

CHANGES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, MANDATORY MINIMUM PENALTIES, AND THE FEDERAL PRISON POPULATION

A. INTRODUCTION

This chapter addresses the requirement in the statutory directive to assess the impact of mandatory minimum penalties on the federal prison population. Such an assessment requires consideration, as set forth in Part C, of how mandatory minimum penalties themselves have changed. Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system, as described in Part B, that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. As described in Part D, the changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.

B. SYSTEMIC CHANGES TO THE FEDERAL CRIMINAL JUSTICE SYSTEM

1. *Increased Federalization of Criminal Law*

Federalization of criminal law refers to the transformation of “traditional state and local criminal offenses into federal crimes.”³⁸¹ Starting in the late 1960s, an increased emphasis on law and order in national politics contributed to the enactment of a “steady stream of [federal] criminal statutes.”³⁸² “[C]oncern[s] with organized crime, drugs, street violence and other social ills precipitated a particularly significant rise in federal legislation tending to criminalize activity involving more local conduct, conduct previously left to state regulation.”³⁸³

³⁸¹ Susan A. Ehrich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825 (2000); see Michael A. Simon, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 906 n.8 (2000) (“The term ‘federalization’ usually describes the legislative process of enacting federal criminal laws that cover conduct that is already criminal under state law.”) (citing Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1030 n.2 (1995) (discussing “federalization” as term of art)).

³⁸² Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 726 (2002) (internal citations omitted). Accord Simon, *supra* note 382, at 906 (Law and order became a volatile campaign issue in the late 1960s.).

³⁸³ Task Force on Federalization of Crim. Law, A.B.A., *The Federalization of Criminal Law* 7 (1998) [hereinafter the ABA Report].

While the trend toward federalization of criminal law existed in 1991, “[a]ll signs indicate that the federalization trend [has been] growing, not slowing”³⁸⁴ since that time. The continued increased federalization of criminal law has contributed to the increasing size of the Federal prison population.

In the period from 1992 through 1994, Congress created federal criminal statutes penalizing failure to pay child support,³⁸⁵ carjacking,³⁸⁶ and domestic violence,³⁸⁷ and expanded the Hobbs Act to include robbery.³⁸⁸ In 1996, Congress added laws punishing drug-induced rape³⁸⁹ and church arsons.³⁹⁰ In 1998, Congress enacted new laws punishing sexual abuse of children,³⁹¹ identity theft,³⁹² telemarketing fraud,³⁹³ and theft of cellular phone services.³⁹⁴ Many of these federal laws overlap with one another, and cover ground already addressed by state law, including violent crimes.³⁹⁵ They also provided for concurrent jurisdiction with state courts,

³⁸⁴ ABA Report at 11.

³⁸⁵ See Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. § 228 (Supp. IV 1998).

³⁸⁶ See Anti-Car Theft Act of 1992, 18 U.S.C. § 2119 (1994 & Supp. IV 1998).

³⁸⁷ See Violence Against Women Act, 18 U.S.C. § 2261 (1994 & Supp. IV 1998).

³⁸⁸ See Hobbs Act, 18 U.S.C. § 1951 (1994).

³⁸⁹ See Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104–305, 110 Stat. 3807 (codified in scattered sections of title 21, United States Code).

³⁹⁰ See Church Arson Prevention Act of 1996, Pub. L. No. 104–155, 110 Stat. 1392 (codified at 18 U.S.C. § 247, 42 U.S.C. § 10602 (Supp. IV 1998)).

³⁹¹ See Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105–314, 112 Stat. 2974 (codified at 18 U.S.C. § 2241 (Supp. IV 1998)).

³⁹² See Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105–318, 112 Stat. 3007 (codified at 18 U.S.C. § 1028).

³⁹³ See Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105–184, 112 Stat. 520 (codified in scattered sections of title 18, United States Code).

³⁹⁴ See Wireless Telephone Protection Act, Pub. L. No. 105–172, 112 Stat. 53 (1998) (codified at 18 U.S.C. § 1029 (Supp. IV 1998)).

³⁹⁵ See Eric Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21-23 (discussing possible causes of federalization of crime); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 43 (1996) (discussing federalization in 1980s and 1990s). For example, in 1994, 18 U.S.C. § 924(i) provided the death penalty for murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime. Though Congress resurrected the federal death penalty in 1988, see 21 U.S.C. §§ 848(e)(1)(A)–(B) (1988), use of capital punishment at the federal level traditionally was reserved for offenses that occur on federal lands (or on the high seas), murders of a federal official, and killings involving espionage, hijacking, or kidnapping across state-lines. See Rory Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999). Congress has since broadened the federal death penalty to cover deaths occurring during other types of offenses, including offenses involving aircraft and motor vehicles, terrorist attacks and other violence against railroad carriers and mass

rather than exclusive federal jurisdiction.³⁹⁶ This congressional activity prompted then Chief Justice Rehnquist to assert that:

[t]he trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system . . . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems.³⁹⁷

The trend toward federalization of criminal law did not abate with the turn of the century. The “number of criminal offenses in the United States Code increased from 3,000 in the early 1980s to 4,000 by 2000 to over 4,450 by 2008.”³⁹⁸ From 2000 through 2007, Congress enacted an average of 56.5 crimes per year.³⁹⁹ This “number [of criminal statutes] does not take into account the thousands of criminal offenses dispersed throughout federal regulations”⁴⁰⁰ created by federal agencies and departments, of which there are so many that “the Congressional Research Service itself admitted that it was unable to even count all of the offenses,” but estimates that the regulatory criminal offenses number in the “tens of thousands.”⁴⁰¹

Congressional action alone, however, is not the only contributing factor to the increased federalization of criminal law. Prosecutorial charging decisions have also factored into the trend. For example, in 1991, the Department of Justice announced Project Triggerlock, an initiative with the “stated goal [of] reduc[ing] violent crime by imposing severe sentences on unlawful gun possessors.”⁴⁰² The initiative relied primarily on the enforcement of the federal felon-in-

transportation systems, bank robbery, and carjacking, among others. *See, e.g.*, 18 U.S.C. §§ 34, 1992(b), 2113(e), 2119(3).

³⁹⁶ Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 762 (1996); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1312 (1997).

³⁹⁷ CHIEF JUSTICE WILLIAM H. REHNQUIST, FED. JUDICIARY, THE 1998-YEAR END REPORT OF THE FEDERAL JUDICIARY (1998), available at https://www.uscourts.gov/News/TheThirdBranch/99-01-01/The_1998_Year-End_Report_of_the_Federal_Judiciary.aspx.

³⁹⁸ *Overcriminalization: An Explosion of Federal Criminal Law*, Heritage Foundation Fact Sheet No. 86 (Apr. 27, 2011).

³⁹⁹ John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Memo No. 26 at 1 (June 16, 2008).

⁴⁰⁰ *Id.* at 4.

⁴⁰¹ *Overcriminalization: An Explosion of Federal Criminal Law*, Heritage Foundation Fact Sheet No. 86 (Apr. 27, 2011).

