a number of similar border missions previously coordinated by JTF-6 and performed by the 1st Marine Division involved shooting incidents and training fatalities. Divisional and subordinate headquarters failed to incorporate reviews of previous missions, including serious incidents occurring therein, into the training plans and standard operating procedures used for subsequent missions.

The Marines assigned to Mission 414-97A were selected based on their need for a training opportunity rather than on their qualifications for the mission. The best-qualified Marines for a real-life border reconnaissance mission involving potential hostilities would have been a team of reconnaissance scouts or infantry riflemen from a line unit, or military policemen, who have had the benefit of sustained training together in many of the skills required for such a mission. Instead, the Marines assigned to Mission 414-97A were selected from a headquarters unit that typically was fully occupied with providing supply, maintenance and administrative support to an entire artillery battalion. In fact, Headquarters Battery Marines were selected specifically because their full-time devotion to numerous decentralized administrative and support responsibilities made them generally deficient in tactical security operations.

By military occupational specialty, Banuelos was a fire support marine with additional training as a field artillery scout observer; Torrez was a motor vehicle and wrecker operator who was also trained as a combat aidsman; Blood was a motor vehicle operator; and Wieler was a field radio operator. At the time they were se-

lected for Mission 414-97A, the four Marines worked in two different sections of the Headquarters Battery and had never worked together as a team. The make-up of Team 7 was not finalized until about May 5, 1997, less than two weeks before the mission.

In June 1996, a 1st Marine Division report on a training fatality that occurred during a JTF-6 mission recommended that in the future, mission commanders should be allotted a minimum of ten uninterrupted training days and five uninterrupted days for pre-deployment preparation prior to each mission. However, the divisional, regimental and battalion headquarters failed to follow up on this recommendation by prioritizing training and preparation and providing guidance, support and supervision therefor.

Captain Lance McDaniel, the Headquarters Battery Commander and mission commander for Mission 414-97A, did schedule training for Mission 414-97A on a number of occasions. However, higher headquarters repeatedly caused the training to be canceled by scheduling inspections, evaluations, and maintenance activities in which Headquarters Battery was ordered to participate. By the time the Marines deployed to Texas on May 12, 1997, Captain McDaniel had conducted only three days of dedicated training for the mission. Many of his Marines were diverted by other duties and received even less training: for example, Blood received only six to eight hours of training for the mission, Wieler's training was limited to erecting communications antennas, and Torrez received no training at all. The four Marines of Team 7 never trained as a team before occupying their LP/OP on May 17, 1997.

The Marines' unreadiness for Mission 414-97A was compounded by a lack of support from both JTF-6 and the Border Patrol. Of the three organizations responsible for the mission, JTF-6 had by far the greatest expertise and experience in military counter-drug operations, while the Marfa Sector Border Patrol had the greatest knowledge of law enforcement procedures and local conditions in the Big Bend area. Both agencies were responsible for providing detailed background information and training guidance to the Marines, but they failed to do so.

JTF-6 provided logistical and administrative support for Mission 414-97A but did not communicate the operational and tactical requirements associated with counter-drug border surveillance. Similarly, the Border Patrol failed to explain law enforcement procedures for minimizing the use of force and defusing dangerous situations in an environment where drug smugglers and alien smugglers operate near innocent civilians.

In addition, both agencies provided only a fragmentary and sometimes inaccurate picture of local conditions. For example, the Marines were told that Redford was an unfriendly area where 70-75% of the local population was involved in drug trafficking, and they were alerted to the dangers posed by armed smugglers. However, the Marines were not made to understand that innocent civilians in this remote and sometimes dangerous part of the country carry weapons and are wary of intruders for entirely sensible reasons. They were not made to understand how threatening four heavily camouflaged and armed Marines might appear to local residents with no foreknowledge of their presence.

The Marines in Team 7 were not even informed that their LP/OP was located very near a number of family homes, including the Hernandez home; that Hernandez regularly brought his goats to the Polvo Crossing area; or that there had been a previous shooting incident involving Hernandez. Border Patrol Agent in Charge Mario Vargas, who was responsible for Border Patrol liaison with the Marines, never briefed them on local conditions.

