



AUDIT OF THE DEPARTMENT OF JUSTICE PROCESSING OF CLEMENCY PETITIONS

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EXECUTIVE SUMMARY

The authority to grant clemency for federal criminal offenses vests solely with the President of the United States.¹ The President's clemency power is authorized under Article II, Section 2, of the Constitution and can take several forms depending on the petitioner's sentence and whether or not the petitioner has been released from incarceration. According to 28 Code of Federal Regulations (C.F.R.) § 1.1, the forms of clemency include:

- **Pardon** - A Presidential pardon will restore certain rights lost as a result of the pardoned offense; it will not erase or expunge the record of conviction.
- **Commutation of Sentence** - A commutation of sentence reduces the sentence being served, but it does not have any impact upon the conviction itself. Commutation petitions can also include a request for: (1) a full or partial remission of any fines or restitution imposed by the court; and (2) a reprieve, which delays the impending punishment or sentence, including a temporary delay in the execution of capital punishment.²

Since fiscal year (FY) 1900, 22 percent of the more than 95,000 clemency petitions received were granted.³ However, in recent years the President has infrequently exercised clemency power. Between FYs 2005 and 2010, only 177 (3 percent) of the 5,806 clemency decisions made were granted, while the remaining 5,629 (97 percent) were denied. In addition, the backlog of petitions has steadily increased since FY 1900 and

¹ Federal criminal offenses include all criminal violations of the United States Code, the District of Columbia Code, and the Uniform Code of Military Justice.

² Respite, a temporary delay in the execution of capital punishment, was formerly included as a separate type of clemency. However, it is no longer used and petitions related to a delay in capital punishment cases are now included in the reprieve category, which would similarly be temporary in nature and designed to allow more time to review matters related to the case.

³ The Office of the Pardon Attorney (OPA) does not report clemency statistics prior to FY 1900.

escalated to more than 3,000 petitions in FY 2002, which corresponded to a rapid increase in the number of petitions filed.⁴

While the power to grant clemency is vested solely in the President, according to 28 C.F.R. § 1.1, requests for executive clemency for federal offenses are directed to the Office of the Pardon Attorney (OPA) for processing, with the exception of petitions relating to military offenses.⁵ The specific responsibilities of the OPA, in consultation with the Office of the Deputy Attorney General (ODAG), include the following:

- receive and review all petitions for executive clemency, conduct the necessary investigations, and prepare recommendations for the President, which are reviewed and signed by the Deputy Attorney General;⁶
- provide policy guidance for the conduct of clemency proceedings and the standards for decision;
- confer with individual clemency petitioners, petitioners' representatives, public groups, members of Congress, various federal, state, and local officials, and others in connection with the disposition of clemency proceedings; and
- maintain contacts with Department of Justice (DOJ) officials, the Counsel to the President, and other government officials to advise them on clemency matters as requested.

The OPA's review may include referrals to the Federal Bureau of Investigation (FBI) to conduct a background investigation of the petitioner, as well as referrals to other entities, such as the Federal Bureau of Prisons (BOP), U.S. Probation Office, federal prosecuting and law

⁴ Throughout this audit report we define the term "backlog" to include all clemency petitions that have been received by the OPA, but have not received a final decision by the President or been administratively closed by the OPA.

⁵ A petitioner applying for executive clemency with respect to military offenses should submit his or her petition directly to the Secretary of the military branch that had original jurisdiction over the court-martial trial and conviction of the petitioner.

⁶ As mentioned previously, petitions for pardon of a military offense should first be sent to the Secretary of the military branch that had original jurisdiction. Once the military pardon petition has been reviewed by the appropriate Secretary, the petition along with any required documentation is forwarded to the OPA for review and processing. By long-standing convention, the President does not entertain petitions for commutation of a military sentence, but rather defers to military authorities on such matters.

enforcement agencies, sentencing judges, and identifiable victims, to obtain appropriate information, comments, and recommendations.

In FY 2010, the OPA consisted of six attorneys and six support staff, and had a budget of \$2.7 million.⁷ The OPA reviews and processes clemency petitions using the guidelines outlined in the U.S. Attorneys' Manual.⁸ Subsequently, the OPA provides a recommendation and report to the ODAG for review and signature. The ODAG then performs its own assessment of the report and recommendation. According to our interview with ODAG officials, generally the ODAG does not overrule the OPA's recommendation but may suggest changes to the report, including the order of significant factors supporting the recommendation. Once the recommendation is approved and the report is signed by the Deputy Attorney General, the OPA forwards the recommendation and report to the White House. Once the President makes a final decision on the clemency petition, the OPA is notified by the White House and the OPA completes the necessary documentation and notifications.

Office of the Inspector General Audit Approach

The objectives of this audit were to determine whether: (1) the OPA has established effective procedures for processing and reducing the backlog of clemency petitions, and (2) DOJ components have established effective procedures to respond to the OPA's referrals in a timely manner.

The scope of our audit generally included clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010.⁹ As a result, our audit included 12,897 clemency petitions opened between November 1993 and September 2010, and 40,226 referral and status actions between December 1993 and September 2010, reported in OPA's Executive Clemency Tracking

⁷ Over the past 5 fiscal years, OPA's staffing has had little change above or below the FY 2010 numbers. Therefore, we believe the improvements discussed in this report are due to process improvements, not staffing. The Pardon Attorney is a career position selected by the Attorney General and heads the OPA. The OPA's website is www.justice.gov/pardon.

⁸ U.S. Attorneys' Manual § 1-2.112 Standards for Considering Pardon Petitions and § 1-2.113 Standards for Considering Commutation Petitions.

⁹ Throughout this audit report we use the term "pending" to indicate the status of clemency petitions included in the backlog. Petitions are pending at the OPA, ODAG, or White House. For example, a petition processed by the OPA that is awaiting review by the ODAG would be considered "pending" at the ODAG.

System (ECTS).¹⁰ However, we considered information outside this period if it was relevant to the audit, and the instances in which we considered such information are noted in the report.

We conducted audit work at the OPA, ODAG, BOP, FBI, Executive Office for U.S. Attorneys, and Criminal Division. We interviewed the Pardon Attorney and OPA staff responsible for processing clemency petitions, as well as ODAG officials regarding the review of clemency petitions. We also interviewed officials responsible for responding to the OPA's referrals requesting information, comments, and recommendations related to clemency petitions. Additionally, we obtained and analyzed information from OPA's ECTS and conducted a case file review of a statistical sample of 313 petitions to verify the accuracy of the information in the ECTS and determine whether the case files contained any additional information related to the OPA's referrals.

Finally, we sent questionnaires to six DOJ components, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); Drug Enforcement Administration (DEA); Antitrust Division; Civil Division; Civil Rights Division; and Tax Division, to obtain an understanding of the processes for responding to the OPA's referrals requesting information, comments, and recommendations on clemency petitions. Questionnaires were also sent to a sample of 30 U.S. Attorneys' Offices (USAO) and 41 BOP institutions and contract facilities.¹¹ Appendix I contains a more detailed description of our audit objectives, scope, and methodology.

Results in Brief

Based on discussions with the OPA and our review of a sample of clemency petition case files, we identified the procedures used to process clemency petitions. In our judgment, based on the procedures identified, we found that the OPA utilized a reasonable approach to investigate the merits of clemency petitions and develop its recommendations. In addition, the reports and recommendations undergo an extensive review by the Pardon Attorney and the ODAG before being signed by the Deputy Attorney General and provided to the President.

¹⁰ The referral actions documented in ECTS track all OPA referrals to the petitioner, petitioner's attorney, and referral agencies, including the U.S. Attorneys' Offices (USAO), FBI, and BOP, for information, comments, and recommendations on clemency petitions. Additionally, ECTS tracks the status of the report and recommendation during the time it is at the ODAG or at the White House for review.

¹¹ Not all of the USAOs and BOP institutions or contract facilities received referrals from the OPA during the period covered by our audit. Referrals were sent to 90 of the 93 USAOs and 124 of the 129 BOP institutions or contract facilities.

However, we also found that the backlog of clemency petitions increased by 92 percent over 6 years, from 2,459 petitions at the beginning of FY 2005 to 4,714 petitions at the end of FY 2010. This increase in the backlog was due in part to the fact that the number of clemency petitions received by the OPA more than doubled from FY 2005 to FY 2010, and the President did not make any decisions on clemency petitions from the time he took office in January 2009 through FY 2010. However, we note that during the first 5 months of FY 2011 (October 1, 2010 through February 28, 2011), the President granted 9 pardons while denying 131 pardon petitions and 1,157 commutation petitions. These Presidential decisions resulted in a slight decrease in the backlog of clemency petitions to 4,194 as of the end of February 2011. In May 2011, the President then granted 8 more pardons and denied 741 pardon and 1,947 commutation petitions. This most recent Presidential action reduced the total backlog to 2,064 petitions as of the end of August 2011.

Although the backlog increased from FY 2005 to FY 2010, we also found that the number of petitions processed by the OPA increased by 61 percent during that time.¹² As of the end of FY 2010, 29 percent of the 4,714 petitions in the backlog were at the OPA, 18 percent were at the ODAG, and 52 percent were at the White House. Therefore, more than half of the backlog was outside of DOJ's control at this time.¹³

We found that during our audit scope, on average it took almost 2 years to process clemency petitions from the OPA's receipt of the petition to the President's final decision, which may have contributed to the growing backlog. During the time that a petition is at the OPA, the petition may be referred to various entities for information regarding the petitioner, the petitioner's offense, or for an opinion on whether clemency should be granted. The OPA typically requests a response within 30 days from the date of the referral, but does not follow up with the component on outstanding referrals until 60 days past the date of the referral.

¹² Petitions are considered processed by the OPA when the first report and recommendation is sent to the ODAG for review and signature.

¹³ Due to the Presidential decisions made during the first 5 months of FY 2011 and in May 2011, the percentage of the backlog residing at the OPA, ODAG, and White House shifted. According to the OPA, as of the end of August 2011, 47 percent of the 2,064 backlogged petitions were at the OPA, 31 percent were at the ODAG, and 21 percent were at the White House. Due to the timing of these Presidential decisions we did not audit these statistics. Therefore, the remaining sections of this Executive Summary generally cover our audit scope which ended at the close of FY 2010.

We found that a significant cause of the delay in processing clemency petitions was that the entities receiving referrals did not always respond to the OPA's referrals within the period of time required by the entities' internal guidelines or the period of time requested by the OPA. We determined that according to ECTS, during the period covered by our audit, the average response time for an entity receiving a referral was 124 days (4.1 months) per petition, ranging from 30 days (1 month) to more than 489 days (16.3 months). In addition, the entities receiving referrals generally did not notify the OPA if additional time was required to provide a response. We also found that the OPA often did not follow up on outstanding referrals within the 60 days required by its internal policy.

We identified 10 DOJ components that received referrals from the OPA during the period covered by our audit: (1) ATF; (2) BOP Headquarters and Wardens; (3) DEA; (4) FBI; (5) USAOs; (6) Antitrust Division; (7) Civil Division; (8) Civil Rights Division; (9) Criminal Division; and (10) Tax Division. Eight of the 10 DOJ components have established internal guidelines that require them to respond to the OPA within 30 days or less, or to advise the OPA if an unusual delay is anticipated. The FBI has longer internal deadlines because of its role in performing background investigations and translation services. The FBI's timeframes are 120 calendar days for background investigations and 1 month for translation services. ATF did not have established timeframes for responding to the OPA's referrals.

We found that according to ECTS, DOJ components that received referrals from the OPA took an average of 112 days (3.7 months) per petition to provide a response to the OPA.¹⁴ On average, the response times of five components, the DEA, Antitrust Division, ATF, Tax Division, and Civil Division, did not materially exceed their own established timeframes or the OPA's requested response time. The average response time per petition for these components ranged between 30 and 49 days. However, we found that on average, the response times for the remaining five components, the BOP institutions or contract facilities, all USAOs that received OPA referrals, Civil Rights Division, FBI, and Criminal Division, materially exceeded the established timeframes for responding to OPA referrals.¹⁵ The average

¹⁴ We excluded the FBI from our calculation of the average response time for DOJ components because full background investigations may take significantly longer than the other types of requests included in the OPA's referrals.