⁴⁰² David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1440-41 (2011) (internal citations omitted). *See also* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR U.S. ATT'YS, *United States Attorneys' Bulletin*, Vol. 40, No. 8, at 248 (Aug. 1992), available at

possession statute.⁴⁰³ “The systematic involvement of the federal government in prosecuting gun cases that were the result of local police arrests and that would have been otherwise prosecuted in state court, is considered by many to be ‘[t]he most important change in federal-local interaction during the 1990s.’”⁴⁰⁴ The Department of Justice has undertaken several other similar initiatives in recent years.⁴⁰⁵

2. *Changes In the Size and Composition of the Federal Criminal Docket*

Changes in both the size and composition of the federal criminal docket⁴⁰⁶ also have contributed to the increasing federal prison population. The size of the federal criminal docket has changed significantly in the last 20 years. The total number of federal cases has almost tripled from 29,011 in fiscal year 1990⁴⁰⁷ to 83,946 in fiscal year 2010.⁴⁰⁸ Similarly, the number of federal offenders convicted of violating a statute carrying a mandatory minimum penalty has more than tripled since fiscal year 1990, from 6,685 cases to 19,896 in fiscal year 2010.⁴⁰⁹

The composition of the federal criminal docket has also changed. In fiscal year 1990, cases involving drug offenses made up 44.5 percent of the docket.⁴¹⁰ Fraud offenses constituted another 10.5 percent of the docket, followed by firearms (7.5%), larceny (7.4%), and

http://www.justice.gov/usao/eousa/foia_reading_room/usab4008.pdf (“This initiative targets repeat offenders who use or carry guns . . . and put[s] chronic offenders behind bars under stiff federal mandatory sentences.”).

⁴⁰³ 18 U.S.C. § 922(g).

⁴⁰⁴ Patton, *supra* note 403, at 1441 (citing Daniel Richman, *The Past, Present and Future of Violent Crime Federalization*, 34 CRIME & JUST. 377, 397 (2006)).

⁴⁰⁵ See, e.g., U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR U.S. ATT’YS, *Project Safe Neighborhoods – An Overview of the Strategy*, United States Attorneys’ Bulletin, Vol. 50, No. 1 at 1 (Jan. 2002), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5001.pdf (“Project Safe Neighborhoods is a comprehensive, strategic approach to reducing gun violence in America.”); Press Release, Justice Program Shows Success in Crime-Ridden Areas (July 15, 1999), available at <http://www.ojp.usdoj.gov/archives/pressreleases/1999/eows99151.htm> (“Operation Weed and Seed . . . is a multi-agency strategy, including partners from law enforcement, health, education and social services, that ‘weeds out’ violent crime, gang activity, drug use, and drug trafficking in targeted neighborhoods and then ‘seeds’ the designated area by restoring these neighborhoods through social and economic revitalization.”).

⁴⁰⁶ The federal criminal docket referred to throughout this report consists of felonies, which are punishable by more than one year of imprisonment, and Class A misdemeanors, which are punishable by not more than one year’s imprisonment. See 18 U.S.C. § 3559(a). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).

⁴⁰⁷ See 1991 COMMISSION REPORT at 51 (Table 4).

⁴⁰⁸ U.S. SENT’G COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 1. By comparison, the size of the population has increased from 248,709,873, to 308,745,538 during the same time period. See <http://www.census.gov/main/www/cen1990.html>, reporting census data as of April 1, 1990 and <http://2010.census.gov/2010census/data/>, reporting census data as of April 1, 2010.

⁴⁰⁹ Cf. 1991 COMMISSION REPORT at 51 (Table 4) and Table D-1 (Mandatory Minimum Status of Cases in Circuit and District (Fiscal Year 2010)) in Appendix D of this report.

⁴¹⁰ U.S. SENT’G COMM’N, ANNUAL REPORT (1991) at 52 (Figure E).

immigration (7.0%).⁴¹¹ Combined, these types of offenses accounted for 76.9 percent of the federal criminal docket.

In fiscal year 2010, cases involving immigration, drugs, firearms, or fraud made up the vast majority of the federal docket, accounting for more than 80 percent of all cases reported to the Commission.⁴¹² The portion of the annual caseload attributable to each type of offense, however, has changed significantly. Immigration cases were the most common federal crime in fiscal year 2010,⁴¹³ accounting for 34.3 percent of the federal criminal docket. Drug offenses constituted another 28.9 percent of the docket, followed by fraud (9.7%) and firearms (9.6%) offenses.⁴¹⁴

The percentage of all federal cases involving a conviction for violating a statute carrying a mandatory minimum penalty has remained relatively constant during the last 20 years. Convictions carrying a mandatory minimum penalty accounted for 26.6 percent in fiscal year 1991 compared to 27.2 percent in fiscal year 2010. *See* Figure 4-1.⁴¹⁵ The percentage of federal offenders subject to a mandatory minimum penalty, however, has declined from 20.5 percent in fiscal year 1991 to 14.5 percent in fiscal year 2010. This decline is largely attributable to the enactment in 1994 of the “safety valve” at 18 U.S.C. § 3553(f),⁴¹⁶ which, as discussed in Chapter 2, allows the court to sentence certain drug trafficking offenders below otherwise applicable mandatory minimum penalties.⁴¹⁷

⁴¹¹ *Id.*

⁴¹² Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Table 3.

⁴¹³ *Id.*

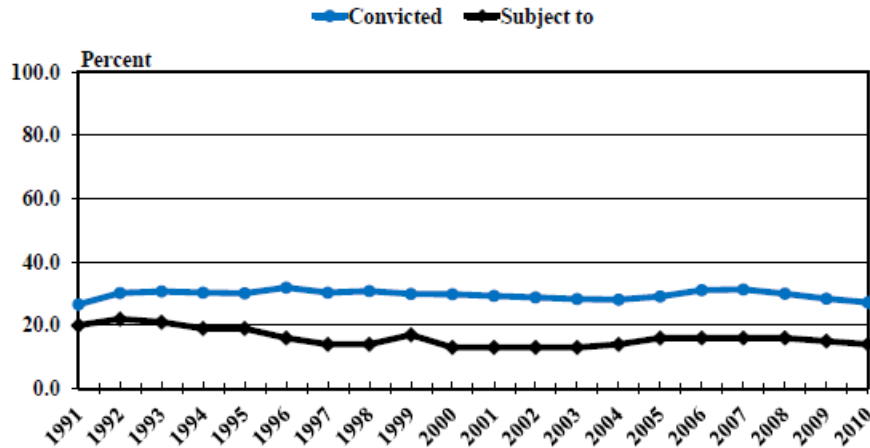
⁴¹⁴ Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure A.

⁴¹⁵ The figures in this chapter were created from the dataset discussed in Chapter 7, *infra*. The percentages reflected in the figures may differ slightly from percentages based upon numbers reported in the Commission’s Sourcebooks for the referenced fiscal years. The possible discrepancy is the result of cases having been excluded from analyses in this Report as a result of missing documentation.

⁴¹⁶ The rates of relief attributable to substantial assistance have remained relatively constant over time.

⁴¹⁷ The impact of the “safety valve” is discussed in Chapter 8, *infra*.

Figure 4-1
Percentage of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
and Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

Although immigration offenses constitute a large percentage of the federal caseload, only a small percentage of immigration offenders are convicted of offenses carrying a mandatory minimum penalty.⁴¹⁸ Thus, their inclusion masks the increased use of mandatory minimum penalties for the remaining federal criminal docket over the same time period.