The Marines and the Border Patrol did not plan or rehearse responses to civilian contact—which would necessarily compromise their covert mission and require some level of disengagement—nor did they plan or rehearse emergency responses to dangerous situations. No Border Patrol agents were specifically assigned the duty of responding to the Marine LP/OPs. Agent Vargas never even visited Hole 3, and so the Border Patrol did not know its exact location until after the Hernandez killing. This lack of preparation had tragic results.

Finally, two more areas of preparation for Mission 414-97A deserve mention because, although they did not directly cause Hernandez' death, they are emblematic of the supporting agencies' negligent inattention to detail.

First, Agent Vargas was responsible for securing land use agreements from the owners of three adjacent strips of land on which the Marines were to be located, and he represented to the Marines that he had secured the necessary agreements. However, he failed to secure an agreement for the central strip of land, and as a result the Marines of Team 7 were inadvertently trespassing when they occupied their LP/OP.<sup>15</sup>

Second, at JTF-6's insistence and over the protests of 1st Marine Division Officers, the emergency medevac helicopter for Mission 414-97A was stationed in Marfa, more than sixty miles from the LP/OPs. This meant that the medevac would have to take more than an hour to pick up a casualty and deliver him to a hospital, which could pose a danger to injured Marines as well as civilians.

#### *Problems with Execution of Mission 414-97A*

Predictably, lapses in training and preparation led to problems with mission execution.

*Border Patrol Unresponsiveness.* The written operation order governing the execution of Mission 414-97A, which was based on prior planning and liaison by the Marines, JTF-6, and the Border Patrol, was promulgated by Headquarters Battery on April 17, 1997, and then reviewed together by all three agencies.<sup>16</sup> Based on the operation order and on previous discussions with Border Patrol representatives, the Marines and JTF-6 expected the Border Patrol to respond to reports of border crossings or suspicious activity by promptly arriving at the scene and, if appropriate, apprehending the suspected drug smugglers or illegal aliens. The Marines and JTF-6 expected the Border Patrol to be able to respond to reports

<sup>15</sup>See memorandum for record from Lieutenant Colonel William Reichert (June 3, 1997), at Appendix I.

<sup>16</sup>See Memorandum of Understanding between 5th Battalion, 11th Marine Regiment; United States Border Patrol; Operation Alliance; and Joint Task Force Six (April 24, 1997), and Operation Order for JTF Mission 414-97 (April 17, 1997), at Appendix J.

from the Marine surveillance teams, including reports of emergency situations, within fifteen minutes.

The operation order stated that, "Teams will be watching for and making accurate real time reports on all personnel, airplanes, and vehicles in their respective sector, paying particular attention to anything resembling illegal activity. Reports will go to the [forward command post]. Teams will continue to monitor the activity as long as it is in their field of view. The [forward command post] will contact the [tactical operations center] who will contact the Border Patrol. The Border Patrol will have agents close enough to our holes to respond in short order (15 minutes or less). The Border Patrol will handle the situation from that point."

Team 7 reported relatively frequent activity at the Polvo Crossing, but the Border Patrol failed to respond to a majority of the Marines' reports. When the Border Patrol did respond, it sometimes took them twenty or thirty minutes to arrive at the scene. Many suspects were able to leave the area before the Border Patrol arrived, which frustrated Team 7 and caused them to question the utility of their mission.

On May 19, 1997, Team 7's second day at the LP/OP, the Border Patrol told the Marines that Polvo Crossing was a Class B Port of Entry—i.e., a legal border crossing point—which explained the high level of activity there and the limited Border Patrol response. The Marines were frustrated that this key information had not been conveyed earlier. However, the truth of the matter was that Polvo Crossing was not a legal crossing point; rather, it was a customary illegal crossing point permitted by the Border Patrol.<sup>17</sup>

The next evening, when Hernandez was killed, the issue of Border Patrol response time assumed crucial significance. As described above, the Marines initially reported shots fired at 6:05 p.m. and did not fire back at Hernandez until 6:27 p.m. Had the Border Patrol arrived on the scene within fifteen minutes, as the Marines expected, they would probably have been able to defuse the situation without loss of life. However, the Border Patrol did not arrive until 6:45, which was thirty-eight minutes after the Marines reported shots fired, and eighteen minutes after Banuelos shot Hernandez. The Border Patrol agents had to be directed onto the scene over the radio because, due to poor prior planning, they did not know where the LP/OP was located.

