Written Testimony of Michael B. Mukasey – Senate Judiciary Committee

Sentencing Reform and Corrections Act of 2015 – 10/19/15

I am grateful to Chairman Grassley, ranking member Leahy, and the entire committee for hearing my views on the Sentencing Reform and Corrections Act of 2015, which I support for the reasons and on the bases set forth below.

I. General Principles and Considerations

I see no need to burden the Committee and the record with a recitation of all the basic principles and considerations that I think apply to criminal sentencing. You are familiar with them, and most are set forth at 18 USC Section 3553(a). There are a few, however, that may not be set forth in that statute and that I think relate particularly to this legislation, and I state them at the beginning so that you can be aware of what may be guiding my views. I will elaborate more fully on any of these if the committee wishes.

First, I do not think that criminal sentencing is exclusively a matter for judges; it is a matter as well for the political branches – Congress and the executive – who define crimes and who set the bounds for sentencing those who commit crimes. Congress sets the maximum penalty for offenses in legislation that defines those offenses and that is enacted with the approval and participation of the executive. Generally, judges may impose sentences ranging from probation and/or a fine, to imprisonment for the maximum term specified in the relevant statute. However, as to those offenses whose perpetrators are viewed as posing particularly grave risks to the community, there is good

reason to cabin the discretion of sentencing judges not only as to the maximum penalty but also as to the minimum penalty. The community has the right to be assured that those who commit those offenses will be confined and thereby prevented from committing further such offenses, for a specified minimum term.

Second, I believe that the success of rules that relate to sentencing is to be measured by the crime rate, not by the incarceration rate. Although I certainly do not believe that a large prison population should be the goal of any society, it is to the victims of crime – actual and potential – and to an orderly and productive society, not to those who commit crimes, that I think we owe our principal obligation. Confining those who commit crimes cannot itself deal with all the cultural, economic, familial and personal issues that may contribute to criminal behavior; moreover, when we purport to measure the blameworthiness of past acts and the likelihood of deterring future ones in months or years of freedom denied, we are engaging in an inherently arbitrary exercise. But neither of those facts, nor both together, is an excuse to avoid using the tools that criminal law provides in order to protect law-abiding citizens and society at large.

Third, I think that once a sentence is imposed by applying to a particular case the general rules and principles that the law prescribes, the decision whether to change that sentence in light of rules and principles that may be applicable to future cases should rest with those who participated in the initial decision – the district judge who imposed sentence, counsel for the sentenced defendant, and the U.S. Attorney in the relevant

district. It is they who are most familiar with the case and are in the best position to evaluate the possible consequences of a change in the sentence.

II. The Proposed Legislation

The reduction in the mandatory minimum sentences for prior drug offenses and for certain firearms offenses still maintains substantial mandatory sentences while expanding the range of predicate offenses so as to provide a better measure of the true dangerousness of particular defendants. Thus, Section 101 reduces the enhanced minimum in a three-strike situation from life to 25 years, and the ordinary minimum for conviction of prior drug felonies from 20 years to 15 years. Although only serious drug felonies are predicates for imposing the mandatory minimum, predicate offenses may now include serious violent felonies rather than only drug offenses – a positive step in my view. Section 104 also reduces the enhanced minimum for prior convictions from 25 to 15 years for certain firearms offenses, but adds state convictions in which a defendant carried, brandished or used a firearm – another positive step in my view that more accurately measures a defendant's dangerousness than considering only federal convictions.

The reduction in the enhanced mandatory minimum for armed career criminals from 15 years to 10 leaves in place a substantial deterrent, and the increase in the statutory maximum for firearms possession by certain offenders from 10 years to 15 years provides flexibility that can be used when needed.

My principal concerns with the retroactive applicability of the reduced mandatory minimums established under Sections 101, 104 and 105 are allayed both by the bill's provisions, and by what I have been told will be the policy of the Department of Justice in cases where defendants apply for sentence reduction. The bill provides that such an application will be granted only if the sentencing court believes reduction is warranted, after reviewing sentencing factors including a defendant's record in prison. In addition, I have been told that the Department will leave to each U.S. Attorney's office the determination of what position to take in response to each application for retroactively reduced mandatory minimums.

When we combine this case-by-case review, with responsibility for the government's position in each case lodged in the district where the case originated, it seems apparent that these potentially retroactive provisions will not result in any wholesale release of prisoners. Indeed, I believe the largest category of those eligible for consideration of retroactive sentencing is those sentenced to mandatory minimums for firearms offenses; of those, many have additional counts of conviction that would leave their sentences unchanged.

The expansion of the current safety valve under Section 102 to defendants with up to 4 criminal history points does not raise serious objection, particularly because it excludes those with serious prior offenses. I also support the new safety valve under Section 103 because it creates an incentive that did not previously exist for those

relatively high in the chain of responsibility to cooperate and help dismantle drug organizations.

One other section on which I would offer a comment is Section 210, which provides for compassionate release of prisoners over the age of 60 with no record of violence, as well as the terminally ill and those in nursing homes who have served most of their sentences. These prisoners are generally the costliest for BOP to house, as well as the least likely to commit additional crimes. This, along with reduced mandatory minimums and the expanded safety valve features referred to above, will help reduce the prison population and the proportion of Department of Justice resources absorbed by BOP. That proportion has been steadily increasing as the prison population ages, and reducing it will permit needed funds to be used in active and effective law enforcement.

III. Conclusion

The projected effects of this statute are just that – projections. In addition, the incidence of crime is especially difficult to predict. The statute calls for ongoing assessments in coming years of the risk presented by federal inmates, and we will know in that time whether, for whatever reason, crime has increased or diminished. That will have to be closely watched so as to determine whether further legislation is necessary. In the meantime, I believe for the reasons summarized above that the current bill deserves support.