In fiscal year 1991, drug offenses constituted 44.5 percent of the overall federal criminal docket⁴¹⁹ compared to 28.9 percent in fiscal year 2010.⁴²⁰ As already noted, immigration offenses now constitute the largest percentage of the federal criminal docket, 34.4 percent in fiscal year 2010,⁴²¹ compared to only 7.0 percent in fiscal year 1991.⁴²² When immigration offenses are excluded from the analysis, the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty has increased over time, from 27.8 percent in fiscal year 1991 to 39.9 percent in fiscal year 2010. *See* Figure 4-2.

⁴¹⁸ In fiscal year 2010, 0.6 percent of immigration cases involved mandatory minimum sentencing provisions. *See* Table D-2 (Mandatory Minimum Status in Each Primary Offense Category (Fiscal Year 2010)) in Appendix D of this Report.

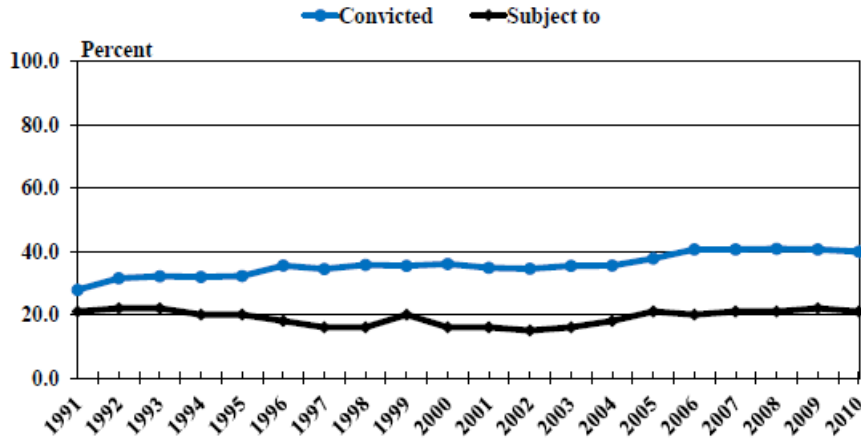
⁴¹⁹ Commission 1991 Datafile OPAFY91.

⁴²⁰ *See* U.S. SENT’G COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure A.

⁴²¹ *Id.*

⁴²² U.S. SENT’G COMM’N, ANNUAL REPORT (1991) at 50.

Figure 4-2
Percentage of Offenders Convicted of an Offense Carrying a Mandatory Minimum Penalty
and Subject to a Mandatory Minimum Penalty at Sentencing
Immigration Cases Excluded
Fiscal Years 1991 - 2010



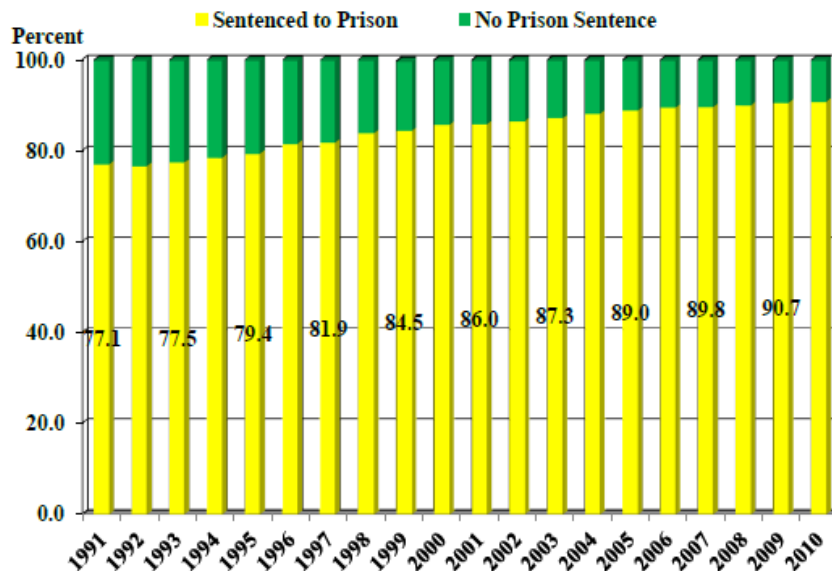
SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

When immigration offenses are excluded from the analysis, the percentage of offenders subject to a mandatory minimum penalty decreased from 20.5 percent in fiscal year 1990 to 15 percent in fiscal year 2003, before gradually increasing to 21.2 percent in fiscal year 2010.

3. *Increased Imposition of Sentences of Imprisonment*

The increased use of sentences of imprisonment over the last 20 years has also affected the size of the federal prison population. As illustrated in Figure 4-3, in fiscal year 1991, 77.1 percent of sentences imposed included a term of imprisonment. In fiscal year 2009, 90.7 percent of sentences imposed included a term of imprisonment, which represents an increase of 13.6 percent.

**Figure 4-3
Imposition of Term of Imprisonment
Fiscal Years 1991 - 2010**



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991-USSCFY2010.

In cases in which a term of imprisonment is imposed, the average sentence imposed has decreased from 62 months of imprisonment in fiscal year 1991 to 54 months of imprisonment in fiscal year 2010.⁴²³ See Figure 4-4. The nine-month decline in the average sentence of imprisonment imposed has not resulted in a decrease in the federal prison population, however, because the size of the federal docket has tripled over the same time period, and the proportion of offenders sentenced to prison has increased.

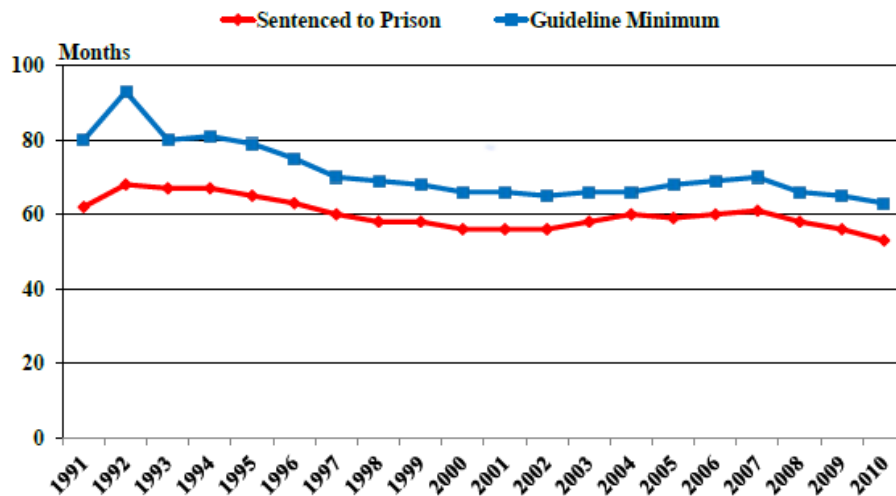
Figure 4-4 also shows the relationship over time between the average term of imprisonment imposed and the average minimum of the guideline range for offenders sentenced to a term of imprisonment. There is a fairly consistent relationship over time between the average term of imprisonment imposed and the minimum of the guideline range, which is often referred to as the “presumptive sentence.”⁴²⁴ This ongoing trend shows how changes in offense severity and offender culpability, as measured by the guidelines, affect sentencing decisions over time and demonstrates that the guidelines continue to have a strong gravitational pull on federal sentencing practices. Presumptive sentences increase or decrease for a variety of reasons,

⁴²³ These figures are the average sentences for cases in which a sentence of imprisonment was imposed. Cases in which no sentence of imprisonment was imposed are not reflected in these average sentences. Note that the average sentences reported herein differ from those reported in the Commission’s Sourcebook for the referenced fiscal years because cases lacking certain documentation were excluded from the analyses conducted for this Report. See *infra* Chapter 7(B).