In the aftermath of the Hernandez killing, the Border Patrol took the position that the fifteen-minute response time set out in the operation order was a guideline rather than a requirement, and that it applied only during the hours of darkness, when the Marines were at their LP/OPs. The Border Patrol argued that they did not have enough agents in Presidio to perform their assigned duties and also provide round-the-clock fifteen-minute response time to all four LP/OPs.

At best, the Border Patrol's stated understanding of the response time requirement differed drastically from that of the Marines and JTF-6 and signaled a serious failure of inter-agency planning and coordination.

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<sup>17</sup>See memorandum for record from Major Michael Burmeister (June 20, 1997), at Appendix K.

*Premature Deployment of Team 7.* Banuelos further complicated the emergency response situation by moving Team 7 to its LP/OP well before the onset of darkness. The Marines were supposed to remain hidden by day, because if they were spotted their mission would be compromised. Smugglers who knew where the Marines were located could easily evade them by moving up or down river. Because full darkness did not descend until about 8:45 p.m., the Marines of Team 3, which preceded Team 7 at Hole 3, did not occupy the LP/OP until sometime between 9:00 and 10:00 p.m. each night.

Banuelos moved Team 7 to the LP/OP much earlier, between 6:00 and 7:00 p.m. each evening. Captain McDaniel did not monitor the mission carefully enough to discover and correct this departure from proper procedure. On the evening of the killing, Banuelos began moving his team up the hill before 6:00 p.m. and soon compromised his team's operational security by encountering Hernandez. This would not have occurred if Team 7 occupied its LP/OP at the proper time.

*Failure of Mission Command.* When Banuelos radioed the TOC at 6:11, "As soon as he readies that rifle back down range, we're taking him," the radio operator on duty was a junior enlisted man, Lance Corporal James Steen, who immediately responded, "Roger, fire back." Captain McDaniel and other Marine officers and non-commissioned officers in the TOC knew that Steen's instruction to Banuelos was incorrect and might provoke needless hostilities. Nonetheless, no one countermanded the order.

Instead, Sergeant Daren Dewbre replaced Steen at the radio and, at 6:15, told Banuelos, "You're to follow the Rules of Engagement." Banuelos did not acknowledge the transmission and may not have received it, and Sergeant Dewbre did not transmit any additional instructions. Even if Banuelos received the transmission, it was too vague to provide useful guidance.

As Team 7 pursued and engaged Hernandez, the TOC failed to question and direct them over the radio. The TOC also failed to dispatch assistance in person, even though there were Marines at a radio relay station who could have traveled to Hole 3 within fifteen minutes. The chain of command simply watched events unfold.

It is understood that Captain McDaniel did not wish to distract the attention of Team 7 from a potentially life-threatening situation by micro-managing them with superfluous questions and instructions, nor did he wish to interfere with the Border Patrol agents who were primarily responsible for responding to the LP/OPs. Nonetheless, he should have been more proactive in his exercise of command.<sup>18</sup> A more involved mission commander might have averted a tragedy.

*Lack of Medical Attention.* The Hernandez autopsy showed that his wounds were so serious that he almost certainly would have died no matter what medical attention he received. Nonetheless, it is worth noting that the four Marines failed to administer first aid to Hernandez, which reflects poorly on their mission performance.

<sup>18</sup> See memorandum from Brigadier General James Lovelace to Fort Bliss Commanding General (June 20, 1997), pages 2-3, at Appendix L.

According to Torrez, who was the specially-trained Combat Aidsman for Team 7, he and the other members of the team did not provide medical care to Hernandez because they thought his neck might be broken and did not want to exacerbate the injury by moving him. However, that explanation is not consistent with the Marines' prior training.

