Statement of

The Honorable Chuck Grassley

United States Senator
United States Senate
June 23, 2011

Prepared Statement of Senator Chuck Grassley
Senate Judiciary Committee
Executive Business Meeting
Sentencing Commission, the Civilian Extraterritorial Jurisdiction Act
Thursday, June 23, 2011

Sentencing Commission

Mr. Chairman, last year, we passed the Fair Sentencing Act. That law reduced sentences for crack cocaine, and directed the Sentencing Commission to establish changes to the Guidelines. The law applied prospectively only.

Now, however, the Sentencing Commission is considering applying its crack cocaine guidelines retroactively. By its own calculations, the sentences of 12,000 inmates would be reduced.

Most of these offenders are violent and likely to reoffend. Although these offenders are now serving time for crack cocaine offenses, the vast majority have been convicted of serious crimes in the past.

According to the Commission, nearly 30 percent have been convicted of a crime that involved the use of a weapon, and 15 percent have been convicted of a firearms crime that carries a mandatory minimum sentence.

More than 70 percent of the eligible offenders under the Commission's proposal have been convicted of multiple serious crimes. Some of these individuals have been convicted of murder, manslaughter, aggravated armed robbery, rape, and other serious violent offenses. Many committed serious crimes while on parole.

If the Commission makes its guidelines retroactive, these are the kinds of people who will be turned loose, or released sooner. This would represent a major threat to public safety.

The fact that the statute applies prospectively only should be the end of the matter. But having failed to convince Congress to make the law apply retroactively, proponents now seek an end run, to obtain retroactivity from unelected Sentencing commissioners.

Heedless of the input from myself and a number of other members of the House and Senate Judiciary Committees, I understand that the Commission will apply the guidelines retroactively.

The Sentencing Commission has shown that it will abuse its discretion if Congress gives it any opportunity for leniency. The Justice Department supports retroactivity to a large degree here. This position also abuses any leniency Congress provides. So, in the future, I will oppose any leniency for convicted criminals that this Justice Department and Sentencing Commission can abuse.

In addition to the dangers of releasing violent inmates, retroactive application of the guidelines would impose numerous costs on the Justice Department and the courts.

Inmates will file thousands of resentencing petitions. Prosecutors will be required to respond, diverting them from other priorities. Court clerks will spend time managing this additional work. Magistrate judges will review the petitions and will hold at least some hearings to resolve them. Justice Department lawyers will need to prepare for those hearings. The Marshals Service will be required to transport inmates to and from their hearings. Various clerical functions and expenses will need to be incurred if the hearings are favorable to the inmates.

Neither the Department of Justice nor the courts should have to absorb these costs. If scarce resources are to be shifted, from prosecuting crime, to addressing petitions and hearings, the Sentencing Commission should have to pay the costs associated with making its guidelines retroactive. That is what my amendment does.

The Sentencing Commission has decided to pursue a liberal agenda at all costs, disregarding significant opposition to its misguided policies, and disregarding specific Congressional intent. Perhaps my amendment will, for the first time, gain their attention.

If the Sentencing Commission is going to be nothing but a one-way liberal ratchet to apply lower sentences for convicted violent offenders, we should think about abolishing it. Perhaps we should put it out of its misery - and ours.

Mr. Chairman, I will not offer my amendment today, but I am extremely unhappy with how the Sentencing Commission is operating, and with how the kind of tough sentencing regime that we passed in 1984 has been undermined by the courts, the Justice Department, and the Sentencing Commission. This will change.

The Civilian Extraterritorial Jurisdiction Act

Mr. Chairman, I have amendments I plan to offer to the Civilian Extraterritorial Jurisdiction Act, but I would like to say a few words about the bill first. I think we all agree that anyone who commits a crime should be held accountable and prosecuted to the fullest extent of the law. However, extending the long arm of American criminal law globally is not an issue we should take lightly.

No one here supports government employees or contractors breaking the law abroad. Stories of abuse by contractors are horrific, including those who have committed serious crimes such as rape and murder. None of us support or condone this conduct. Ensuring these criminals are

brought to justice should be one of our highest priorities.

There is a need for this legislation and I want to be able to support this bill. However, as I stated at the hearing, we need to make sure that this legislation will not harm government employees or contractors that we send abroad to protect our national security. This includes intelligence operatives and agents of the law enforcement community.

We held a hearing to discuss these issues and the witnesses provided a lot of information on this topic. Unfortunately, we have yet to receive answers to important written questions that were submitted to the Justice Department. Those answers may have been helpful in addressing some of the concerns I have. So, because we never received those answers, we'll have to address those concerns through the amendment process today.