⁴²⁴ For a more detailed discussion of this relationship, see U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, 72-73 (Mar. 2006) [hereinafter COMMISSION 2006 BOOKER REPORT].

including guideline amendments,⁴²⁵ statutory changes, and prosecutorial charging decisions. For example, as discussed above, immigration offenses now account for the largest portion of the federal caseload. Immigration offenses received an average sentence of 18 months of imprisonment in fiscal year 2010, which is less than the average of 54 months of imprisonment for the overall criminal caseload. Accordingly, the increase in the portion of the federal caseload comprised of immigration offenses has contributed to the decrease in average sentence length shown in Figure 4-4.⁴²⁶

Figure 4-4
Average Sentence When Offender Sentenced to Prison and Guideline Minimum
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission 1991 through 2010 Datafile, USSCFY1991-USSCFY2010.

C. CHANGES IN MANDATORY MINIMUM PENALTIES

At the same time that systemic changes to the federal criminal justice system described in Part B were occurring, so too were changes occurring in mandatory minimum penalties.

1. *Expansion of Mandatory Minimum Penalties*

A proliferation of mandatory minimum penalties has occurred over the past 20 years. Since 1991, the number of mandatory minimum penalties has more than doubled, from 98⁴²⁷ to

⁴²⁵ Congress has issued to the Commission at least 85 specific and general directives regarding the guidelines in 45 different Acts since 1991. All but two of those 45 Acts resulted in amendments to the guidelines that increased the applicable guideline sentencing ranges. See USSG App. B (2010).

⁴²⁶ See U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure E.

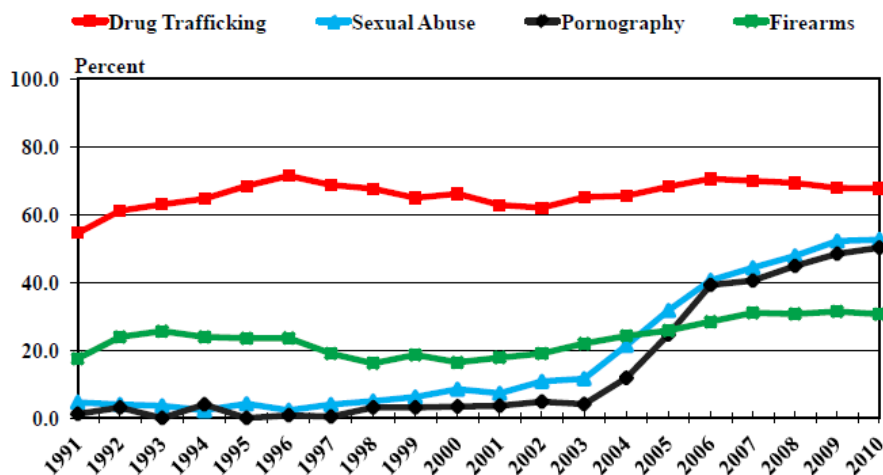
⁴²⁷ See 1991 COMMISSION REPORT, Appendix A.

195 today. Table A-1 in Appendix A of this report lists those statutory provisions carrying mandatory minimum penalties.⁴²⁸

2. Changes in Types of Offenses Subject to Mandatory Minimums

New types of offenses have become subject to mandatory minimum penalties. See Figure 4-5. For example, in fiscal year 1991, the percentage of child pornography offenders convicted of violating a statute carrying a mandatory minimum penalty was 2.8 percent.⁴²⁹ By fiscal year 2010, six years after the enactment of mandatory minimum penalties for certain child pornography offenses,⁴³⁰ more than half (50.1%) of child pornography offenders were convicted of violating a statute carrying a mandatory minimum penalty. Similarly, in fiscal year 1991, the percentage of sexual abuse offenders convicted of violating a statute carrying a mandatory minimum penalty was 3.8 percent. By fiscal year 2010, 52.5 percent of sexual abuse offenders were convicted of an offense carrying a mandatory minimum penalty. See Figure 4-5.

Figure 4-5
Offenders in Select Offense Types Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Years 1991 - 2010



SOURCE: U.S. Sentencing Commission, 1991 through 2010 Datafiles, USSCFY91 – USSCFY10.

Although Congress has broadened the types of offenses that carry mandatory minimum penalties, drug trafficking and firearms offenses continue to make up the greatest portion of

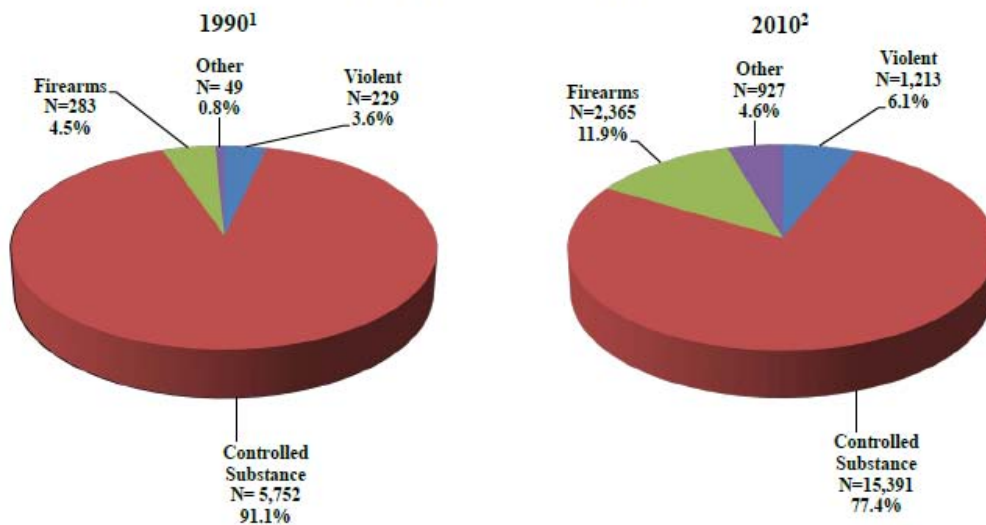
⁴²⁸ See Table A-1 in Appendix A of this Report.

⁴²⁹ In fiscal year 1991, only two of the 95 pornography cases involved a conviction for violating a statute carrying a mandatory minimum penalty. Both cases were convictions for violating 18 U.S.C. § 2252, which carries a mandatory minimum penalty of five years of imprisonment.

⁴³⁰ In 2003, Congress enacted the PROTECT Act, which created mandatory minimum penalties for trafficking in and receipt of child pornography, among other offenses.

convictions carrying mandatory minimum penalties.⁴³¹ In fiscal year 1990, 91.1 percent of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a drug trafficking offense, and 4.5 percent were convicted of a firearms offense.⁴³² See Figure 4-6. In fiscal year 2010, 77.2 percent (n=15,356) of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a drug trafficking offense, and 11.9 percent (n=2,365) were convicted of a firearms offense.⁴³³ In fiscal year 1990, 3.6 percent of defendants convicted of violating a statute carrying a mandatory minimum penalty were convicted of a violent offense⁴³⁴ compared to 6.1 percent in fiscal year 2010.⁴³⁵

Figure 4-6
Primary Offense of Conviction for Offenders Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Years 1990 and 2010



¹ See 1991 Mandatory Minimum Report, at page 51.

² SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

Similar trends are observed when examining sentencing data by statute of conviction. The *1991 Commission Report* found that four statutes covering drug trafficking and firearms

⁴³¹ See Table D-3 (Number of Convictions and Mean Sentence for Mandatory Minimum Statutes (Fiscal Year 2010)) in Appendix D of this Report.

⁴³² 1991 COMMISSION REPORT at 51 (Table 4).

⁴³³ See Table D-2 in Appendix D of this Report.

⁴³⁴ A violent offense was defined as “homicide, kidnapping, sex offenses, robbery, assault, and burglary/breaking and entering” in the 1991 COMMISSION REPORT at 51, n. 3.

⁴³⁵ See Table D-2 in Appendix D of this Report. In order to draw accurate comparisons to the findings in the *1991 Commission Report*, violent offenses are defined as murder, kidnapping/hostage taking, sexual abuse, pornography, assault, robbery, and burglary/breaking and entering for purposes of this chapter.

offenses⁴³⁶ constituted the overwhelming majority (94.3%) of all convictions of violating statutes carrying a mandatory minimum penalty during the period from 1984 through August 1990.⁴³⁷ Today the same four statutes still constitute the majority of such convictions, but they constitute a smaller majority (71.6%)⁴³⁸ as other newer statutes carrying mandatory minimum penalties, such as child pornography and aggravated identity theft statutes, are used with increased frequency.

Table 4-1 lists the five statutes carrying mandatory minimum penalties most frequently used in fiscal year 2010. Two subsections of 21 U.S.C. § 841 and one subsection of 18 U.S.C. § 924⁴³⁹ remain in the top five most frequently used statutes of conviction carrying a mandatory minimum penalty. There are, however, two notable differences in the five most common statutes. First, the most frequently reported conviction of an offense carrying a mandatory minimum penalty in fiscal year 2010 was 21 U.S.C. § 846 (Attempt and Conspiracy [to Commit a Drug Trafficking Offense]).⁴⁴⁰ Violations of section 846 accounted for almost one third (32.8%) of the convictions of statutes carrying a mandatory minimum penalty. By contrast, in 1991, the Commission reported no convictions under that statute.⁴⁴¹ Second, 18 U.S.C. § 1028A, the aggravated identity theft statute that was enacted in 2004,⁴⁴² was added to the list of most frequently used statutes carrying a mandatory minimum penalty in fiscal year 2010.

⁴³⁶ 21 U.S.C. §§ 841, 844, 960, 18 U.S.C. § 924(c).

⁴³⁷ 1991 COMMISSION REPORT at 39-40 (Table 1).

⁴³⁸ See Table D-3 in Appendix D of this Report.

⁴³⁹ The 1991 *Commission Report* did not report separate percentages for the subsections of these statutes because the Commission did not code subsections of each statute separately at that time. As a result, this report does not provide a comparison between the top five statutes carrying mandatory minimum penalties as noted in the 1991 *Commission Report* and the top five statutes carrying mandatory minimum penalties most frequently reported in fiscal year 2010.

⁴⁴⁰ The statutory penalties for violating 21 U.S.C. § 846 are the “same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. § 846.

⁴⁴¹ See 1991 COMMISSION REPORT at 39-40. Section 846 convictions were not punishable by a mandatory minimum term of imprisonment until enactment of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

⁴⁴² Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004).

Table 4-1
Number of Convictions for Most Frequently Used Statutes
Carrying Mandatory Minimum Penalties⁴⁴³
FY 2010

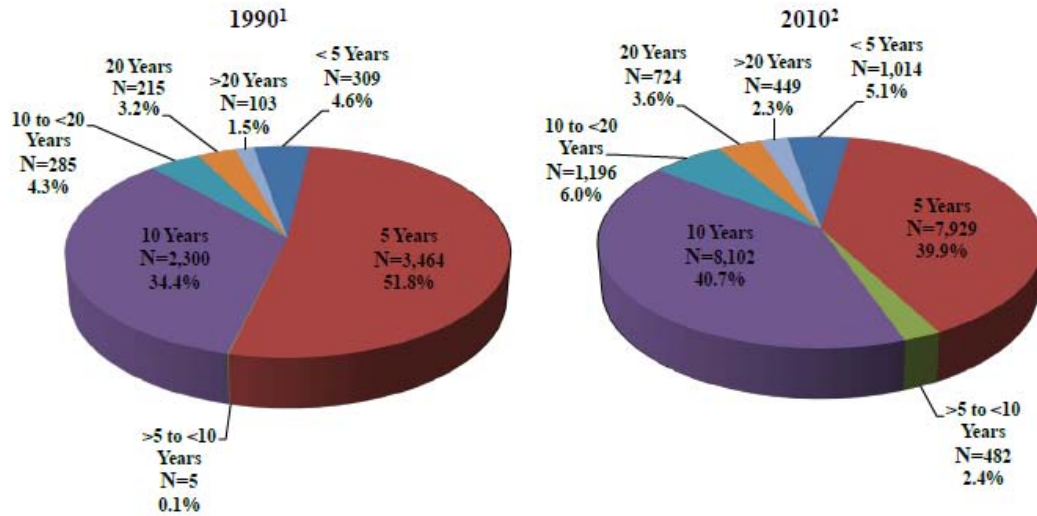
<i>STATUTE</i>	<i>TOTAL NUMBER OF COUNTS OF CONVICTION</i>	<i>PERCENTAGE OF COUNTS OF CONVICTION</i>
Total	28,261	100.0
21 USC § 846	9,258	32.8
21 USC § 841(b)(1)(B)	3,203	11.3
21 USC § 841(b)(1)(A)	2,685	9.5
18 USC § 924(c)(1)(A)(i)	1,547	5.5
18 USC § 1028A(a)(1)	1,008	3.6

3. *Increases in the Severity of Penalties for Mandatory Minimum Offenses*

Since fiscal year 1990, not only has there been an increased reliance on statutes carrying mandatory minimum penalties (excluding immigration offenses), but defendants now are convicted of violating statutes that carry longer mandatory minimum penalties. *See* Figure 4-7. In fiscal year 1990, slightly more than half (51.8%) of offenders convicted of an offense carrying a mandatory minimum penalty were convicted for violating a statute carrying a mandatory minimum penalty of five years of imprisonment. That percentage declined to 39.9 percent in fiscal year 2010. In contrast, the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty of ten years of imprisonment increased from 34.4 percent to 40.7 percent between fiscal years 1990 and 2010. There also has been a slight increase in the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty greater than ten years of imprisonment, from 9.0 percent in fiscal year 1990 to 11.9 percent in fiscal year in 2010.

⁴⁴³ For additional information concerning convictions for violating statutes carrying mandatory minimum penalties, *see* Table D-3 and Table D-4 (Specific Guideline Applied and Average Sentence by Guideline for Each Mandatory Minimum Statute (Fiscal Year 2010)) in Appendix D of this Report.