¹⁵ OPA referrals to the FBI included requests for limited background investigations, full background investigations, and translation services. However, we found that ECTS does not track these services separately. Therefore, we were unable to separate this information and instead could only determine the average amount of time a petition is at the FBI.

response time per petition for these components ranged from 105 days (3.5 months) to 489 days (1.3 years), and exceeded the established time frames by a range of 90 days (3 months) to 459 days (1.3 years).

Further, we found that during the time period covered by our audit, petitions were at the ODAG for an average of 142 days (4.7 months) pending review of the report and recommendation. Finally, petitions were pending at the White House for an average of 282 days (9.4 months) before a decision was made by the President. Thus, the timeframe that petitions were pending at the White House, while outside the control of DOJ, significantly contributed to the increased backlog of clemency petitions.

In our report, we make 10 recommendations to assist the OPA, DOJ components, and the ODAG in processing clemency petitions in a more efficient manner, which we believe may facilitate further reduction of the backlog.

Our report contains detailed information on the full results of our review of DOJ's processing of clemency petitions. The remaining sections of this Executive Summary summarize in more detail our audit findings.

Analysis of Clemency Petitions and the Backlog

Processing Clemency Petitions

At each stage in the processing of a clemency petition, the OPA assesses the merit of the petition using the standards set forth in the U.S. Attorneys' Manual, § 1-2.112 through § 1-2.113.¹⁶ The review approach varies based on whether the petition appears to be of sufficient merit.

To ensure consistency in assessments and recommendations, the Pardon Attorney reviews each report and recommendation to ensure that the recommendation complied with the established standards. In addition, all OPA reports and recommendations are reviewed by ODAG and White House personnel. However, ultimately the power to grant clemency is vested solely in the President.

Based on discussions with the OPA and our review of a sample of clemency petition case files, we identified the procedures used to process clemency petitions. As noted previously, in our judgment, based on the

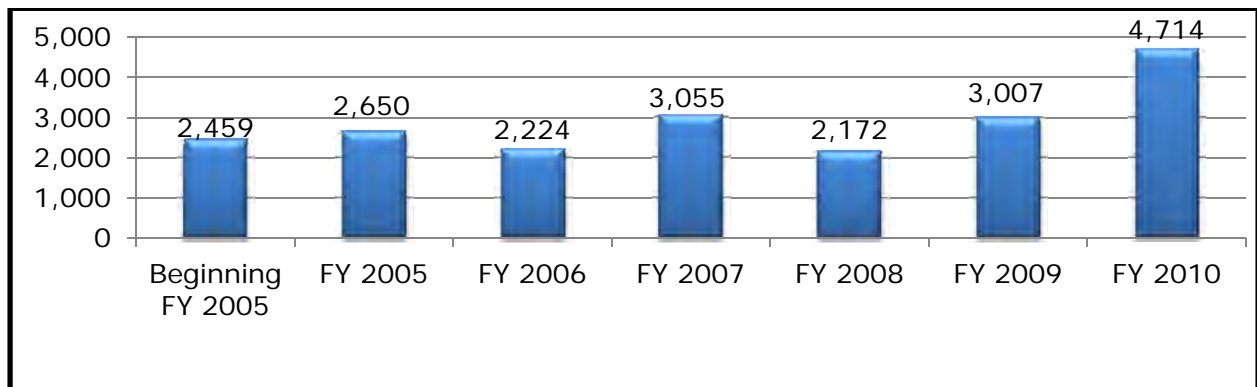
¹⁶ Clemency petitions include both pardons and commutations. Commutations include requests for reduction of sentence, remission of fine, and reprieve.

procedures identified, we found that the OPA utilized a reasonable approach to investigate the merit of clemency petitions and develop its recommendations. In addition, the reports and recommendations undergo an extensive review before they are provided to the President. The procedures for processing clemency petitions are detailed in Appendix IV.

Clemency Petition Backlog

We found that the backlog of clemency petitions increased by 92 percent from the beginning of FY 2005 to the end of FY 2010, as shown in Exhibit 1.

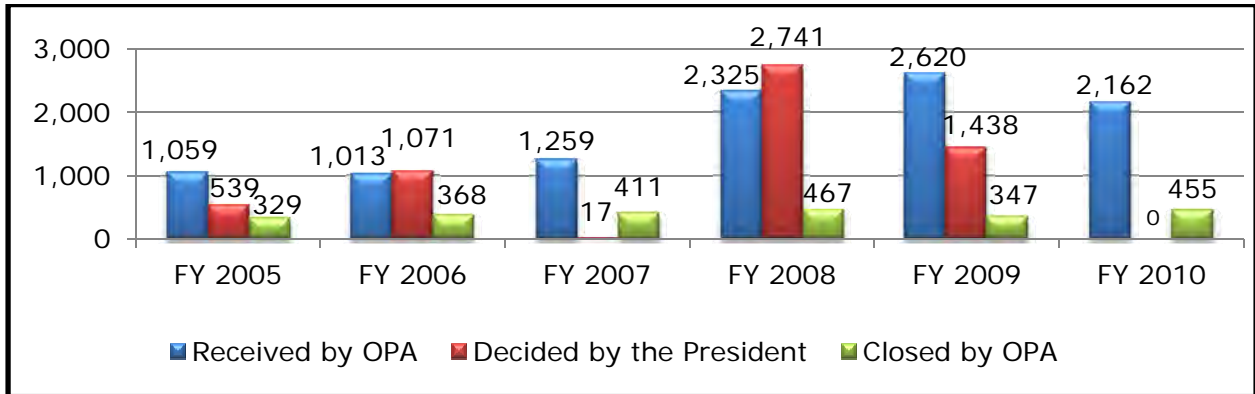
**EXHIBIT 1
BACKLOG OF CLEMENCY PETITIONS BY FISCAL YEAR END
FISCAL YEARS 2005 – 2010**



Source: Office of the Inspector General (OIG) analysis of ECTS data

The increased backlog from FY 2005 to FY 2010 was due, in part, to the increased number of clemency petitions received by the OPA during that time, while the number of petitions decided by the President decreased during FYs 2009 through 2010, as shown in Exhibit 2.

EXHIBIT 2
PETITIONS RECEIVED, DECIDED, AND CLOSED¹⁷
FISCAL YEARS 2005 - 2010



Source: OIG analysis of ECTS data

Despite the increased backlog, we found that the number of petitions processed by the OPA increased from 1,075 in FY 2005 to 1,733 in FY 2010. Although our audit scope ended at the end of FY 2010, we observed that during the first 5 months of FY 2011, the President granted 9 pardons while denying 131 pardon and 1,157 commutation petitions. The Presidential decisions resulted in a slight decrease in the backlog of clemency petitions to 4,194 as of the end of February 2011. Further, we found that at this time over half of the backlog was outside DOJ's control because the petitions had been forwarded to the White House for Presidential decision, as shown in Exhibit 3.

¹⁷ Petitions decided by the President and petitions closed by the OPA include petitions that may have been received in a previous fiscal year.

**EXHIBIT 3
BACKLOG OF PETITIONS¹⁸**

LOCATION OF PETITIONS	BACKLOG	PERCENTAGE	BACKLOG	PERCENTAGE
	ECTS DATA AS OF 9/30/2010		ECTS DATA AS OF 2/28/2011 ¹⁹	
OPA	1,386	29%	1,280	31%
ODAG	860	18%	464	11%
White House	2,468	52%	2,450	58%
Total Backlog	4,714	100%	4,194	100%

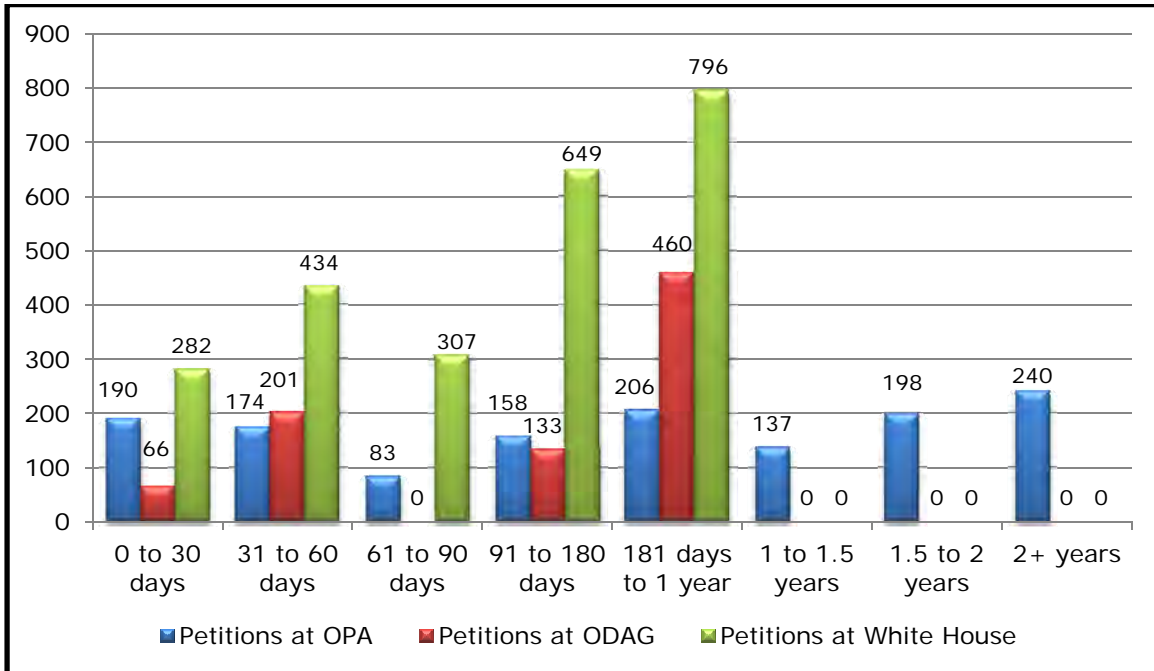
Source: OIG analysis of ECTS data

An aging schedule of the backlog of petitions as of the end of FY 2010 is shown in Exhibit 4.

¹⁸ The sum of the individual numbers prior to rounding may differ from the sum of the individual numbers rounded.

¹⁹ As previously noted, in May 2011, the President granted 8 pardons while denying an additional 741 pardon and 1,947 commutation petitions. According to the OPA, this most recent Presidential action reduced the total backlog to 2,064 petitions as of the end of August 2011, with 47 percent of those petitions at OPA, 31 percent at the ODAG, and 21 percent pending at the White House. Due to the timing of these Presidential decisions we did not audit these statistics. Therefore, the remaining sections of this Executive Summary generally cover our audit scope which ended at the close of FY 2010.

EXHIBIT 4
AGING SCHEDULE OF BACKLOG PETITIONS
AS OF THE END OF FY 2010



Source: OIG analysis of ECTS data

As shown in Exhibit 4, at the end of FY 2010 the oldest petitions resided at the OPA, with 12 percent of the total backlog being over 1 year old.

As a result of our audit, the OPA implemented new procedures designed to decrease the length of time a petition is at the OPA and further reduce the backlog. In June 2010, the OPA began generating a monthly report that identifies pardon petitions that have been at the OPA for more than 1 year and commutation petitions that have been at the OPA for more than 9 months prior to being sent to the ODAG. OPA attorneys are currently using this report as a management tool for prioritizing the OPA's efforts in processing petitions, to correct any incorrect information, and to assist in monitoring delayed responses to referrals.

We also found that of the 12,897 petitions included in our audit scope, 5,806 petitions had a final clemency decision signed by the President as of the end of FY 2010.²⁰ Of the 5,806 clemency decisions made during

²⁰ Presidential clemency decisions do not include petitions that were administratively closed by the OPA.

FYs 2005 through 2010, 177 clemency requests were granted (3 percent), including 169 pardons, 7 commutations, and 1 commutation and remission.

Clemency Petition Processing Times

During our audit scope, we found that on average, it took 721 days (nearly 2 years) from the time the OPA received a petition until a final clemency decision was made by the President, as shown in Exhibit 5.