I plan to offer a couple of amendments today to discuss the need for a clearer exemption for intelligence and law enforcement agents operating abroad, and to discuss the blank check that this legislation includes for the appropriators to expand the size and budget of the Justice Department.

I also filed an important amendment regarding the Classified Information Procedures Act, that I will not offer today. However, that amendment should be a part of the discussion, given that Assistant Attorney General Lanny Breuer noted problems with that law, occurring in prosecutions under the Military Extraterritorial Jurisdiction Act. So, not having received answers to my written questions from the Justice Department on this topic, I will hold-off on offering this amendment today, and will instead save that amendment for consideration on the Senate floor.

Amendment to only modify the language of the exception for intelligence activities.

I support holding accountable those who commit crimes overseas, and the Civilian Extraterritorial Jurisdiction Act seeks to accomplish that objective. Those who commit horrible acts, such as rape and murder, must be brought to justice.

And, while I support Chairman Leahy's efforts to hold government employees and contractors responsible, we must be mindful of the intelligence community and allow them to complete their mission.

My amendment is a complete substitution of S.1145, with the only changes to Section 5 - covering intelligence activities. My amendment removes language that the intelligence community admits is "surplusage" and unnecessary.

It also expands that protection for law enforcement and protection operations abroad as well. This is the same protection that current federal criminal law - 18 U.S.C. 1029 and 1030 - applies to intelligence and law enforcement officials in certain instances.

Under the current carve-out in the Leahy substitute, an intelligence agent may not be protected from prosecution, even though he was following orders from his supervisor. The current provision in the substitute includes an additional hurdle that forces an agent to also make sure the

authorization from his supervisor was "authorized in a manner consistent with applicable U.S. law."

How is an agent in the field to know whether the authorization was "in a manner consistent with U.S. law"?

Under this current language, the agent will have to question the manner in which the authorization was given, and ask for proof, before he takes any action, or be subject to potential prosecution.

Why would we require an agent to seek approval from the General Counsel every time his supervisor tells him to do something?

At worst, this language leaves the agent exposed to criminal liability, and at best, slowed or stuck in bureaucratic paperwork.

This is not the message we should be sending to our agents in the field. These agents will want to hire lawyers, just to tell them if they can do their job. This is the sort of requirement that makes agents and operators question what Congress is doing, and whether the job is worth the hassle and risk.

Further, there are clarifications that could be made to make this carve-out more effective.

For example, subsection (b)(2) merely restates (b)(1) in another way. Therefore, it is duplicative and unnecessary. And the intelligence community has advised my staff that they agree this language is unnecessarily duplicative.

Being duplicative, courts will inevitably misinterpret whatever congressional intent we have, as they attempt to give each phrase a unique meaning and effect. Aside from the unnecessary duplication, the amendment is too narrow.

My amendment also protects law enforcement and protection activities of U.S. government agents overseas.

For example, as part of my investigation into ATF's "Fast and Furious" operation, agents were ordered to let guns walk-meaning to allow the guns to fall into the hands of criminals.

What would happen if the ATF agents were ordered by their supervisors to allow this conduct in Mexico? Would they be prosecuted because the operation has now been linked to the death of a border patrol agent?

Another example, the FBI, ICE, Secret Service, DEA, the N.Y.P.D., and other state and locals - all have officers posted overseas.

It is reasonable to assume that these agents may be required to perform an intelligence function at some time. Are they protected under CEJA's definition of intelligence activities or not?

Often, that determination will depend on what budget pays them. Instead of playing the budget game, my amendment clears-up this ambiguity.

It also provides protection for Secret Service agents performing their protection assignments abroad.

Any ambiguities we fail to correct in Congress, will be litigated in a court room. This is after a field agent has been indicted and arrested. We can and should avoid that scenario at all costs. We should not require agents to pay for defense attorneys, and risk jail time at the political whim of the Justice Department.

I support the Civilian Extraterritorial Jurisdiction Act and its goals, but I also want to support the agents and operators who are protecting America's interests. Let's protect theirs.

I urge my colleagues to support this amendment and ask for a roll call vote.

Amendment to strike "such sums as necessary" and draw funds from Department of Justice Criminal Division Appropriations
*****this amendment was accepted with a modification from Senator Leahy**

Mr. Chairman, I'd call up Grassley amendment ALB11429 and offer it for consideration. This amendment recognizes the dire financial situation the federal government is currently in, by striking the blank check the legislation currently provides the appropriations committee.

Section 6 of the bill would authorize, for five years, "such sums as necessary" to implement the act. This includes the cost of setting up new "investigative units", designed to investigate and prosecute crimes committed overseas by government employees and contractors.