Both the basic skills training received by all Marines and the Combat Aidsman training received by Torrez included instruction in simple diagnosis of casualties. When encountering a casualty, a Marine should first check if he is breathing, if he has a pulse, and if he is bleeding, because problems in those three areas can be fatal in a matter of minutes. Respiration, pulse, and to some extent bleeding can all be monitored without moving the casualty. Moreover, it is worth moving the casualty to provide emergency lifesaving techniques—i.e. unclogging the airway, administering cardiopulmonary resuscitation, or applying a tourniquet—even if the movement may aggravate a neck or spinal injury.

Given their previous training, the failure of the four Marines to provide medical attention is troubling.

#### *Interference with Criminal Investigation*

An intentional homicide, particularly a shooting homicide, calls for a criminal investigation. A person who commits a homicide is not exempt from investigation or prosecution merely because he works for the government, or because he wears a uniform, or because he was on the job when he pulled the trigger. The power of the federal government should not be used to allow, defend, or excuse potentially criminal conduct.

Unfortunately, these principles were not always followed during the Texas state criminal investigation of Hernandez' death.

*Interviews of Suspects.* In response to the Marines' report that they were taking fire, Border Patrol agents and local law enforcement officials converged on the Polvo Crossing area. They began to arrive in the vicinity about ten minutes after Banuelos shot Hernandez and finally linked up with the Marines around 6:45 p.m.

The situation they faced was that of an intentional homicide with four potential suspects. In cases involving multiple suspects it is standard procedure to separate the suspects and interrogate them individually. The suspects' statements can then be examined side-by-side for inconsistencies, and the truth can eventually be drawn out, if necessary, through further investigation and interrogation.

On the other hand, if multiple suspects are allowed to coordinate their stories before being interrogated by law enforcement officers, it becomes difficult or impossible to uncover deceptions, if such occurred, and piece together an accurate account of events.

The first local law enforcement officials on the scene were Officer Gilbert Spencer of the Permian Basin Drug Task Force and Deputy Oscar Gallegos of the Presidio County Sheriff's Office, who began to cordon off the area and collect evidence. Arriving with Spencer and Gallegos were Border Patrol Agents Jerry Succa, Stanley Myers, Rodolfo Martinez, and Johnny Urias. Over the next hour they were joined by Assistant Chief Patrol Agents Rudy Rodriguez and David Castaneda of the Border Patrol, and Sheriff Danny

Dominguez and Chief Deputy Rusty Taylor of the Presidio County Sheriff's Office.

Agent Castaneda and Officer Spencer went with Banuelos to the area from which Banuelos said he fired at Hernandez, and after a brief search Banuelos pointed out an expended shell casing. They then asked Banuelos to walk through the area and recreate the events leading up to the shooting, and Banuelos asked that Team 7 conduct the walk through together. Agent Castaneda and Officer Spencer agreed, and the Marines conducted a thirty to forty minute walk through of the area, with Banuelos and Torrez doing most of the talking.

Later in the evening, Chief Deputy Taylor coordinated the taking of brief written statements from the Marines. The Marines were told to recount the events of the shooting but were not required to answer any specific questions.

Later still, the Texas Rangers and the Federal Bureau of Investigation assumed the lead investigative roles for the State of Texas and the federal government, respectively, but neither agency was able to interview the Marines that evening, because the Marines had departed to Marfa. In Marfa they spent the night in two hotel rooms provided by Border Patrol Chief Patrol Agent Jerry Agan, who also offered to provide professional counseling to the Marines. According to the Marines, they did not discuss the events of the shooting among themselves during their night at the hotel, but this assertion is not credible.

The next day the Marines were returned at mid-day to the site of the shooting, where they were awaited by Texas Rangers David Duncan and Jerry Villalobos, and FBI agents Jane Kelly, Steve Gohrick, Steve French, and Kyle Bonath. However, before the law enforcement officers were permitted to interview them, the Marines did another joint walk through of the area, which lasted two hours and was led by Lieutenant Colonel Rennie Cory, the U.S. Army officer appointed to conduct the JTF-6 investigation of the shooting. After the walk through, the Texas Rangers and FBI agents began to interview the four Marines.