**EXHIBIT 5
AVERAGE NUMBER OF YEARS BETWEEN
OPA’S RECEIPT OF A PETITION AND
THE FINAL CLEMENCY DECISION BY FORM OF RELIEF
FISCAL YEARS 2005 – 2010**

FORM OF RELIEF	AVERAGE TIME BETWEEN THE OPA’S RECEIPT OF A PETITION AND FINAL CLEMENCY DECISIONS
Pardon	1,194 days (3.27 years)
Commutation	573 days (1.57 years)
Commutation and Remission	791 days (2.17 years)
Remission Only	795 days (2.18 years)
For All Forms of Relief	721 days (1.98 years)

Source: OIG analysis of ECTS data

We also found that the average clemency petition processing time improved between FYs 2005 through 2009, from over 3 years to less than 1 year. However, we anticipate that the average processing time will increase in FY 2011 because no decisions were made by the President during FYs 2009 through 2010. Therefore, for the petitions decided by the President in FY 2011, there will be a corresponding increase in the average processing time related to the fact that 2,468 petitions were pending at the White House as of the end of FY 2010.

We found that during our audit scope, the total processing time for a clemency petition while at DOJ was an average of 423 days (1.16 years). This processing time included the period from the OPA’s receipt of a petition to the time the first report and recommendation were sent to the White House.

Because of the length of time it takes to process a clemency petition on average, petitions may be administratively closed prior to a decision by the President due to the petitioner’s release from imprisonment, the death of

the petitioner, or withdrawal of the petition. During our audit scope, 729 petitions (11 percent) were administratively closed by the OPA after the report and recommendation had been sent to the White House, but before the President made a final clemency decision.

We found that during our audit scope, clemency petitions, on average, were pending longest at the OPA (293 days, or 9.8 months) as compared to the ODAG (142 days, or 4.7 months) and the White House (282 days, or 9.4 months). We believe that this was due to the fact that the OPA is responsible for reviewing and investigating the petitions, including referrals to other entities, and for preparing the report and recommendation for the Deputy Attorney General. In addition, a significant portion of the OPA's investigation of clemency petitions depends on information and comments provided by outside individuals and agencies. The timeliness of responses to the OPA's referrals from other DOJ components and other entities greatly impacts the length of time petitions are pending at the OPA. In fact, when we removed the time that referrals were pending at various entities, we found that the average OPA processing time was actually 197 days (6.6 months).

We found that the failure of the entities receiving referrals to respond to the OPA within the period of time required by the entities' guidelines, or the period of time requested by the OPA significantly contributed to the delays in processing clemency petitions. In its referral requests, the OPA typically requests a response within 30 days from the date of the referral, with the exception of referrals to the FBI for background investigations. However, under its current process, the OPA does not follow up on outstanding referrals until 60 days after the initial referral.

We determined that during the period covered by our audit, according to ECTS, the average response time for an entity receiving a referral was 124 days (4.1 months), ranging from 30 days (1 month) to more than 489 days (16.3 months). However, some of the entities receiving referrals are outside of DOJ's control, such as the petitioner, petitioner's attorney, U.S. Probation Office, Sentencing Judge, U.S. Immigration and Customs Enforcement, Internal Revenue Service, and the Secretary of the military branch that had original jurisdiction over the court-martial trial and conviction of the petitioner. Excluding these entities and the FBI, we determined that referrals were at DOJ components for an average of 112 days (3.7 months) before a response was provided to the OPA.

We also found that the OPA did not always follow up on outstanding referrals or did not follow up within its own prescribed timeframes. During our case file review of a statistical sample of 313 petitions, we found that the

OPA failed to follow up on 43 percent of the referrals for which a response was not provided within 60 days. Further, for the referrals for which the OPA did follow up, the average follow-up time was 168 days (5.6 months) after the initial referral.

In June 2010, in response to our audit, the Pardon Attorney implemented a monthly report that lists petitions with a referral outstanding for more than 60 days, which should enhance the timeliness of follow-up on referrals. OPA attorneys are currently using this report as a management tool for policing delayed responses. However, our report also contains additional recommendations to improve the timeliness and tracking of referrals, and to enhance follow-up.

We also found that in June 2010, the OPA established a separate e-mail address to request and receive documentation from the BOP electronically. Previously, all referrals to the BOP were processed through the mail.²¹ This new procedure should improve the timeliness for requesting and receiving information from the BOP. In 2011, the OPA also began sending referrals electronically to the USAOs, FBI, and U.S. Probation Office, but the remaining referrals to other entities are still sent through regular mail. Therefore, we recommend that the OPA process all future referrals electronically.²²

As we described previously on page vi, we identified 10 DOJ components that received referrals from the OPA during the period covered by our audit.²³ Eight of the 10 DOJ components have set internal guidelines that require them to respond to the OPA within 30 days or less. For example, the BOP requires its Wardens to respond within 15 working days, while the USAOs and DOJ's litigating divisions fall under the guidelines established in the U.S. Attorneys' Manual or internal guidelines to respond within 30 days or advise the OPA if an unusual delay is anticipated. As we previously noted, because of its unique role of performing background

²¹ According to the Pardon Attorney, with the implementation of electronic referrals for all BOP requests, the cost for mail services was reduced by approximately \$15,000 as of the spring of 2011.

²² The only documents that cannot be transmitted electronically are documents that require original signatures, such as the petition, the report and recommendation transmitted to the ODAG for review and signature, and the signed report and recommendation transmitted to the White House.

²³ The 10 DOJ components included the USAOs and BOP institutions or contract facilities. Not all of the USAOs and BOP institutions or contract facilities received referrals from the OPA during the period covered by our audit. Referrals were sent to 90 of the 93 USAOs and 124 of the 129 BOP institutions or contract facilities.

investigations and language translation services for the OPA, the FBI has developed longer timeframes for the services it provides. During the scope of our audit, the FBI's internally established deadlines were 120 calendar days for background investigations, and about 1 month for translation services. However, in November 2010, the FBI reduced its internal deadline for background investigations to 60 days. ATF officials told us that ATF strives to meet the OPA's 30 day timeframe but it did not have established internal timeframes for responding to the OPA's referrals.

As we also noted previously, of the 10 identified DOJ components, we found that 5 of them (DEA, Antitrust Division, ATF, Tax Division, and Civil Division) did not materially exceed established timeframes, or the OPA's requested response time. According to ECTS, the average response time for these components ranged between 30 days (1 month) and 49 days (1.6 months) per petition. However, as we describe more fully in our report, we found that on average the response times, as shown in ECTS, for the remaining five components (BOP institutions and contract facilities, USAOs, Civil Rights Division, FBI, and Criminal Division) ranged from 105 days (3.5 months) to 489 days (1.3 years) per petition, which materially exceeded established timeframes, as shown in Exhibit 6.

EXHIBIT 6
AVERAGE REFERRAL RESPONSE TIME PER PETITION
FISCAL YEARS 2005 - 2010

REFERRAL AGENCY	AVERAGE TIME AT EACH AGENCY	ESTABLISHED TIMEFRAME AT EACH AGENCY
BOP (Referrals to Wardens Only)	105 days	15 days
USAOs	153 days	30 days
DOJ Civil Rights Division	263 days	30 days
FBI	343 days	120 days ²⁴
DOJ Criminal Division	489 days ²⁵	30 days

Source: OIG analysis of ECTS data

As shown above, for OPA referrals to BOP Wardens the average response time was 105 days (3.5 months), which materially exceeded established timeframes. Although the BOP as a whole did not respond to OPA referrals in a timely manner, it should be noted that for referrals which were required to be sent to BOP Headquarters, the average response time was only 45 days, which did not materially exceed established timeframes. Additionally, during our audit FBI officials stated that the FBI utilizes an internal tracking database to monitor the progress of all background investigations. According to the FBI's database, background investigations for clemency petitions conducted from FY 2005 to May 2010 averaged 232 days (7.7 months) per referral. Therefore, even when we use the 232 days, the FBI materially exceeded its 120 day timeframe.

Based on interviews and questionnaires sent to DOJ components that received referrals from the OPA, we found that common reasons provided as to why the components took so long to respond included: (1) other workload demands, (2) management and staff changes, (3) time spent locating and reviewing files, (4) difficulty in locating the information because the inmate and the inmate's files were transferred from the facility receiving

²⁴ For the FBI we used the established deadline for background investigations (120 days) because it was the longest period of time established for the three types of referrals sent to the FBI.

²⁵ The average time includes three petitioners who were prosecuted by the Criminal Division's former Counterespionage Section, which is now part of the National Security Division. We found these to be valid referrals because the referrals occurred during the time that the Counterespionage Section was a part of the Criminal Division and the Criminal Division was the primary prosecuting agency. Nonetheless, if these petitions were removed from our calculation, the average response time for the Criminal Division would be 233 days (7.8 months) per petition.

the request, (5) time spent contacting or coordinating with other components that might have information related to the petitioner, and (6) the component lacked a system to track and monitor the request. As a result, our report includes recommendations to ensure that these DOJ components respond to OPA referrals in a more timely manner.

We further analyzed specific OPA referrals for which, according to ECTS, the referral was pending at the BOP Wardens, USAOs, or FBI for a significant period of time, to determine the reasons why the referrals were shown as pending in ECTS for a significant period of time, as shown in Exhibit 7.

**EXHIBIT 7
CLEMENCY PETITION REFERRALS PENDING IN ECTS
FOR SIGNIFICANT PERIODS OF TIME**

OPA CASE No.	DOJ COMPONENT	ECTS INITIAL REFERRAL DATE	ECTS RESPONSE DATE OR DATE CLOSED WITH NO RESPONSE	ECTS TOTAL TIME	DOJ COMPONENT REASON FOR DELAY
2000-11-0247	BOP	12/07/00	04/25/06	1,965 days (5.4 years)	Monitoring procedures were not effective.
2004-09-1060	BOP	09/08/04	12/10/07	1,188 days (3.3 years)	No records or inmate file to review regarding the non-response. Inmate was released 04/25/05.
2000-01-0330	USAO	03/07/00	02/20/07	2,541 days (6.9 years)	USAO does not know reason for no response due to passed time and movement of personnel.
2001-08-1682	USAO	11/09/05	---	1,661 days (4.6 years) ²⁶	USAO responded on 12/19/08. The delay resulted from misplacement of the petition and file. ²⁷

²⁶ This referral was outstanding as of the May 28, 2010, OIG data query that included petitions pending at the beginning of FY 2005 and clemency petitions opened between FY 2005 and May 28, 2010. The referral was still outstanding as of the September 30, 2010, data query.

²⁷ According to the OPA, the response was not received until February 20, 2009.

OPA CASE NO.	DOJ COMPONENT	ECTS INITIAL REFERRAL DATE	ECTS RESPONSE DATE OR DATE CLOSED WITH NO RESPONSE	ECTS TOTAL TIME	DOJ COMPONENT REASON FOR DELAY
2005-10-0002	FBI	11/04/05	---	1,431 days (3.9 years)	First request was returned unopened - unable to conduct background investigation because petitioner was not a U.S. citizen. A subsequent request was received 01/17/08 and the FBI returned a response on 03/10/08. ²⁸
2005-11-0087	FBI	05/10/06	---	1,479 days (4.1 years)	First request returned unopened. A subsequent request was received 08/25/09 and the FBI returned a response on 02/02/10. ²⁹

Source: OIG analysis of ECTS data, sampled BOP institution or contract facility Wardens, sampled USAOs, the FBI, and the OPA

We also found that petitions spent an average of 142 days (4.7 months) at the ODAG pending review of the OPA's report and recommendation. The ODAG officials told us that timeliness in processing the reports and recommendations can be impacted by an administration change or the lack of a confirmed Deputy Attorney General. However, we found that during the 11-month period for which there was an Acting Deputy Attorney General, from February 2010 through December 2010, the Acting Deputy Attorney General processed more than 90 percent of the reports and recommendations provided by the OPA. Further, ODAG officials also stated that the ODAG does not have any timelines or any documented policies or procedures for reviewing the OPA's reports and recommendations regarding clemency petitions. Therefore, our report includes a recommendation that the ODAG should develop policies, procedures, and timeframes for reviewing the OPA's clemency reports and recommendations in order to help ensure that the ODAG reviews the OPA's reports and recommendations in a timelier manner. In addition, we recommended that the OPA provide the ODAG with

²⁸ According to the OPA, its case file confirmed the FBI's response. The Pardon Attorney stated that the OPA should have closed the referral after determining the FBI was unable to conduct the background investigation.