Figure 4-7
Length of Mandatory Minimum Penalty for Offenders Convicted of an Offense
Carrying a Mandatory Minimum Penalty
Fiscal Years 1990 and 2010



¹ See 1991 Commission Report, at page 49.

² SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10

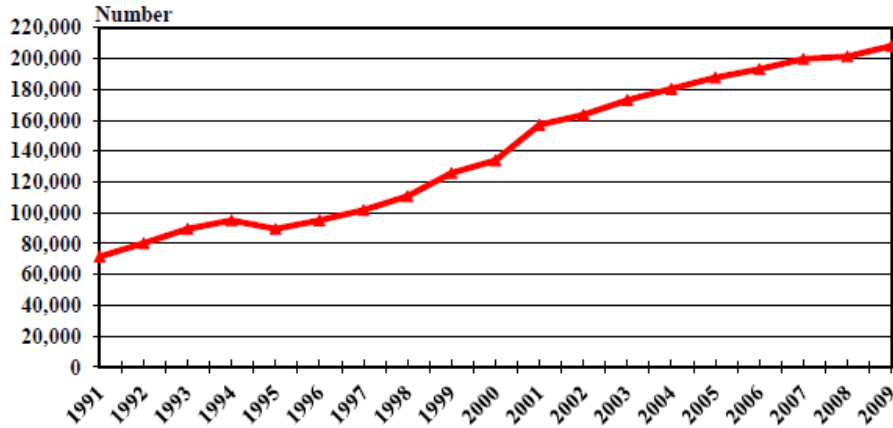
D. CHANGES IN THE SIZE AND COMPOSITION OF THE FEDERAL PRISON POPULATION

The changes to the federal criminal justice system discussed in Parts B and C, *supra*, have had a significant impact on the federal prison population. The number of inmates housed by the Federal Bureau of Prisons (BOP) has almost tripled from 71,608 on December 31, 1991,⁴⁴⁴ to 208,188 on December 31, 2009.⁴⁴⁵ See Figure 4-8.

⁴⁴⁴ Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin, 1 (1995).

⁴⁴⁵ Heather C. West, et al., *Prisoners in 2009*, Bureau of Justice Statistics Bulletin, 2 (2010).

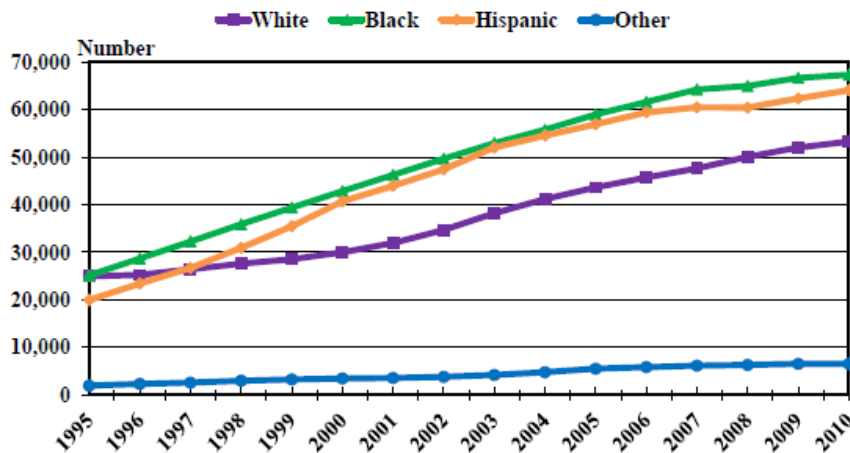
Figure 4-8
Number of Offenders in Prison on December 31
1991 - 2009



SOURCE: Allen J. Beck and Darrell K. Gilliard, *Prisoners in 1994*, *Bureau of Justice Statistics Bulletin*, 1 (1995), Allen J. Beck and Paige M. Harrison, *Prisoners in 2000*, *Bureau of Justice Statistics Bulletin*, 1 (2001), and Heather C. West, William J. Sabol, and Sarah J. Greenman, *Prisoners in 2009*, *Bureau of Justice Statistics Bulletin*, 2 (2010).

The racial composition of the federal prison population has changed over time. See Figure 4-9. In 1995, Black inmates (n=25,106) outnumbered other racial groups in the federal prison population, followed by White (n=24,900), Hispanic (n=19,913), and Other Race offenders (n=1,895). By 1997, however, the number of Hispanic inmates (n=26,681) exceeded the number of White inmates (n=26,388), but Black inmates continue to outnumber all other racial groups.

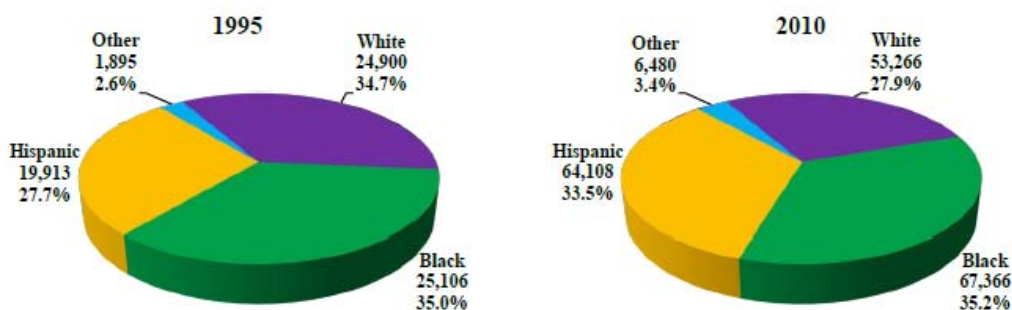
Figure 4-9
Number of Offenders in Prison on September 30
by Race of Offender
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The proportion of Black inmates in the federal prison population has, however, remained relatively constant. As shown in Figure 4-10, Black inmates constituted 35.0 percent of the prison population in 1995 and 35.2 percent in 2010.⁴⁴⁶ The proportion of Other Race offenders has also remained relatively constant (2.6% in 1995 and 3.4% in 2010). By contrast, the proportion of Hispanic inmates increased from 27.7 percent in 1995 to 33.5 percent in 2010, coupled with a corresponding decrease in the proportion of White inmates during that period (from 34.7% in 1995 to 27.9% in 2010).

Figure 4-10
Percentage of Offenders in Prison on September 30
by Race of Offender
1995 and 2010

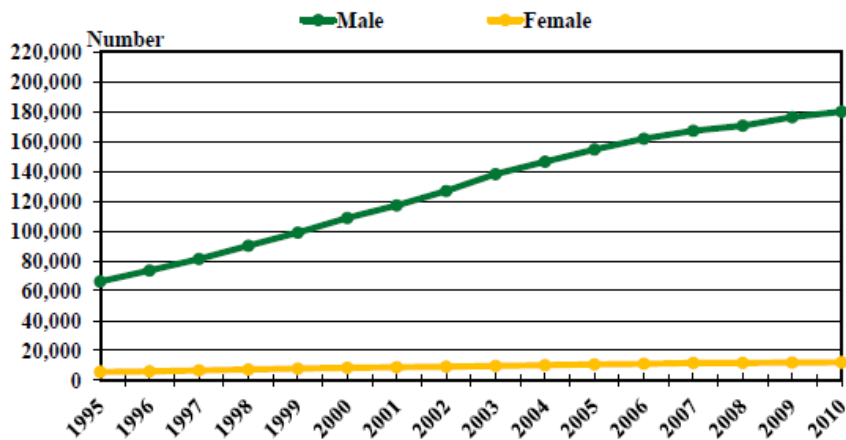


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

Throughout this period, the overwhelming majority of inmates in the federal prison population each year were male with 66,237 male inmates in 1995 and 179,967 male inmates in 2010. See Figure 4-11.