In sum, the Marines were treated much differently from most potential suspects in homicide cases, and as a result they benefitted from ample opportunities to coordinate and memorize their stories before being subjected to professional law enforcement interrogation. This created a significant obstacle to criminal prosecution.

*Subsequent Investigation.* During their criminal investigation, the Texas Rangers and District Attorney Valadez found it difficult to obtain necessary information, documents and testimony from the Marines, JTF-6 and the Border Patrol. The federal agencies failed to provide evidence in response to simple requests, so the District Attorney served subpoenas. The Defense Department responded to those subpoenas by asserting federal immunity, and the Justice Department responded that the subpoenas were improperly drafted, while reserving the right not to comply with the subpoenas even if they *were* properly drafted.<sup>19</sup>

<sup>19</sup>See letter from Defense Department General Counsel Judith Miller to District Attorney Albert Valadez (July 18, 1997), and letter from Border Patrol Sector Counsel Marilyn Chambers to Assistant District Attorney Mimi Smith (July 3, 1997), at Appendix M.

The four Marines were moved to El Paso on May 22, 1997, and shortly thereafter they returned to Camp Pendleton, which greatly hampered the Texas Rangers' continuing investigation. Meanwhile, the Border Patrol agents with information regarding the killing were initially forbidden to discuss the matter with the Texas Rangers or the District Attorney (although they were made available to Banuelos' defense attorney), then finally permitted to provide strictly limited testimony before the Texas grand jury.<sup>20</sup> On a number of occasions the Texas Rangers and the District Attorney were able to obtain relevant information only by publicizing the federal agencies' stonewalling, or at least threatening to do so.

For almost three months, the Texas Rangers and the District Attorney were forced to bargain with the Justice and Defense Departments to receive some, but not all, of the information, documents, and witness testimony required for their criminal investigation. The Texas state criminal investigation operated through a series of negotiated agreements between opposing agencies, rather than as a joint cooperative search for truth and justice.

Finally, the Justice Department's Civil Division, with the strong support of the Defense Department, prepared a recommendation to Attorney General Reno that she assert federal supremacy to block any Texas state criminal prosecution.<sup>21</sup> However, the Attorney General did not have to assert federal supremacy because the Texas grand jury did not deliver an indictment.

This delay and obstruction by the federal agencies should not have occurred. Esequiel Hernandez, Jr., was killed under suspicious circumstances, and his family, community, and the people of Texas had a right to see justice served, whatever the outcome might be. They had a right to see the truth come out.

However, the true facts regarding Hernandez' death were potentially dangerous to numerous officials of the Justice and Defense Departments. Those officials might face criminal prosecution, civil liability, public embarrassment, or damage to their careers. Thus, the Justice and Defense Departments, both powerful federal agencies, used their power to obstruct and impede state criminal law enforcement in the Hernandez case.

They should not have done so. They should have cooperated fully and promptly with the Texas state criminal investigation. They had no justification for doing otherwise.

#### *Doubts and Discrepancies Regarding the Marines' Account of Events*

In part because of the investigative difficulties described above, the true account of the events leading up to the death of Esequiel Hernandez, Jr., probably remains unknown. Various investigations of the Hernandez killing have pointed out discrepancies and raised serious doubts regarding the Marines' account of events, without,

<sup>20</sup> See electronic mail from Border Patrol Sector Counsel Marilyn Chambers to Immigration and Naturalization Service Headquarters Counsel Michael Cameron (July 29, 1997), letter from Border Patrol Sector Counsel Marilyn Chambers to Deputy Chief Patrol Agent Jerry Agan et al. (July 29, 1997), and letters from Chief Patrol Agent Simon Garza to Border Patrol Agent Jerry Succa, Border Patrol Agent James DeMatteo, Border Patrol Agent Johnny Urias, Border Patrol Agent Stanley Myers, Assistant Chief Patrol Agent Rudy Rodriguez, and Assistant Chief Patrol Agent David Castaneda (August 11, 1997), at Appendix N.