²⁹ According to the OPA, the case file documented that the FBI incorrectly closed the initial background investigation request. When the OPA discovered the error on July 31, 2009, it issued a subsequent referral on August 25, 2009. The Pardon Attorney stated that the OPA should have closed the initial referral after determining the FBI's error, or at the very least upon issuing the subsequent referral.

a monthly aging report listing clemency petitions that are currently pending at the ODAG. As a result, beginning in March 2011, the OPA began providing the ODAG with a monthly aging report that lists clemency petitions pending at the ODAG and the date the reports and recommendations were provided to the ODAG.

Finally, we found that petitions were at the White House for an average of 282 days (9.4 months) before a decision was made by the President. This average, while outside the control of DOJ, significantly contributed to the increased backlog of clemency petitions from FY 2005 to FY 2010.

Conclusion and Recommendations

We found that the backlog of clemency petitions almost doubled from FY 2005 to FY 2010, although it began to decrease in FY 2011. Further, we found during our audit scope that it took an average of almost 2 years from the time the OPA received a petition until a final clemency decision was made by the President, which we believe contributed to the growing backlog during that time period. In our judgment, a significant factor related to the length of time it took to process a clemency petition is that the entities receiving referrals did not always respond to the OPA within the established timeframes. We also found that the OPA did not always follow up on outstanding referrals or did not follow up within its established timeframes. Furthermore, it took the ODAG an average of 142 days (4.7 months) to review OPA's reports and recommendations, and it took the White House an average of 282 days (9.4 months) to make a decision on clemency petitions during this timeframe.

Our audit work and findings resulted in 10 recommendations to assist the OPA, DOJ components, and the ODAG in processing clemency petitions in a more efficient manner. For example, we recommend that:

- The OPA implement procedures to ensure that follow-up is conducted on outstanding referrals within its established timeframes; process all future referrals electronically; include an aging report detailing all open referrals when following up with the USAOs; and develop procedures that ensure that its case management system is updated to document changes in the status of referrals.
- DOJ components implement procedures to ensure they respond to the OPA's referrals in accordance with established internal guidelines.

- The ODAG develop policies, procedures, and timeframes for reviewing the OPA's clemency reports and recommendations to help ensure that it responds to the OPA in a timely manner.

AUDIT OF THE DEPARTMENT OF JUSTICE PROCESSING OF CLEMENCY PETITIONS

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INTRODUCTION

The Office of the Pardon Attorney (OPA), in consultation with the Attorney General or his designee, assists the President in the exercise of executive clemency as authorized under Article II, Section 2, of the Constitution. Specifically, Article II, Section 2 states that the President “shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Under the Constitution, the President's clemency power applies to federal criminal offenses, which include all criminal violations of the U.S. Code and the District of Columbia Code as well as violations of the Uniform Code of Military Justice.³⁰ According to 28 Code of Federal Regulations (C.F.R.) § 1.1, the forms of clemency include:

- **Pardon** - A pardon is an indication of forgiveness. A Presidential pardon will restore certain rights lost as a result of the pardoned offense, such as the right to vote and bear firearms. It also should lessen to some extent the stigma arising from a conviction. However, it will not erase or expunge the record of conviction. Under Department of Justice (DOJ) rules governing petitions for executive clemency, there is a minimum waiting period of 5 years after completion of sentence before petitioners are eligible to apply for a Presidential pardon.
- **Commutation of Sentence** - A commutation of sentence reduces the sentence being served, but it does not imply forgiveness of the offense, does not have any impact upon the conviction itself, and does not remove disabilities attendant to the conviction. Requests for commutation of a prison sentence generally are not accepted unless the petitioner has begun serving the sentence. In addition, commutation requests are generally not accepted from a petitioner who is currently challenging his or her conviction or sentence through appeal or other court proceeding. A commutation petition may include:
 - **Remission of Fine or Restitution** – A remission of fine or restitution includes a full or partial remission of any fines or restitution imposed by the court.

³⁰ The President's clemency power does not extend to state criminal offenses. Clemency for state criminal convictions falls under the authority of the Governor or other appropriate authorities for the state where the conviction occurred (e.g., the state board of pardons and paroles).

- **Reprieve** – A reprieve delays the impending punishment or sentence, including a temporary delay in the execution of capital punishment. A reprieve is temporary in nature, designed to allow more time to review matters related to the case. A request for reprieve may be included in the commutation petition.

The OPA reports clemency statistics from fiscal year (FY) 1900 to the present on its website. During FY 1900 through August 2011, the Presidents of the United States have granted 22 percent of the more than 95,000 clemency petitions received, including 14,296 pardons, 4,955 commutations, 1,097 remissions of fines, and 336 respites, as shown in Exhibit 1.³¹

³¹ Respite, a temporary delay in the execution of capital punishment, was formerly included as a separate type of clemency. However, respite is no longer used and petitions related to a delay in capital punishment cases are now included in the reprieve category, which would similarly be temporary in nature and designed to allow more time to review matters related to the case.

EXHIBIT 1
CLEMENCY GRANTED BY U.S. PRESIDENTS³²
FISCAL YEARS 1900 - 2011

PRESIDENT	FISCAL YEARS OF PRESIDENCY³³	PARDONS GRANTED	COMMUTATIONS GRANTED	REMISSION OF FINES GRANTED	RESPIRE GRANTED
William McKinley ³⁴	1900-1901	291	123	26	6
Theodore Roosevelt	1902-1909	668	363	59	9
William Taft	1910-1913	383	361	72	15
Woodrow Wilson	1914-1921	1,087	1,366	148	226
Warren Harding	1922-1923	300	386	39	48
Calvin Coolidge	1924-1929	773	773	126	19
Herbert Hoover	1930-1933	672	405	120	1
Franklin D. Roosevelt	1934-1945	2,819	488	477	12
Harry S. Truman	1945-1953	1,913	118	13	N/A
Dwight D. Eisenhower	1953-1961	1,110	47	0	N/A
John F. Kennedy	1961-1964	472	100	3	N/A
Lyndon B. Johnson	1964-1969	960	226	1	N/A
Richard M. Nixon	1969-1975	863	60	3	N/A
Gerald E. Ford	1975-1977	382	22	5	N/A
Jimmy Carter	1977-1981	534	29	3	N/A
Ronald Reagan	1981-1989	393	13	0	N/A
George H.W. Bush	1989-1993	74	3	0	N/A
William J. Clinton	1993-2001	396	61	2	N/A
George W. Bush	2001-2009	189	11	0	N/A
Barack H. Obama	2009-2011 ³⁵	17	0	0	N/A
Total		14,296	4,955	1,097	336

Source: OPA

³² Cases in which multiple forms of relief were granted are counted in only one category. The figures for commutations exclude one reprieve granted in FY 2000 and one reprieve granted in FY 2001. Also excluded from this exhibit are individual members of a class of persons granted pardons by proclamation, such as President Carter's proclamation granting clemency to certain Vietnam-era offenders, and persons granted clemency after action by President Ford's Presidential Clemency Board.

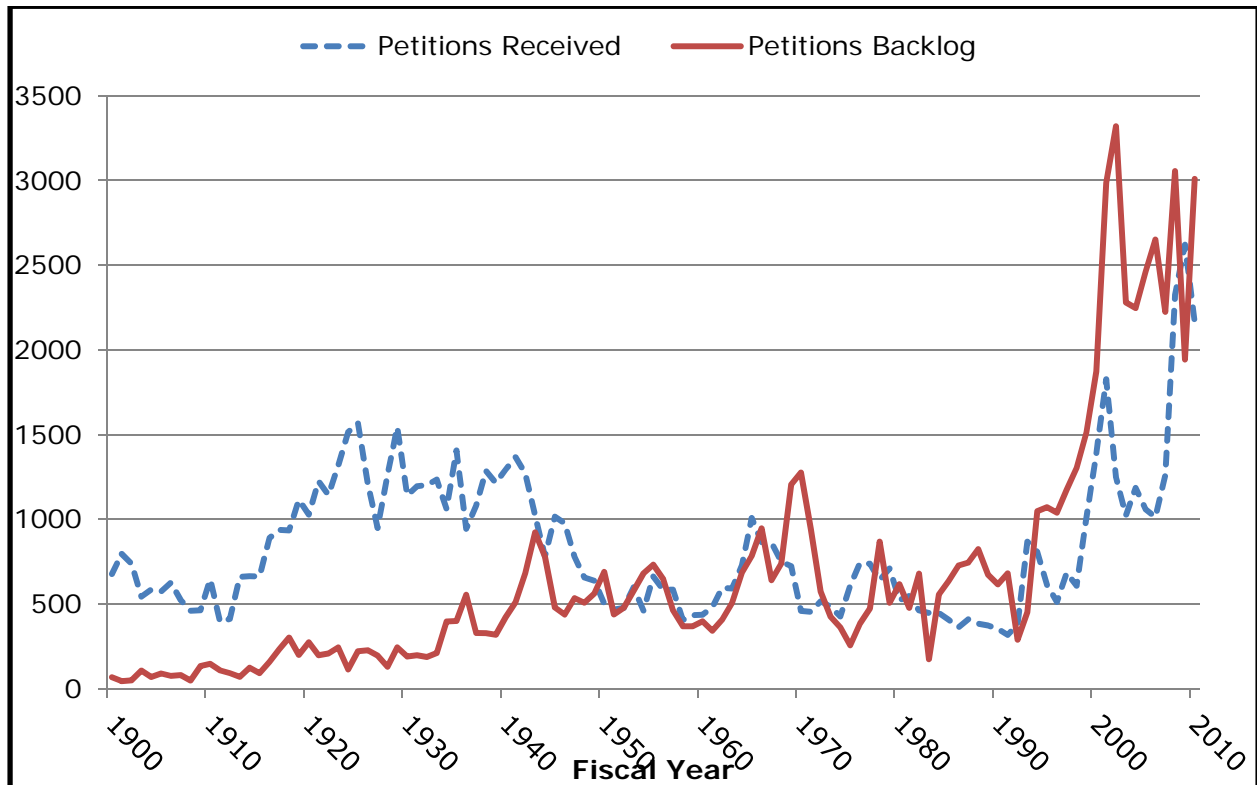
³³ Prior to 1976, the federal fiscal year was defined as July 1 to June 30.

³⁴ President McKinley's presidential term was from March 4, 1897, through September 14, 1901; however, the OPA does not report clemency statistics prior to FY 1900.

³⁵ Clemency statistics for President Obama are through August 2011. We did not audit the statistics for FY 2011.

The backlog of petitions has steadily increased since FY 1900 and escalated to more than 3,000 petitions in FY 2002, which corresponded to a rapid increase in the number of petitions filed, as shown in Exhibit 2.³⁶

**EXHIBIT 2
CLEMENCY PETITIONS RECEIVED AND BACKLOG BY FISCAL YEAR
FISCAL YEARS 1900 – 2010**



Source: Office of the Inspector General (OIG) analysis of OPA statistics

Although the OPA processes petitions related to requests of full pardons resulting from military convictions, by long-standing convention, the President does not entertain petitions for commutation of a military sentence, but rather defers to military authorities on such matters. Appendix III provides additional detail regarding clemency definitions and guidelines.

OPA Responsibilities and Functions

The mission of the OPA is “to assist the President in the exercise of his constitutional pardoning power by providing him with the best information

³⁶ Throughout this audit report we define the term “backlog” to include all clemency petitions that have been received by the OPA, but have not received a final decision by the President or been administratively closed by the OPA.

available on which to base a fair and just decision in cases in which applicants seek clemency.” According to 28 C.F.R. § 1.1, requests for executive clemency for federal offenses should be directed to the OPA for processing, with the exception of petitions relating to military offenses.³⁷ In FY 2010, the OPA consisted of six attorneys and six support staff, and had a budget of \$2.7 million.³⁸

The power to grant clemency is vested solely in the President. No hearing is held on the clemency petition by either DOJ or the White House. The OPA reviews clemency petitions and prepares a report and recommendation, which is reviewed and signed by the Deputy Attorney General and provided to the White House to assist the President in making clemency decisions. The OPA also notifies the petitioner and any other parties included in the petition process when a final decision is made on the petition. As a matter of well established policy, the specific reasons for the President's decision to grant or deny clemency are not disclosed by either the White House or DOJ. There is no appeal from the President's decision to deny a clemency petition. However, if a pardon petition is denied, a petitioner may submit a new petition for consideration no earlier than 2 years from the date of denial. If a commutation petition is denied, a petitioner may submit a new petition for consideration 1 year from the date of denial.