⁴⁴⁶ The Commission received information from the BOP on the start and release date for each offender in prison from October 1, 1990, through September 30, 2010. Commission data files were combined with a BOP data file to determine how many offenders were in prison, what percentage of prisoners were convicted of violating a statute containing a mandatory minimum penalty, and what percentage of prisoners were subject to a mandatory minimum penalty at sentencing. The Commission used September 30, 1995, as the relevant date from which to draw the prison population comparisons presented throughout this report because of data limitations prior to that date. The Commission can only identify offenders convicted of violating a statute carrying a mandatory minimum penalty who were sentenced after nationwide implementation of the federal sentencing guidelines in January 1989, and for whom the Commission received the necessary sentencing documentation from the sentencing court to perform this analysis. Therefore, this analysis cannot account for offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum and sentenced prior to January 1989. For example, only 27.8% of offenders in the custody of BOP as of September 30, 1991, were sentenced after January 1989. Therefore, an analysis of the offenders in BOP custody as of that date could not account for the remaining 72.2% of offenders in the BOP custody at that time. As of September 30, 1995, 71.8% of offenders in BOP custody were sentenced after January 1989, and that figure increased to 90.5% as of September 30, 2009.

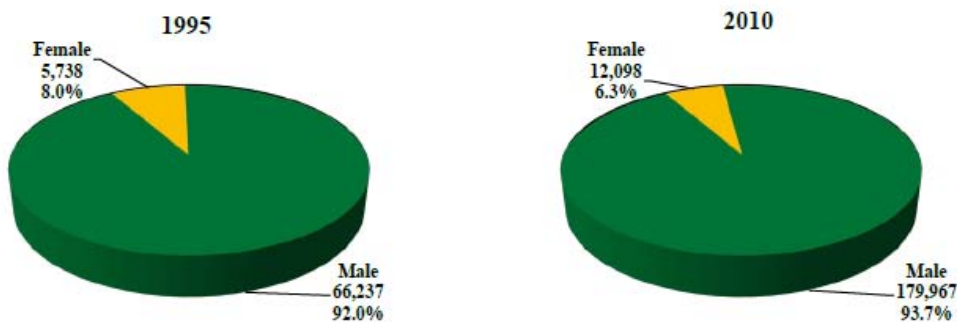
Figure 4-11
Number of Offenders in Prison on September 30
by Gender of Offender
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

As shown in Figure 4-12, the proportion of male inmates in the federal prison population has remained relatively constant over time. In 1995, male inmates constituted 92.0 percent in 1995, increasing slightly to 93.7 percent in 2010. *See* Figure 4-12.

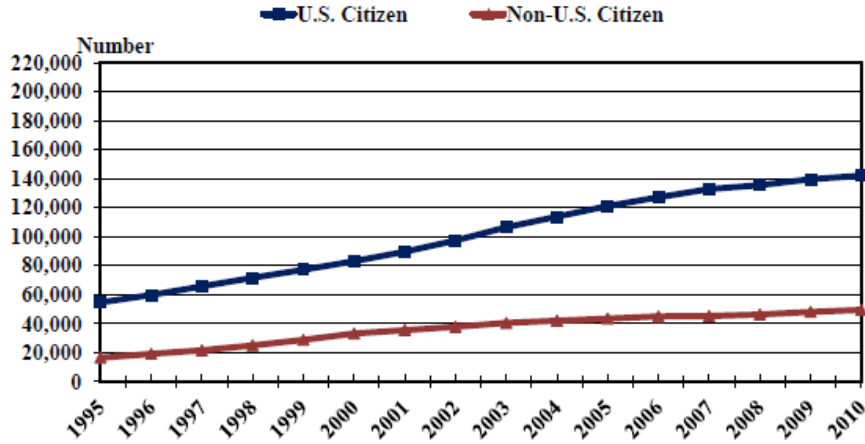
Figure 4-12
Percentage of Offenders in Prison on September 30
by Gender of Offender
1995 and 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

In 1995, United States citizen inmates (n=54,716) outnumbered non-citizen inmates (n=16,533). *See* Figure 4-13. The number of United States citizen and non-citizen inmates has increased annually. Nevertheless, United States citizen inmates continue to outnumber non-citizen inmates.

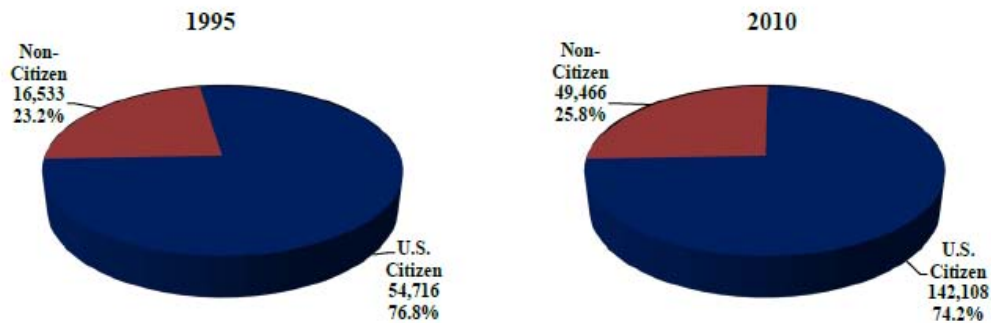
Figure 4-13
Number of Offenders in Prison on September 30
by Citizenship of Offender
1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The proportion of United States citizen inmates in the federal prison population has also remained stable over time, notwithstanding the change in the composition of the federal docket noted in Part A, *supra*.⁴⁴⁷ As shown in Figure 4-14, in 1995 more than three quarters of inmates (76.8%) in the federal prison population were United States citizens. By 2010, that percentage decreased only slightly to 74.2 percent. See Figure 4-14.

Figure 4-14
Percentage of Offenders in Prison on September 30
by Citizenship of Offender
1995 - 2010

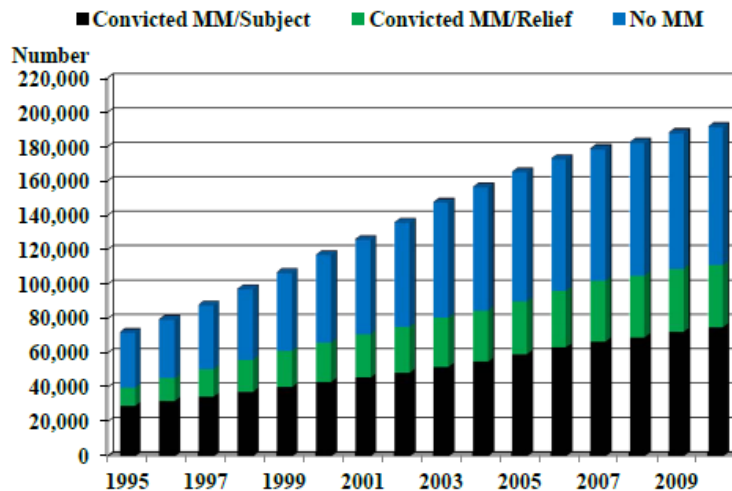


SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

⁴⁴⁷ Immigration cases were the most common federal crime in fiscal year 2010.