<sup>21</sup> See memorandum from Assistant Attorney General Frank Hunger to Attorney General Janet Reno (August 6, 1997), at Appendix O.

however, proving a different set of facts. The cumulative effect of such doubts and discrepancies is to create the disquieting impression that justice has not been done in this case, and may never be done.

*Hernandez' Alleged Assault on the Marines.* Esequiel Hernandez, Jr., was a young man of good reputation in the town of Redford. He had no history of violence, drug-related activities, or other criminal record. He was apparently well liked by his teachers and classmates. According to some local residents, he wanted to join the Marines.

It is inconceivable that Hernandez would have knowingly begun an assault on four heavily armed United States Marines. State and federal law enforcement authorities conducting re-enactments at the Polvo Crossing concluded that Hernandez almost certainly could not have identified the heavily camouflaged Marines from his initial position on the adjacent ridge line.<sup>22</sup> At best he might have made out some unidentified and possibly frightening movement. If he did shoot in the Marines' direction, it was probably either inadvertent (if he had not seen the Marines) or a reaction to fear.

*Hernandez' Movement along the Ridge Line.* Banuelos stated that Hernandez moved tactically along the ridge line, bobbing and weaving and seeking cover. This is not credible. Hernandez moved only about 200 meters along the ridge line over a period of twenty minutes. His pace of about ten meters per minute suggests a meandering stroll rather than a combat maneuver. If he was seeking cover from the Marines, he would not have stayed exposed on top of a ridge line with only an occasional creosote bush to use for partial concealment. Instead, he would have backed off the ridge, away from the Marines and toward his nearby home.

The most probable explanations for Hernandez' slow progress along the ridge are either that he did not see the Marines at all, or that he saw some unidentified motion and was still trying to figure out what it was.

Banuelos also stated that Hernandez' movement created the impression that he might be trying to flank the team of Marines, but this too is difficult to credit.<sup>23</sup> If Banuelos was worried about an assault from his right flank, he could have stayed on the high ground of the LP/OP, with its superior visibility and fields of fire, rather than descending into the draw, where he might become vulnerable to flanking fire from above. Alternatively, Team 7 could have moved back to its hide position.

*Forensic Evidence.* Some forensic experts were troubled by evidence which may be inconsistent with the Marines' account of events.

First, according to his family members and close friends, Hernandez was a right-handed shooter. Thus, if Hernandez had raised his rifle to aim at Blood, he would probably have presented the left

<sup>22</sup> See memorandum from Federal Bureau of Investigation Agent Kyle Bonath to El Paso office (July 17, 1997), at Appendix P.

<sup>23</sup> Neither the Justice Department civil rights investigators nor the Marine Corps investigators were able to credit the "flanking" explanation. See memorandum from Special Litigation Counsel Barry Kowalaki to Acting Assistant Attorney General Isabelle Pinzler (October 14, 1997), page 2, and letter from Lieutenant Colonel Lewis Bumgardner to Special Litigation Counsel Barry Kowalaki (October 27, 1997), page 8, at Appendix Q.

side of his body to Banuelos. However, Banuelos' bullet struck Hernandez on the right side of his chest.

Second, although Hernandez was supposed to have been knocked backward by Banuelos' shot into the old, abandoned well, the autopsy apparently did not find bruises and marks on Hernandez' back to corroborate such a fall.<sup>24</sup> Third, the M-16 round which struck Hernandez fragmented into two pieces, despite the fact that a round fired from an M-16 rifle into a human body is unlikely to fragment if it has traveled more than fifty to seventy-five meters before impact.<sup>25</sup>

*Weather Conditions.* Although the Marines claimed that strong winds hindered their verbal communications and prevented them from shouting a warning to Hernandez, the Border Patrol agents and local law enforcement officers who arrived on the scene shortly after the killing uniformly stated that the weather was calm and did not interfere with communications.<sup>26</sup>

*Previous Encounter with Hernandez.* On May 19, 1997, the day before the killing, Team 7 reported seeing a man on horseback at the Polvo Crossing. Border Patrol Agents James Kramer and Martin Arredondo responded to the report by traveling to the crossing, where they saw horse tracks, then traveling west about a quarter of a mile, where they encountered Hernandez riding a horse.<sup>27</sup> They saw nothing unusual about meeting Hernandez, who was riding in the vicinity of his home.

