BRENNAN CENTER FOR JUSTICE

July 31, 2013

The Honorable Patrick J. Leahy   The Honorable Charles E. Grassley
Chairman   Ranking Member
United States Senate   United States Senate
Committee on the Judiciary   Committee on the Judiciary
224 Dirksen Senate Office Building   224 Dirksen Senate Office Building
Washington, DC 20510   Washington, DC 20510

Re: Support for Bipartisan "Smarter Sentencing Act of 2013" Introduced by Senators Durbin and Lee

The Brennan Center for Justice at New York University School of Law writes to express support for Senators Durbin and Lee's Smarter Sentencing Act ("SSA") of 2013.

The Brennan Center is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice.[1] The Brennan Center's Justice Program seeks to ensure a rational, efficient, effective, and fair criminal justice system. As part of that mission, we advocate for systemic reforms that will reduce the influx of individuals into prison, reduce the criminal justice system's size and severity, and reduce mass incarceration. We support the Smarter Sentencing Act of 2013 because of its potential to provide long-term reform that will reduce the size and scope of the federal criminal justice system and serve as a model for states in the future.

Currently, the federal Bureau of Prisons ("BOP") operates at thirty-seven percent over capacity.[2] With almost 218,000 inmates, the federal prison population has increased by nearly 790% since 1980.[3] Indeed, the federal prison population increased by 1,453 prisoners in 2012 alone – a 0.7% increase from 2011 – even as the total U.S. prison population declined for the third consecutive

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[1] This letter does not represent the opinions of NYU School of Law.
[2] *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies,* Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 2 (April 17, 2013) [hereinafter Samuels Statement], *available at* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).
[3] NATHAN JAMES, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 51 (2013).

year in a row.[4] In fiscal year 2013, for example, the BOP commanded a 25 percent share of DOJ's budget, a 4.2 percent increase from fiscal year 2012. If current rates of growth continue, the BOP will consume nearly 30 percent of DOJ's budget by 2020.[5] This is just the tip of the iceberg as there are also societal and economic costs.

Several key legislative acts contributed to the exponential increase in the federal prison population. These include the expanded use of mandatory minimum penalties for drug crimes, the increasing federalization of crimes, and the abolition of parole for federal inmates.[6]

Today, almost half of all federal prisoners are incarcerated for drug offenses.[7] As the Director of the BOP recently explained, "[d]rug offenders comprise the largest single offender group admitted to Federal prison and sentences for drug offenses are much longer than those for most other offense categories."[8]

Additionally, the expanded use of mandatory minimum penalties has resulted in offenders being sentenced to longer terms of imprisonment than they were 20 years ago. In a recent report, the United States Sentencing Commission ("the Commission") found that the enactment of a greater number of federal mandatory minimum sentences has, in part, contributed to the growing federal prison population.[9]

We support this legislation's goal of shifting from punitive sentencing policies to more rational and fair criminal justice laws, specifically the provisions that would:

- *Clarify the Fair Sentencing Act of 2010 to Permit Retroactive Application to Prisoners Serving Sentences for Drug Offenses in Certain Circumstances*: The Fair Sentencing Act reduced the disparity between the amount of crack cocaine and powder cocaine needed to trigger certain U.S. federal criminal penalties from a 100:1 weight ratio to an 18:1 weight ratio and eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine. The SSA allows courts to adjust sentences pursuant to the Fair Sentencing Act retroactively in certain circumstances and based upon a motion by the defendant, the BOP Director, the government attorney, or the court. Accordingly, the SSA allows additional individuals to benefit from the Fair Sentencing Act, thus creating a meaningful opportunity to reduce the federal correctional population through sentence reductions.
- *Reduce the Severity and Scope of Mandatory Minimum Penalties*: The SSA lowers some mandatory minimums associated with drug sentences in addition to making more non-violent drug offenders eligible for the safety valve at 18 U.S.C. § 3553(f). These reforms

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[4] E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012 – ADVANCE COUNT 3 (2013).
[5] NANCY LAVIGNE & JULIE SAMUELS, URBAN INSTITUTE, THE GROWTH AND INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012).
[6] JAMES, *supra* note 3, at 7.
[7] *See* E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011 10, tbl. 11 (2012).
[8] Samuels Statement, *supra* note 2, at 3.
[9] UNITED STATES SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 63 (2011).

take a significant step towards right-sizing drug sentences, which are disproportionately severe in the federal system. It also facilitates punishing drug offenders more consistent with Congressional intent by specifically allowing judges to relieve defendants who fall outside the scope of offenders targeted by these penalties – namely defendants who did not play serious or major roles in a drug trafficking offense.[10]

- *Order the Commission to Amend the Federal Sentencing Guidelines to Effectuate its Mandate to Consider Federal Prison Capacity:* The SSA directs the Commission to amend the federal sentencing guidelines consistent with its mandatory minimum sentencing adjustments. This reform could have a long-lasting effect on the average sentence length for all drug offenders processed in the federal system. This reform would also reduce the severity of the overall federal guidelines for all drug offenses, which are based upon the mandatory minimum penalties issued by Congress in the Anti-Drug Abuse Act of 1986.

- *Require Attorney General to Report on Cost Savings*: The SSA requires the Attorney General to submit a report to Congress outlining how the reduced expenditures on Federal corrections and the resulting cost savings will be used to help reduce overcrowding in federal prisons, to increase proper investment in law enforcement and crime prevention, and to help reduce criminal recidivism. This measure allows policymakers to better analyze determinations about the best use of taxpayer dollars, while facilitating a more rational return on investment that tracks the amount of public safety and societal benefits the federal government receives for dollars spent.

Respectfully submitted,

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[10] *See id*. at 24 ("Congress intended to link the five-year mandatory minimum penalties to what some called 'serious' traffickers and the ten-year mandatory minimum penalties to 'major' traffickers.").