The OPA does not publicly disclose information regarding the nature or results of any investigation undertaken to process a clemency petition, or the exact point in the process at which a particular petition is pending at a given time. In addition, documents reflecting deliberative communications pertaining to Presidential decision-making, such as DOJ's recommendations to the President in clemency matters, are not available under the Freedom of Information Act.

The procedures governing the duties of the OPA are set forth in the Code of Federal Regulations, which also provides that the OPA is subject to

³⁷ According to 28 C.F.R § 1.1, a petitioner applying for executive clemency with respect to military offenses is directed to submit his or her petition directly to the Secretary of the military branch that had original jurisdiction over the court-martial trial and conviction of the petitioner.

³⁸ Over the past 5 fiscal years, OPA's staffing has had little change above or below the FY 2010 numbers. Therefore, we believe the improvements discussed in this report are due to process improvements, not staffing. The Pardon Attorney is a career position selected by the Attorney General and heads the OPA. The OPA's website is www.justice.gov/pardon.

the direction of the Deputy Attorney General.³⁹ The regulations “are advisory only and for the internal guidance of DOJ Personnel. They create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, Section 2 of the Constitution.” However, the regulations help ensure that there is an accurate and adequate factual basis for DOJ’s recommendations to the President on clemency petitions. The primary functions of the OPA are to:

- receive and review all petitions for executive clemency, conduct the necessary investigations, and prepare recommendations for the President, which are reviewed and signed by the Deputy Attorney General;⁴⁰
- provide policy guidance for the conduct of clemency proceedings and the standards for decision;
- confer with individual clemency petitioners, petitioners’ representatives, public groups, members of Congress, various federal, state, and local officials, and others in connection with the disposition of clemency proceedings; and
- maintain contacts with DOJ officials, the Counsel to the President, and other government officials, to advise them on clemency matters as requested.

Filing of Clemency Petitions & Administrative Closures

Petitions for executive clemency for federal, non-military offenses should be sent directly to the OPA. The petitions for pardons and commutations are available on the OPA’s website, by mail from the OPA, and from the Federal Bureau of Prison’s (BOP) case manager at each BOP facility. A majority of petitioners complete the clemency petition without the assistance of an attorney. Completed clemency petitions must be submitted through the mail or by registered courier, because the petition must have the petitioner’s original signature.

³⁹ 28 C.F.R § 1.1 to 1.11 is detailed in Appendix II.

⁴⁰ As mentioned previously, petitions for pardon of a military offense should first be sent to the Secretary of the military branch that had original jurisdiction. Once the military pardon petition has been reviewed by the appropriate Secretary, the petition along with any required documentation is forwarded to the OPA for review and processing. By long-standing convention, the President does not entertain petitions for commutation of a military sentence, but rather defers to military authorities on such matters.

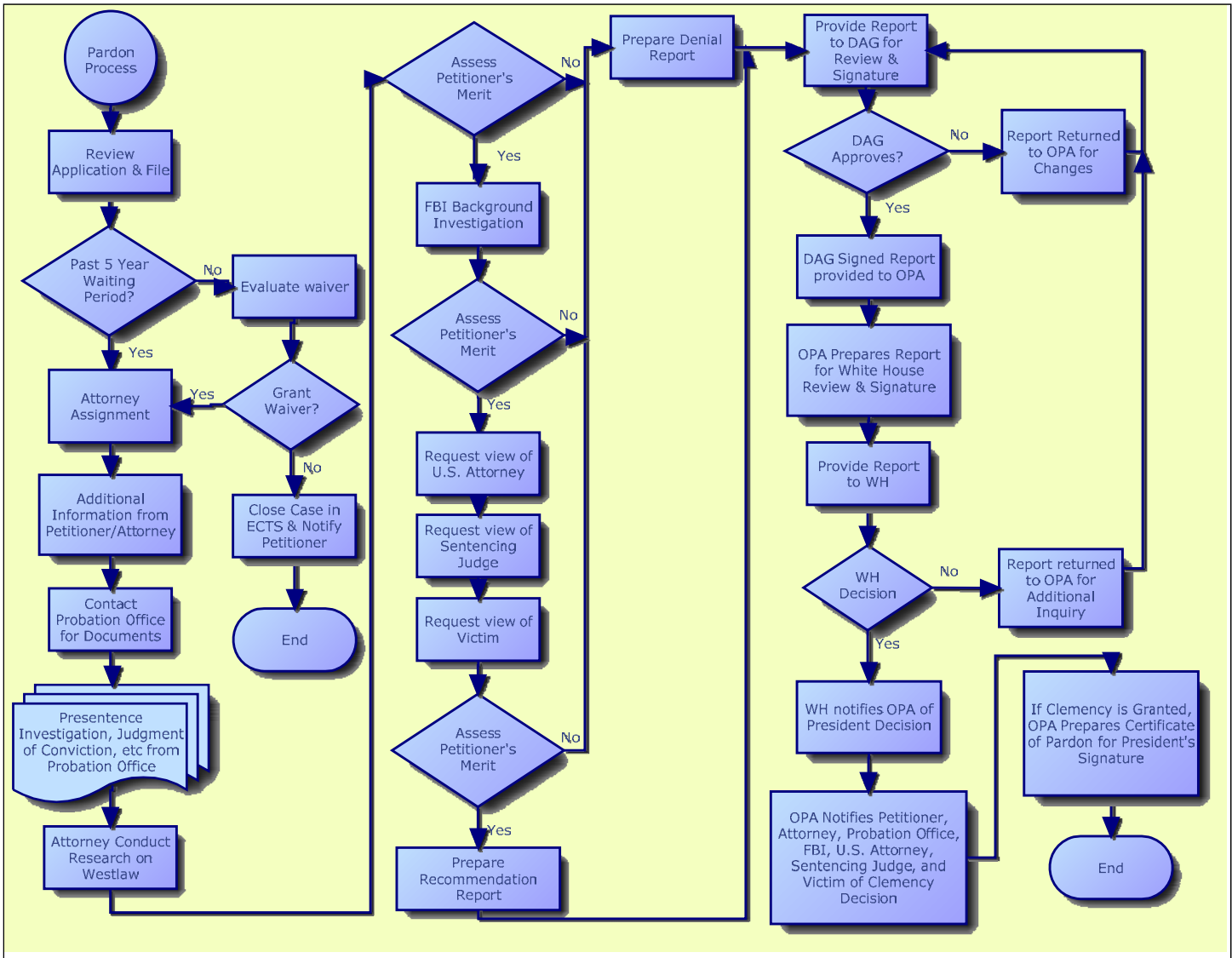
The OPA may administratively close a clemency petition for a number of reasons, including a failure to satisfy the 5-year waiting period in a pardon petition, a petitioner's release from prison before the petition was decided upon, and the pursuit of a judicial remedy by a petitioner in a commutation petition.⁴¹ An administrative closure may also occur due to the death of a petitioner, withdrawal of the petition, or repeated failure of the petitioner to provide requested information related to the petition.

Processing Clemency Petitions

The OPA has few written policies and procedures for processing clemency petitions. However, through interviews, memoranda, and our review of a sample of clemency petition case files, we were able to identify the procedures used by the OPA in processing clemency petitions. Based on our interviews with the OPA and our review of clemency petition files, we developed flowcharts illustrating the OPA's procedures for processing pardon petitions and commutation petitions, as shown in Exhibits 3 and 4.

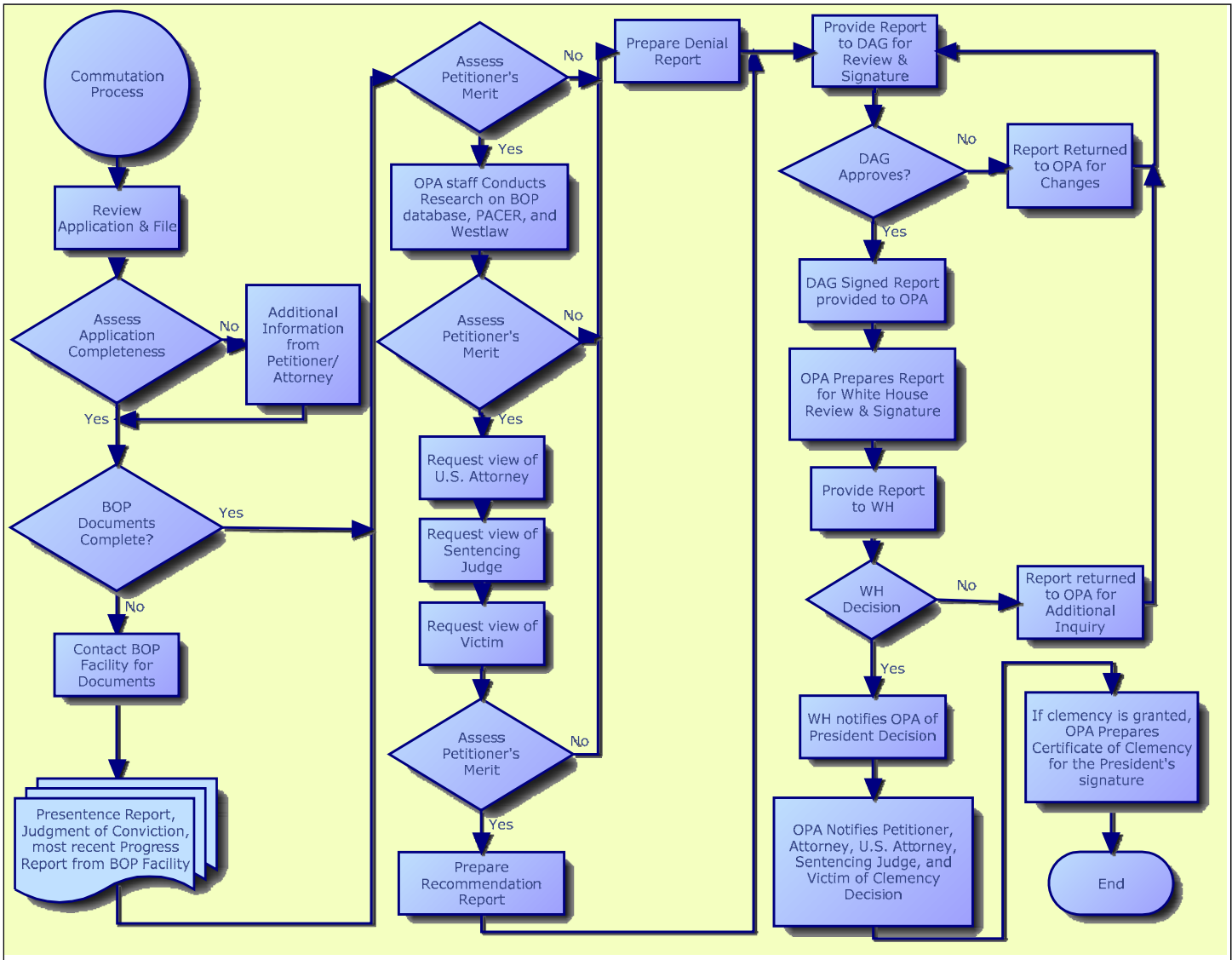
⁴¹ If a pardon petition is received prior to the end of the 5-year waiting period, it is entered into the OPA's Executive Clemency Tracking System (ECTS), described in greater detail later in this report, with a notation that a waiver of the 5-year waiting period is required. Further, the OPA does not process clemency petitions while a petitioner is currently challenging his or her conviction or sentence through appeal or other court proceeding.