This language is a blank check to the Appropriations Committee, and abdicates our responsibility to do our job and provide clear signals of how much money the appropriators should provide. The more we do this, the less control the Judiciary Committee has on how to fund the department.

At a time of trillion dollar deficits and nearly 10 percent unemployment, this legislation signals to the appropriators, spend what you like. That's not how Americans plan their budgets around a kitchen table, and it's not how the American people expect us to work here in Washington.

My amendment would simply require that any amounts appropriated to fund this Act be drawn from funds that would otherwise be appropriated to the Criminal Division of the Justice Department. It's a common sense amendment and one that makes the tough decision the underlying bill has failed to do.

The Criminal Division at the Justice Department currently has over 751 employees, 440 of which are attorneys. The fiscal 2012 budget request from the department recommends increasing that to 782 employees, 462 of which are attorney positions. This request does not include the 144

additional attorneys the division has on a reimbursable basis.

The Criminal Division was designed to "develop, enforce, and supervise the application of all federal criminal laws." This amendment simply ensures the division continues that mission by enforcing and supervising the Civilian Extraterritorial Jurisdiction Act investigations and prosecutions.

This ensures we fund this new legislation in a responsible manner, without further expanding the size of the federal bureaucracy. I urge my colleagues to support it and ask for a roll call vote.

Statement of Senator Chuck Grassley
The Senate Judiciary Committee Vote on S.1145,
the Civilian Extraterritorial Jurisdiction Act,
Thursday, June 23, 2011

Mr. Chairman, I joined today in a voice vote supporting reporting S.1145 out of committee. However, my vote does not signal support for the legislation. Unless changes are made to address the ambiguous and unnecessary language in section 5, regarding the intelligence community carve out, and to ensure that the Unborn Victims of Violence Act is included in the list of covered offenses, as it is in the Military Extraterritorial Jurisdiction Act, I will support holding the bill on the Senate floor as we work to make those important changes.

Section 5 of the bill contains a jurisdictional carve-out for members of the intelligence community. However, that language is not the preferred language of the intelligence community. Instead, the language that is included was merely something the intelligence community said they could "live with". This is the second time in the past few months we have heard this phrase from the intelligence community when this committee has dealt with legislation impacting national security. The first time was the PATRIOT Act mark-up and the version discussed in committee ultimately did not become law. Absent adopting the language preferred by the intelligence community about what activities abroad should be protected, this bill is destined for that same fate on the Senate floor.

No one would dispute the importance of holding government employees and contractors accountable abroad. I support the idea of this legislation, we should never have government employees or contractors committing serious crimes like rape or murder abroad with impunity. However, we need to think long and hard about the consequences of our actions if we legislate criminal extraterritorial jurisdiction too broadly absent a sufficient carve-out for authorized intelligence activities.

The current version of the intelligence carve-out is problematic. There is repetition in the language and extraneous language is unnecessary. Further, under the current carve-out an intelligence agent may not be protected from prosecution, even though he was authorized to undertake an operation. The current provision in the bill would require that a supervisors directive be authorized and also be "consistent with applicable U.S. law." This extra requirement opens up a world of questions. How should an agent in the field know his supervisor's instruction was "consistent with applicable U.S. law"? Will this provision now require agents to obtain a

legal opinion before they take action? This is not the message we should be sending to the field.

Instead, I proposed a carve-out that would include government employees performing intelligence, law enforcement, and protective assignments abroad. This version was based upon existing U.S. law. If the carve-out I proposed is good enough for employees operating inside the United States, it should be good enough for those operating abroad. Why would we give agents operating in the U.S. more protections than those operating in foreign lands-many of which may be hostile.

Another concern I have is that the legislation fails to include the Unborn Victims of Violence Act into the list of covered offenses. The Unborn Victims of Violence Act recognizes a child in utero as a legal victim if he or she is injured or killed during the commission of over 60 listed federal crimes. This law should apply in the Civilian Extraterritorial Jurisdiction Act context just as it does within the United States. It makes no sense not to include this statute to the same federal criminal statutes that would now be applied outside the U.S under Civilian Extraterritorial Jurisdiction Act. The Unborn Victims of Violence Act applies to Department of Defense employees and contractors abroad under the Military Extraterritorial Jurisdiction Act so there is no reason not to include it here. Unborn children outside the United States should be treated no differently than those inside the United States. Any final version of the Civilian Extraterritorial Jurisdiction Act must include this provision and I will work to make sure it becomes a part of the Civilian Extraterritorial Jurisdiction Act before agreeing to a vote on the bill.

Until these concerns are addressed via further changes to the bill, I will support holding this legislation on the Senate floor. No one should take my support for this bill in Committee to mean anything more than an expression of my willingness to work with the sponsors on this topic to address this concern going forward. Thank you.

-30-