Combined Commission and BOP data demonstrate that an increasing number of inmates in the federal prison population were convicted of violating statutes carrying mandatory minimum penalties.⁴⁴⁸ As of September 30, 1995,⁴⁴⁹ combined Commission and BOP data identify 40,104 offenders in BOP custody who were convicted of violating a statute carrying a mandatory minimum penalty. *See* Figure 4-15. As of September 30, 2010, combined Commission and BOP data identify 111,545 offenders in BOP custody who were convicted of an offense carrying a mandatory minimum penalty, a 178.1 percent increase. Similarly, the number of offenders in BOP custody who were subject to a mandatory minimum penalty at sentencing increased from 29,603 as of September 30, 1995, to 75,579 as of September 30, 2010, an increase of 155.3 percent.⁴⁵⁰

Figure 4-15
Number of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty and Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The increase in the federal prison population, however, is not solely attributable to mandatory minimum penalties. Figure 4-15 demonstrates that the number of offenders in BOP

⁴⁴⁸ Commission data files were combined with a BOP data file to determine how many offenders were in prison, what percentage of prisoners who were convicted of violating a statute containing a mandatory minimum penalty, and what percentage of prisoners were subject to a mandatory minimum penalty at sentencing. The Commission received information from the BOP on the start and release date for each offender in prison from October 1, 1990, through September 30, 2010. These offenders were then matched with the Commission’s information on these offenders.

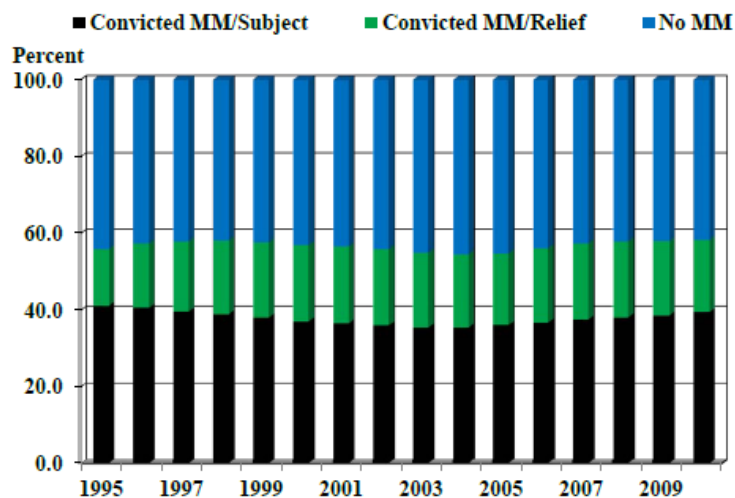
⁴⁴⁹ *See supra* note 447 for the reason the Commission used September 30, 1995, as the relevant date from which to draw this comparison because of data limitations prior to that date.

⁴⁵⁰ For a discussion of the demographic composition of offenders convicted of violating a statute carrying a mandatory minimum penalty and offenders who were subject to a mandatory minimum penalty at sentencing, *see infra* Chapter 7.

custody who were convicted of violating a statute with no mandatory minimum penalty also increased significantly since 1995. The number of offenders in BOP custody who were convicted of violating a statute with no mandatory minimum penalty increased from 31,868 as of September 30, 1995, to 80,303 as of September 30, 2010, an increase of 152.0 percent.

Because the number of offenders in the federal prison population who were convicted of violating statutes with and without mandatory minimum penalties both increased at similar rates, the percentage of offenders in the custody of BOP who were convicted of violating a statute carrying a mandatory minimum penalty has varied little. *See* Figure 4-16. Offenders convicted of violating statutes carrying mandatory minimum penalties increased slightly from 55.7 percent as of September 30, 1995, to 58.1 percent as of September 30, 2010, an increase of 4.3 percent, but the proportion of offenders in the custody of BOP who were subject to a mandatory minimum penalty decreased similarly. The percentage of offenders in BOP custody subject to a mandatory minimum penalty at sentencing decreased from 41.1 percent as of September 30, 1995, to 39.4 percent as of September 30, 2010, a decrease of 4.1 percent.

Figure 4-16
Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing
Fiscal Years 1995 - 2010



SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2010 Datafiles, USSCBOP.

The resulting increase in the size of the federal prison population has caused other changes to the federal prison system. The number of federal prisons has increased from 72⁴⁵¹ to

⁴⁵¹ See Federal Bureau of Prisons, *State of the Bureau* (1991), available at <http://www.bop.gov/news/PDFs/sob91.pdf>. These facilities included any Federal Correctional Complex, Federal Correctional Institution, Federal Detention Center, Federal Medical Center, Federal Prison Camp, Intensive Confinement Center, Metropolitan Correctional Center, and U.S. Penitentiary.

116.⁴⁵² The federal prison appropriations have increased from \$1.36 billion for fiscal year 1991⁴⁵³ to \$6.09 billion for fiscal year 2010.⁴⁵⁴

Notwithstanding the increases in number of facilities and budget, the BOP is currently operating at 35 percent over its rated capacity.⁴⁵⁵ “Crowding is of special concern at higher security facilities with 50 percent crowding at high security facilities and 39 percent at medium security facilities. This severe crowding has resulted in double and triple bunking inmates.”⁴⁵⁶ This overcrowding is expected to continue because, although BOP releases about 61,000 inmates per year, it receives approximately 67,000 new inmates annually.⁴⁵⁷

Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system, including expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. The changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.

⁴⁵² See Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 9 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf. As the federal prison population grew, the BOP’s main response for accommodating the increased prison population was to build or acquire more prison facilities. BOP is currently pursuing alternative measures to reduce overcrowding. See Prepared Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 3–4 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Testimony_BOP_Lappin.pdf.

⁴⁵³ Pub L. No. 101–515, 104 Stat. 2101, 2114 (1990).

⁴⁵⁴ Pub L. No. 111–117, 123 Stat. 3034, 3129 (2009).

⁴⁵⁵ See Prepared Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 2 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Testimony_BOP_Lappin.pdf.

⁴⁵⁶ Id. at 2-3. Accord Fiscal Year 2011 Appropriations: Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations (Mar. 18, 2010) (statement of Harley G. Lappin, Dir. of the Fed. Bureau of Prisons (“Crowding is of special concern at higher security facilities including penitentiaries (operating at 52 percent over capacity) and medium security institutions (operating at 46 percent over capacity.”)); Housing D.C. Code Felons Far Away From Home: Effects on Crime, Recidivism and Reentry: Hearing Before the Subcomm. on Federal Workforce, Postal Service and the District of Columbia of the H. Oversight and Government Reform Comm. 111th Cong. 17 (May 5, 2010) (Testimony of Harley Lappin, Director, Bureau of Prisons (“The Bureau of Prisons is operating at 37 percent over rated the capacity system wide, with high security institutions operating at 51 percent over capacity and medium security institutions operating at 46 percent over capacity.”)).

⁴⁵⁷ See Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 9 (Mar. 17, 2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Hearing_Transcript.pdf.