EXHIBIT 3 PARDON PROCESS



Source: DOJ OIG and OPA

EXHIBIT 4 COMMUTATION PROCESS



Source: DOJ OIG and OPA

Findings I and II of this report provide greater detail about DOJ's role in the processing of clemency petitions. In addition, Appendix IV provides details on the specific processes used for processing pardon and commutation petitions.

Executive Clemency Tracking System

The OPA uses the Executive Clemency Tracking System (ECTS) to track the progress of clemency petitions through the OPA, any referrals to other entities, the Office of the Deputy Attorney General (ODAG), and the White House. The system is also used to track correspondence. In addition, the OPA utilizes two electronic logs that are maintained outside of ECTS for data verification. These logs are the "cases filed" log, which is used to verify petitions that are received by the OPA and the "cases closed" log, which is used to track petitions that are administratively closed. At the end of each month the information in each log is compared to a report generated from ECTS to confirm the accuracy of the information in ECTS.

OPA officials estimated that ECTS was created in 1990. However, ECTS is labor intensive and the OPA's ability to query the system for statistical information is limited. As a result, in September 2010 the OPA began system development for IQ, a new case tracking system designed to replace ECTS. IQ is expected to be operational in November 2011 and will run on the Justice Consolidated Office Network (JCON).⁴²

OIG Audit Approach

The objectives of this audit were to determine whether: (1) the OPA has established effective procedures for processing and reducing the backlog of clemency petitions, and (2) DOJ components have established effective procedures to respond to the OPA's referrals in a timely manner.

The scope of our audit generally included clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010.⁴³ We tested the validity of all ECTS data included in the scope of our audit, covering clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010 to identify any data entry errors, such as referral dates that occurred before the petition was filed or referral response dates that occurred before the referral was sent. We found that this ECTS data included 31 data entry

⁴² At the time our audit was initiated, the OPA's Information Technology services were provided by a local contractor. However, in September 2010, the OPA replaced the local contractor and transitioned to JCON, an IT system which provides interoperability between DOJ components.

⁴³ Throughout this audit report we use the term "pending" to indicate the status of clemency petitions included in the backlog. Petitions are pending at the OPA, ODAG, or White House. For example, a petition processed by the OPA that is awaiting review by the ODAG would be considered "pending" at the ODAG.

errors, which are detailed in the Objectives, Scope, and Methodology in Appendix I.

Our audit included 12,897 clemency petitions opened between November 1993 and September 2010, and 40,226 referral and status actions referred between December 1993 and September 2010, reported in OPA's ECTS.⁴⁴ However, we considered information outside this period if it was relevant to the audit, and the instances in which we considered such information are noted in the report.

As part of our audit approach, we analyzed the ECTS data in our scope to determine various averages and percentages regarding the backlog, processing times, response times, and clemency decisions. As of the end of FY 2010, of the 12,897 petitions included in our audit scope, the President made a clemency decision on 5,806 petitions, the OPA administratively closed 2,377 petitions, and 4,714 petitions were pending at the OPA, ODAG, or the White House.

We conducted audit work at the OPA, ODAG, BOP, Federal Bureau of Investigation (FBI), Executive Office for U.S. Attorneys, and Criminal Division. We interviewed the Pardon Attorney and OPA staff responsible for processing clemency petitions, as well as ODAG officials regarding the review of clemency petitions. We also interviewed officials responsible for responding to the OPA's referrals for information, comments, and recommendations related to clemency petitions. Additionally, we obtained and analyzed the information from OPA's ECTS and conducted a case file review of a statistical sample of 313 petitions to verify the accuracy of the information in ECTS and determine whether the case files contained any additional information related to the OPA's referrals, including documentation of referrals sent and responses received from the entities receiving OPA referrals that were not documented in ECTS.⁴⁵

Finally, questionnaires were sent to 10 DOJ components, the FBI, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); Drug Enforcement Administration (DEA); Antitrust Division; Civil Division; Civil

⁴⁴ The referral actions documented in ECTS track all OPA referrals to the petitioner, petitioner's attorney, and referral agencies, including the U.S. Attorneys' Offices (USAO), FBI, and BOP, for information, comments, and recommendations on clemency petitions. Additionally, ECTS tracks the status of the report and recommendation during the time it is at the ODAG or the White House for review.

⁴⁵ A statistical sample of 313 petitions was selected to provide effective coverage of audit relevant characteristics that include relief type, the number of referrals per petition, referral dates, and petition date through stratified sample designs.

Rights Division; Criminal Division; Tax Division, and samples of 30 of the 93 U.S. Attorneys' Offices (USAO) and 41 of the 129 BOP institutions and contract facilities.⁴⁶ We sent the questionnaires to obtain an understanding of the processes for responding to the OPA's referrals requesting information, comments, and recommendations on clemency petitions.

⁴⁶ Our sampling methodology is described in Appendix I, the Objectives, Scope, and Methodology section of this report. Not all of the USAOs and BOP institutions or contract facilities received referrals from the OPA during the period covered by our audit. Referrals were sent to 90 of the 93 USAOs and 124 of the 129 BOP institutions or contract facilities.

FINDINGS AND RECOMMENDATIONS

I. ANALYSIS OF CLEMENCY PETITIONS AND THE BACKLOG

The OPA has few written policies and procedures for processing clemency petitions. However, based on discussions with the OPA and our review of a sample of clemency petition case files, we identified the procedures used to process clemency petitions. Based on the procedures identified, we found that the OPA utilizes a reasonable approach to investigate the merit of clemency petitions and develop its recommendations. In addition, the reports and recommendations provided to the President undergo an extensive review.

We also found that despite the fact that the number of petitions processed by the OPA increased by 61 percent, from 1,075 in FY 2005 to 1,733 in FY 2010, the backlog of clemency petitions increased during that time by 92 percent, from 2,459 petitions at the beginning of FY 2005 to 4,714 petitions at the end of FY 2010. We believe that the backlog of clemency petitions as of the end of FY 2010 was due in part to the increased number of petitions received by the OPA during our audit scope. During this time the number of petitions received by the OPA more than doubled, while no decisions were made on clemency petitions between the time the current President took office in January 2009 to the end of FY 2010. As of the end of FY 2010, over 50 percent of the backlog was at the White House, pending review.⁴⁷

Processing Petitions

As noted above, we found that the OPA has few written policies and procedures for processing clemency petitions. However, as a result of our

⁴⁷ During the first 5 months of FY 2011, the President granted 9 pardons while denying 131 pardon and 1,157 commutation petitions. In May 2011, the President granted an additional 8 pardons and denied 741 pardon and 1,947 commutation petitions. Due to these Presidential decisions, the percentage of the backlog residing at the OPA, ODAG, and White House shifted. According to the OPA, as of the end of August 2011, 47 percent of the 2,064 backlogged petitions were at the OPA, 31 percent were at the ODAG, and 21 percent were at the White House. Due to the timing of these Presidential decisions we did not audit these statistics. Therefore, the remaining sections of this report generally cover our audit scope which ended at the close of FY 2010.

audit we were able to identify and detail the procedures used by the OPA in processing clemency petitions.⁴⁸

Requests for executive clemency for federal offenses are directed to the OPA for investigation and review. At every stage in the processing of a clemency petition the merit of a petition is assessed using the standards set forth in the U.S. Attorneys' Manual.⁴⁹ For pardons, the principal factors taken into account include: (1) post-conviction conduct, character, reputation, and involvement in community service, or charitable or other meritorious activities; (2) the nature, seriousness, and relative recentness of the offense; (3) acceptance of responsibility, remorse, and atonement; (4) need for relief; and (5) official recommendations and reports. Further, the grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, such as cooperation with investigative or prospective efforts that has not been adequately rewarded by other official action. If at any time during the process it is determined that the petition is not of sufficient merit to warrant further investigation, a report recommending denial is prepared and submitted to the ODAG for review and signature.

Pardon petitions are reviewed and investigated by OPA attorneys under the supervision of the Pardon Attorney. If a pardon petition is found to have sufficient merit based on the initial review, a full background investigation of the petitioner is conducted by the FBI. If the results of the background investigation do not indicate any adverse information related to the petitioner, the OPA refers the matter to the USAO in the district where the petitioner was convicted and sentenced for comments and recommendation.⁵⁰ If applicable, comments and recommendations are also requested from the sentencing judge and any identifiable victims through the USAOs, DOJ litigating divisions, and other federal government components involved in the investigation of the petitioner's offense. After the OPA receives relevant information pertaining to the petition, OPA attorneys assess the merit of the petition and prepare a report and recommendation for the review and signature of the Deputy Attorney General.

⁴⁸ Appendix IV details the OPA's procedures for processing pardon and commutation petitions.

⁴⁹ U.S. Attorneys' Manual, § 1-2.112 Standards for Considering Pardon Petitions and § 1-2.113 Standards for Considering Commutation Petitions.

⁵⁰ The OPA may also request the view and recommendation of the USAO in the district in which the petitioner currently resides.

Commutation petitions, including petitions for remission of fine, are processed by the Pardon Attorney with the assistance of two OPA support staff members. Initially, the merit of the petition is assessed using the presentence report, order of judgment and conviction, and the most recent BOP progress report. If it appears that the commutation petition has merit, the OPA may refer the matter to other related parties for additional information, comment, and recommendation.

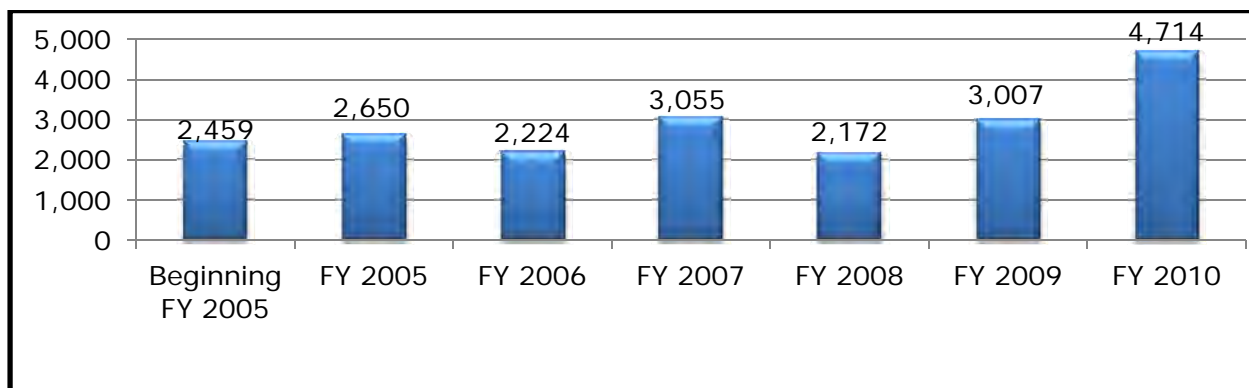
To ensure consistency in determining the merit of petitions and making recommendations to the President, the OPA bases its recommendations on the standards included in the U.S. Attorneys' Manual. The Pardon Attorney reviews each report and recommendation to ensure that the recommendation complies with the established standards. In addition, all OPA reports and recommendations are reviewed by ODAG staff and by the Deputy Attorney General, as it is the Deputy Attorney General's recommendation that is presented to the White House. Finally, the recommendation is reviewed by the White House and a decision is made by the President. If at any time during the process the entity conducting the review believes that the recommendation should be reconsidered, the report is returned to the OPA for additional review and an updated report is submitted.

Based on discussions with the OPA and our review of a sample of clemency petition case files, we identified the procedures used to process clemency petitions. In our judgment, based on the procedures identified, we found that the OPA utilizes a reasonable approach to investigate the merit of clemency petitions and develop its recommendations. In addition, the reports and recommendations provided to the President undergo an extensive review.

Clemency Petition Backlog

We found that the backlog of clemency petitions increased by 92 percent, from 2,459 petitions at the beginning of FY 2005 to 4,714 petitions at the end of FY 2010, as shown in Exhibit 5.