This incident, which was never made public and was not even disclosed to the Justice Department civil rights investigators until January of 1998, raises the strong possibility that the Marines encountered Hernandez on the day before the killing.

*The Marines' Motivation.* The Marines' account of events essentially amounts to a claim of self-defense. However, it is difficult to believe that the Marines felt seriously threatened by a young man whom they themselves had identified as a goat herder. They had seen his goats, and possibly Hernandez himself, on previous days.

If the Marines acted only in self-defense, it is difficult to understand why they tracked Hernandez for twenty minutes before shooting him. The self-defense claim might have made more sense if they had returned Hernandez' fire immediately, but the long delay is puzzling.

Another possibility suggested by the evidence is that the Marines were angered when Hernandez fired in their direction, and they decided to retaliate. Lance Corporal Wieler, who was granted transactional immunity by the Justice Department, stated that the Ma-

<sup>24</sup> See memorandum requested by Lieutenant Colonel Lewis Bumgardner (fax line August 22, 1997), at Appendix R.

<sup>25</sup> See electronic mail from Special Litigation Counsel Barry Kowalaki to Acting Assistant Attorney General Isabelle Pinzler et al. (October 22, 1997), at Appendix S.

<sup>26</sup> See Federal Bureau of Investigation FD-302 reports of interviews with Permian Basin Drug Task Force Officer Gilbert Spencer (August 27, 1997), page 5, Presidio County Sheriff's Deputy Oscar Gallegos (August 28, 1997), page 4, Border Patrol Agent Jerry Succa (August 28, 1997), page 2, Border Patrol Agent Stanley Myers (August 27, 1997), page 2, Border Patrol Agent Rudy Martinez (August 28, 1997), page 2, Border Patrol Agent Johnny Urias (August 28, 1997), page 2, Assistant Chief Patrol Agent Rudy Rodriguez (August 28, 1997), page 2, Assistant Chief Patrol Agent David Castaneda (August 28, 1997), page 1, Presidio County Sheriff Danny Dominguez (August 28, 1997), page 1, and Presidio County Sheriff's Chief Deputy Rusty Taylor (August 27, 1997), page 4, at Appendix T.

<sup>27</sup> See memorandum from Border Patrol Sector Counsel Marilyn Chambers to Deputy Chief Patrol Agent Jerry Agan (January 2, 1998), and Federal Bureau of Investigation FD-302 report of interview with Border Patrol Agent Martin Arredondo (January 9, 1998), at Appendix U.

rines agreed to advance toward Hernandez and "neutralize" him, although Wieler later changed his story and was ultimately determined to be an unreliable witness.<sup>28</sup> Certainly Corporal Banuelos' radio transmission that, "As soon as he readies that rifle back down range, we're taking him," coupled with his decision to advance on Hernandez in a manner likely to appear threatening and provoke a response, suggests an aggressive frame of mind.

*Conclusion.* Ultimately, the Subcommittee, like other organizations that investigated the Hernandez killing, has not been able to ascertain with confidence the course of events leading up to the killing. The resulting uncertainty is not fair to the Hernandez family and their community, or to the four Marines themselves. Had the Justice and Defense Departments cooperated more fully and immediately with the Texas state criminal investigation, this uncertainty might have been alleviated.

#### *Lack of Accountability*

Having made numerous mistakes that resulted in a needless and tragic death, the government agencies and officials responsible for the death of Esequiel Hernandez, Jr. were morally obligated to account for it. Their only proper course of action was to investigate the matter thoroughly, hold accountable those officials who were guilty of negligence or other wrongdoing, institute policies and procedures designed to ensure that similar mistakes do not occur in the future, and publicize their findings and actions so that the American people, to whom the federal government is ultimately accountable, could form their own judgments.