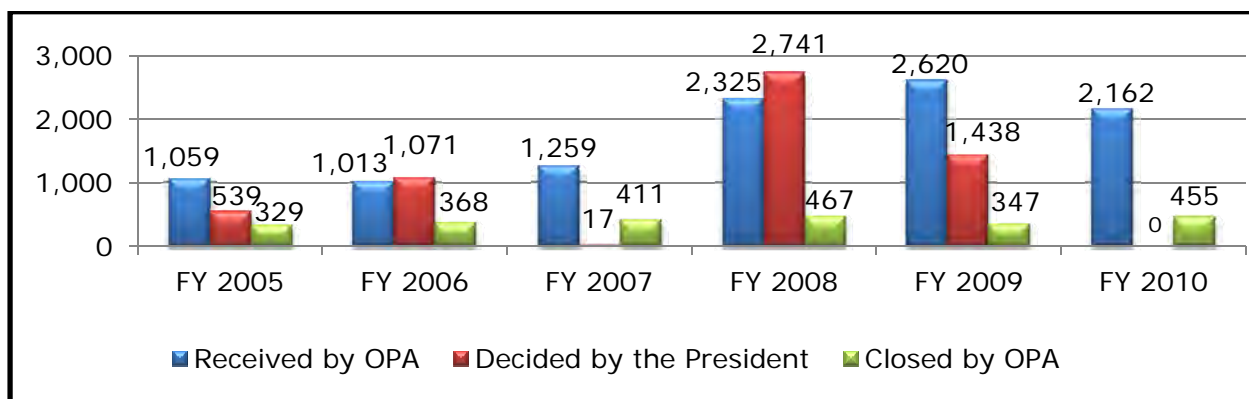
**EXHIBIT 5
BACKLOGGED PETITIONS BY FISCAL YEAR END
FISCAL YEARS 2005 - 2010**



Source: OIG analysis of ECTS data

We analyzed clemency petitions over time and found that the increase in the backlog was, in part, a result of: (1) the increased number of petitions received by the OPA from 1,059 in FY 2005 to 2,162 in FY 2010 (104 percent increase); and (2) the fact that no decisions were made by the current President from January 2009 through the end of FY 2010, as shown in Exhibit 6.

**EXHIBIT 6
PETITIONS RECEIVED, DECIDED, AND CLOSED⁵¹
FISCAL YEARS 2005 - 2010**



Source: OIG analysis of ECTS data

⁵¹ Petitions decided by the President and petitions closed by the OPA include petitions that may have been received in a previous fiscal year. In addition, all Presidential decisions in FY 2009 were made by the prior administration during October 2008 through January 19, 2009.

However, it should be noted that during the first 5 months of FY 2011, which was outside of our audit scope, the President granted 9 pardons while denying 131 pardon and 1,157 commutation petitions. The Presidential decision resulted in a slight decrease in the backlog of clemency petitions to 4,194 as of the end of February 2011. We further analyzed the backlog of clemency petitions as of the end of FY 2010 and for the first 5 months of FY 2011, as shown in Exhibit 7.

**EXHIBIT 7
BACKLOG OF PETITIONS⁵²**

LOCATION OF PETITIONS	BACKLOG	PERCENTAGE	BACKLOG	PERCENTAGE
	ECTS DATA AS OF 9/30/2010		ECTS DATA AS OF 2/28/2011 ⁵³	
OPA	1,386	29%	1,280	31%
ODAG	860	18%	464	11%
White House	2,468	52%	2,450	58%
Total Backlog	4,714	100%	4,194	100%

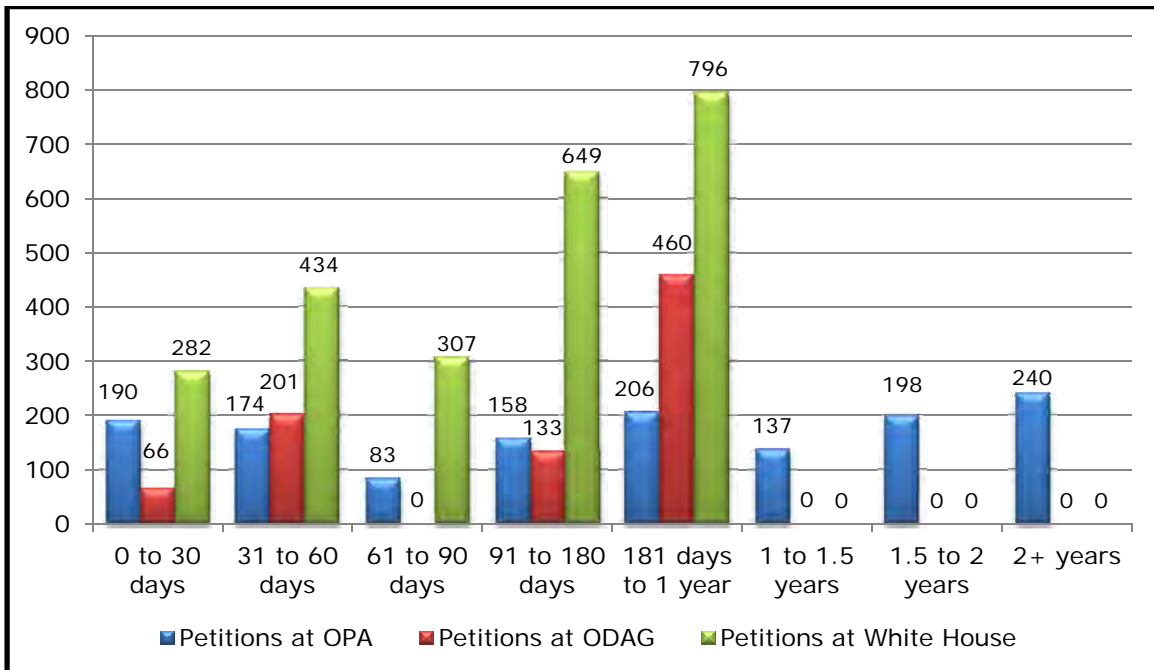
Source: OIG analysis of ECTS data

As shown above, only 47 percent of the backlog was in DOJ's control at the end of FY 2010. This number decreased through the first 5 months of FY 2011 with only 42 percent of the backlog in DOJ's control. An aging schedule of the backlog of petitions as of the end of FY 2010 is shown in Exhibit 8.

⁵² The sum of the individual numbers prior to rounding may differ from the sum of the individual numbers rounded.

⁵³ As previously noted, in May 2011, the President granted 8 pardons while denying an additional 741 pardon and 1,947 commutation petitions. According to the OPA, this most recent Presidential action reduced the total backlog to 2,064 petitions as of the end of August 2011, with 47 percent of those petitions at the OPA, 31 percent at the ODAG, and 21 percent pending at the White House. Due to the timing of these Presidential decisions we did not audit these statistics. Therefore, the remaining sections of this report generally cover our audit scope which ended at the close of FY 2010.

**EXHIBIT 8
AGING SCHEDULE OF BACKLOG PETITIONS
AS OF THE END OF FY 2010**



Source: OIG analysis of ECTS data

As shown above, at the end of FY 2010 the oldest petitions resided at the OPA. We believe this was primarily due to the fact that the OPA is responsible for reviewing and investigating the petitions, and preparing the report and recommendation. In addition, as discussed in greater detail in Finding II, a significant portion of the OPA's investigation of clemency petitions is dependent on information and comments provided by outside individuals and agencies, including the petitioner. The timeliness of the responses to the OPA's referrals greatly impacts the length of time petitions are pending at the OPA.

Additionally, we measured the backlog over 6 fiscal years, FYs 2005 to 2010 and the number of petitions pending at the OPA, ODAG, and White House, as shown in Exhibit 9.

EXHIBIT 9
AGING SCHEDULE OF BACKLOG PETITIONS
FISCAL YEARS 2005 - 2010

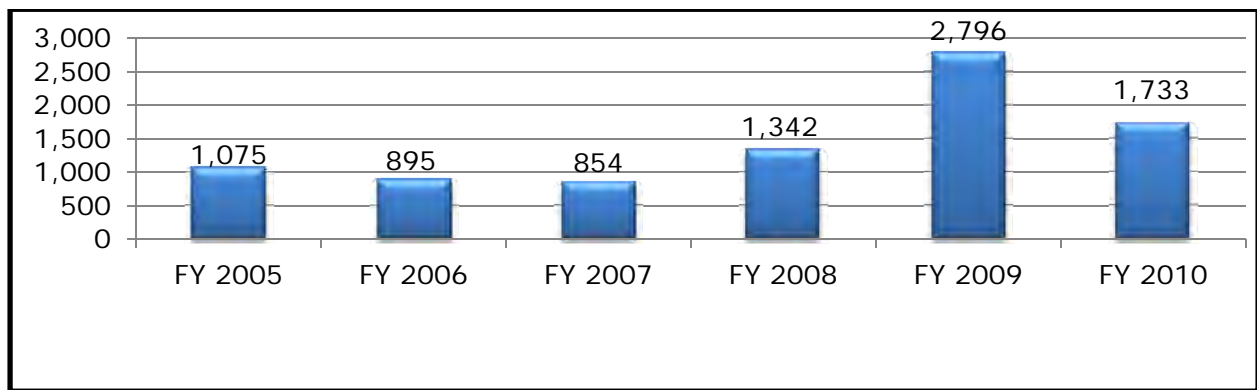
Organization	Backlog	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
OPA	Average Age of Backlog	509	515	441	341	372	402
	0-30	48	81	90	265	131	190
	31-60	44	64	100	118	86	174
	61-90	27	25	75	121	50	83
	91-180	91	119	198	283	152	158
	181-365	199	152	231	431	389	206
	366-548	219	96	100	208	170	137
	549-730	99	109	55	97	75	198
	over 730	210	257	231	205	160	240
	Total Backlog	937	903	1,080	1,728	1,213	1,386
ODAG	Average Age of Backlog	205	97	44	12	133	131
	0-30	181	190	72	28	155	66
	31-60	69	5	117	0	168	201
	61-90	99	0	45	0	183	0
	91-180	262	28	0	0	602	133
	181-365	227	8	1	0	521	460
	366-548	76	7	1	0	0	0
	549-730	63	9	1	0	0	0
	over 730	26	8	1	0	0	0
	Total Backlog	1,003	255	238	28	1,629	860
White House	Average Age of Backlog	227	153	350	61	246	154
	0-30	0	82	2	264	0	282
	31-60	0	139	32	114	0	434
	61-90	19	152	173	6	0	307
	91-180	375	214	239	14	0	649
	181-365	143	464	408	5	165	796
	366-548	172	7	529	3	0	0
	549-730	1	0	344	1	0	0
	over 730	0	8	10	9	0	0
	Total Backlog	710	1,066	1,737	416	165	2,468
OVERALL BACKLOG	2,650	2,224	3,055	2,172	3,007	4,714	

Source: OIG analysis of ECTS data

As shown in Exhibit 9, there was a significant decrease in the number of petitions pending at the ODAG as of the end of FY 2008 and a corresponding increase in the number of petitions pending at the OPA as of the end of FY 2008. This decrease resulted, in part, from a significant decrease in the number of petitions processed by the OPA and forwarded to the ODAG for review during the period that the Pardon Attorney position was vacant from January 2008 through April 2008. We also noted that the total backlog of clemency petitions pending at the OPA increased from FYs 2005 through 2010. However, the increasing backlog at the OPA corresponds to the fact that the number of petitions received increased by 104 percent from FYs 2005 through FY 2010. Further, we found that the number of petitions pending at the White House significantly increased in FYs 2009 and 2010. In addition to the increase in the number of petitions received, the increase in the number of petitions pending at the White House was due to the fact that no decisions were made by the current President from January 2009 through the end of FY 2010.

We also found that although the backlog increased during our audit scope, the number of petitions processed by the OPA increased by 658 (61 percent) from 1,075 in FY 2005 to 1,733 in FY 2010, as shown in Exhibit 10.⁵⁴

**EXHIBIT 10
PETITIONS PROCESSED BY THE OPA TO THE ODAG
FISCAL YEARS 2005 - 2010**



Source: OIG analysis of ECTS data

⁵⁴ Petitions are considered processed by the OPA when the first report and recommendation are sent to the ODAG for review and signature.