*Marine Corps.* Of the three agencies responsible for the killing, the Marine Corps acquitted itself most honorably on the question of accountability. Although it is clear from internal correspondence that some Marine officers actively opposed the state and federal criminal investigations, the Marine Corps' overall institutional response to the tragedy was to appoint retired Major General Coyne to conduct a command investigation. Major General Coyne conducted a thorough investigation and submitted an accurate and detailed report, which the Marine Corps has made available to members of the press and public.

Based on the Coyne Report's findings and conclusions regarding the insufficient training and preparation for Mission 414-97A, official written counseling letters were administered to Major General John Admire, Commander of the 1st Marine Division; Brigadier General Joseph Weber, Commander of the 11th Marine Regiment; Lieutenant Colonel Douglas Montgomery, Commander of the Fifth Battalion; and Captain McDaniel, the mission commander. Such letters are always damaging, and often fatal, to the careers of military officers.

Major General Coyne was supported in his efforts by General Charles Krulak, the Commandant of the Marine Corps. Both offi-

<sup>28</sup>See Memorandum from Special Investigative Counsel Barry Kowalski to Acting Deputy Chief Jessica Ginsburg (September 8, 1997), summary of interview of Corporal Wieler conducted by Major General Coyne on December 4-5, 1997 (undated), Federal Bureau of Investigation internal memorandum (December 7, 1997), and Federal Bureau of Investigation memorandum (December 8, 1997), at Appendix V.

cers were willing to examine unpleasant truths and make difficult decisions for the sake of accountability.

*JTF-6.* JTF-6 was responsible for the overall coordination of military counter-drug missions, including Mission 414-97A. Such missions involved the participation of various law enforcement offices and military units, and it was JTF-6's responsibility to ensure that all the agencies involved had done the necessary training, preparation, and coordination.

The JTF-6 AR-15 investigation<sup>29</sup> focused primarily on the conduct of the Marines and only briefly on JTF-6 procedures. No JTF-6 personnel were held accountable for the shortcomings of the mission.

*Border Patrol.* Shortly after the Hernandez killing, Commissioner Doris Meissner of the Immigration and Naturalization Service (the Border Patrol's parent agency) made two inherently contradictory statements that, unfortunately, typified the Justice Department's approach to accountability. Commissioner Meissner said, "The most important thing being done in this case is it's being investigated, and there will be accountability." She also said, "This incident is not the responsibility of the Border Patrol."<sup>30</sup>

Commissioner Meissner was wrong. Border Patrol agents brought the Marines to Redford to assist in carrying out the Border Patrol's mission of apprehending drug smugglers and illegal aliens. Border Patrol agents failed to prepare the Marines for their mission by failing to convey necessary information about local conditions which only the Border Patrol possessed. Border Patrol agents failed to respond to an emergency situation in time to save Hernandez' life. And Border Patrol agents seriously impaired the criminal investigations of the Hernandez killing. The structural role of the Border Patrol within Mission 414-97A, as well as the numerous costly errors committed by Border Patrol agents with regard to that mission, made the Hernandez killing the direct responsibility of the Border Patrol.

Unfortunately, Justice Department personnel proved eager to hold others accountable but were unwilling to be held accountable themselves. The Department's civil rights division assembled a team of attorneys and investigators who spent six months exploring the possible criminal liability of the four Marines. However, the Department failed to use its own internal investigators, such as the Inspector General's Office or the Immigration and Naturalization Service's Office of Internal Audit, to conduct an internal review comparable to that done by the Marine Corps. The Subcommittee's subpoena forced the Department to produce two brief internal reports summarizing some of the Border Patrol's failings,<sup>31</sup> but these were apparently tightly controlled within the Department and never made public. No Justice Department personnel were held accountable for their negligence or wrongdoing regarding the death of Esequiel Hernandez, Jr.

<sup>29</sup> See Appendix D.

<sup>30</sup> Dane Schiller, *Border Patrol is holding back on more operations with GIs*, *San Antonio Express-News*, June 27, 1997, at 16A.

<sup>31</sup> See *Redford: Events, Consequences and Recommended Actions* (undated Headquarters Border Patrol report), and *Redford Shooting OIA Overview* (undated report from Office of Internal Audit Agent David Adams), at Appendix W.