As a result of our audit, the OPA implemented new procedures designed to decrease the length of time a petition is at the OPA and further reduce the backlog. In June 2010, the OPA began generating a monthly report that identifies older petitions that have not yet been sent to the ODAG. This report is intended to be used as a management tool for prioritizing the OPA's efforts in processing petitions, to correct any incorrect information, and to assist in monitoring delayed responses to referrals. At the time of our audit, the OPA defined older petitions as those received by the OPA prior to January 1, 2009, and that have not yet been sent to the ODAG. Currently, the OPA runs the report for pardon petitions that have been at the OPA for more than 1 year and for commutations petitions that have been at the OPA for more than 9 months prior to being sent to the ODAG. OPA attorneys are using this report as a management tool for prioritizing their efforts in processing petitions, to correct any incorrect information, and to assist in monitoring delayed responses to referrals.

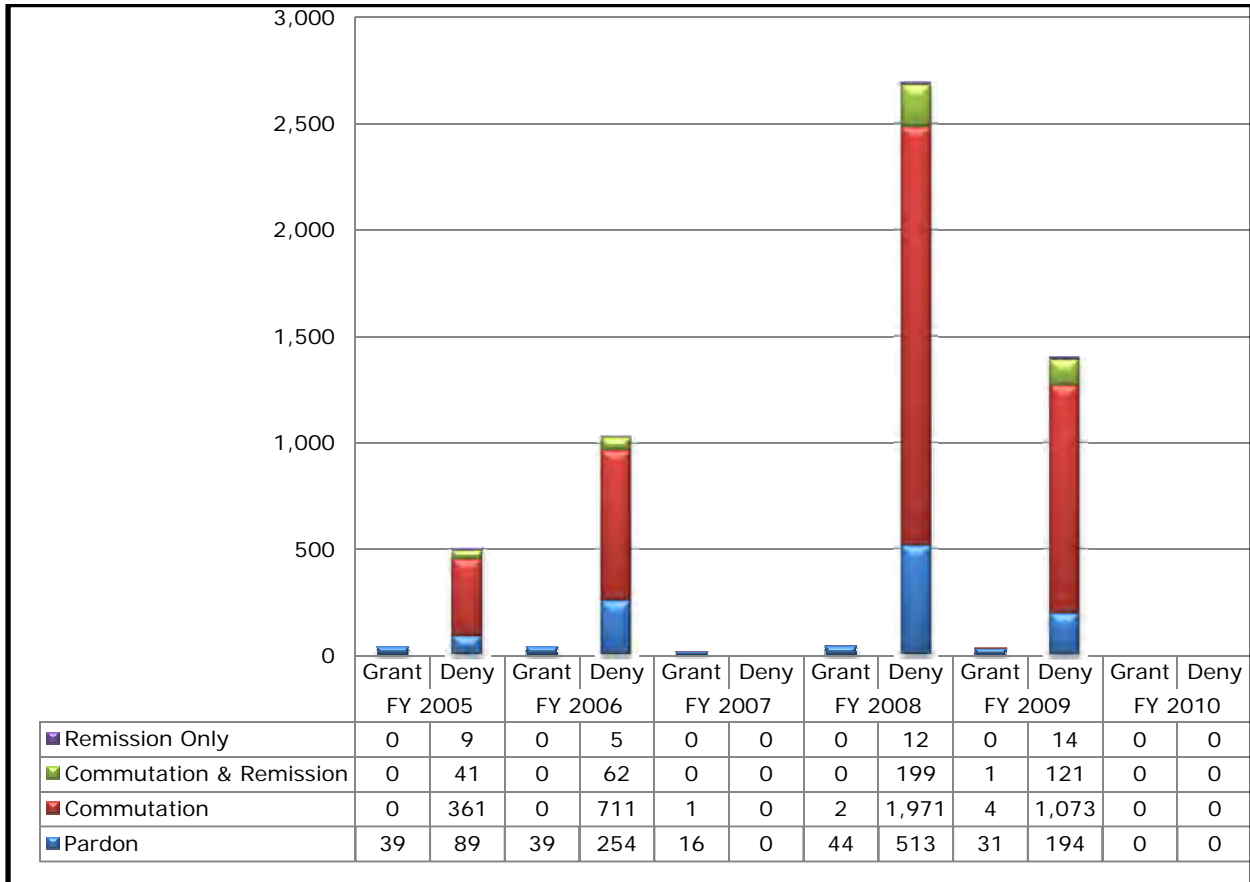
Clemency Decisions

We analyzed clemency decisions and trends, including the percentage of clemency petitions granted, favorable and adverse clemency decisions over time, and the types of offenses for which clemency was granted.

Of the 12,897 petitions included in our audit scope, 5,806 petitions had a final clemency decision signed by the President as of the end of FY 2010.⁵⁵ Of the 5,806 clemency decisions made during FYs 2005 through 2010, 5,629 clemency petitions were denied, while only 177 clemency petitions (3 percent) were granted. The number of favorable and adverse clemency decisions made during FYs 2005 to 2010 is shown in Exhibit 11.

⁵⁵ Presidential clemency decisions do not include petitions that were administratively closed by the OPA.

**EXHIBIT 11
PRESIDENTIAL CLEMENCY DECISIONS BY FISCAL YEAR
FISCAL YEARS 2005 - 2010**



Source: OIG analysis of ECTS data

We further analyzed the 177 favorable clemency decisions granted during FYs 2005 through 2010 and found that the types of clemency granted included 169 pardons, 7 commutations, and 1 commutation and remission, as shown in Exhibit 12.

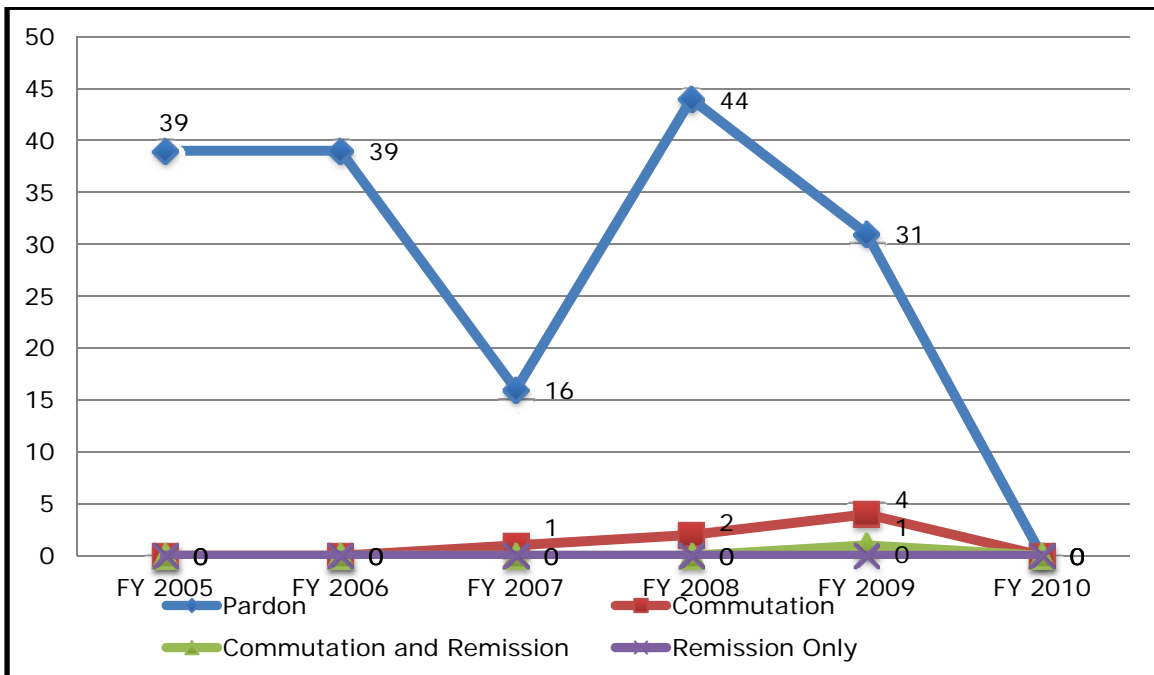
**EXHIBIT 12
CLEMENCY PETITIONS GRANTED
FISCAL YEARS 2005 - 2010**

FORM OF RELIEF	PETITIONS WITH FINAL WHITE HOUSE DECISION	PETITIONS GRANTED	PERCENTAGE GRANTED
Pardon	1,219	169	13.86%
Commutation	4,123	7	0.17%
Commutation and Remission	424	1	0.24%
Remission Only	40	0	0%
Total	5,806	177	3.05%

Source: OIG analysis of ECTS data

We also analyzed the number and types of clemency granted over time during FYs 2005 through 2010, as shown in Exhibit 13.

**EXHIBIT 13
CLEMENCY GRANTED BY FISCAL YEAR
FISCAL YEARS 2005 - 2010**



Source: OIG analysis of ECTS data

Finally, we analyzed the 177 favorable clemency decisions using the petitioner's first offense to identify any trends related to the type of offense, as shown in Exhibit 14.

EXHIBIT 14
FAVORABLE CLEMENCY DECISION BY OFFENSE
FISCAL YEARS 2005 – 2010

OFFENSE	NO. OF PETITIONS GRANTED CLEMENCY BY THE WHITE HOUSE	NO. OF PETITIONS DECIDED BY THE PRESIDENT	PERCENTAGE OF PETITIONS GRANTED CLEMENCY BY OFFENSE
Liquor ⁵⁶	7	8	87.50%
Customs ⁵⁷	3	11	27.27%
Military ⁵⁸	2	8	25.00%
Escape	1	5	20.00%
False Statements	15	81	18.52%
Bail Jump	1	6	16.67%
Embezzlement	9	54	16.67%
Misprision of Felony ⁵⁹	5	32	15.63%
Theft	18	116	15.52%
Assault	5	37	13.51%
Environment	2	15	13.33%
Tax	14	108	12.96%
Gambling	1	8	12.50%
Mail ⁶⁰	2	17	11.76%
Other ⁶¹	6	54	11.11%
Counterfeiting	3	33	9.09%
Arson	1	12	8.33%
Explosives	2	24	8.33%
Bribery	2	33	6.06%
Bank Fraud	6	117	5.13%

⁵⁶ "Liquor" offenses included crimes involving bootlegging, possession of untaxed liquor, making moonshine, illicit distillery, and violation of Internal Revenue Service liquor laws.

⁵⁷ "Customs" offenses included crimes involving importing merchandise, trafficking counterfeit products, and selling migratory birds.

⁵⁸ "Military" offenses were crimes related to being "away without leave."

⁵⁹ Misprision of a felony is the withholding of information on a crime.

⁶⁰ "Mail" offenses included crimes involving theft of U.S. government mail, and unlawful detention and delay of mail.

⁶¹ "Other" offenses included crimes involving animals, forgery, and violation of the Archaeological Resources Act.

OFFENSE	NO. OF PETITIONS GRANTED CLEMENCY BY THE WHITE HOUSE	NO. OF PETITIONS DECIDED BY THE PRESIDENT	PERCENTAGE OF PETITIONS GRANTED CLEMENCY BY OFFENSE
Fraud ⁶²	18	387	4.65%
Firearms	9	272	3.31%
Money Laundering	2	65	3.08%
Robbery	1	42	2.38%
Narcotics	40	3,031	1.32%
Bank Robbery	1	185	0.54%
Alien	1	711	0.14%
Total	177	5,806⁶³	3.05%

Source: OIG analysis of ECTS data

As shown in Exhibit 14, with the exception of liquor offenses, in which 87.5 percent of clemency decisions were favorable, there does not appear to be any significant trends related to the types of crimes for which clemency is granted.

Conclusion

We found that the OPA has few written policies and procedures for processing clemency petitions. Based on discussions with the OPA and our review of a sample of clemency petition case files, we identified the procedures used to process clemency petitions. Based on the procedures identified, we concluded that the OPA utilizes a reasonable approach to investigate the merit of clemency petitions and develop its recommendations. In addition, the reports and recommendations provided to the President undergo an extensive review.

We found that the backlog of clemency petitions increased by 92 percent, from 2,459 petitions at the beginning of FY 2005 to 4,714 petitions at the end of FY 2010. We believe that the increased backlog during this time was primarily a result of more clemency petitions

⁶² "Fraud" offenses included crimes involving mail fraud, wire fraud, food stamp fraud, conspiracy to defraud the U.S. government, false claims, falsified loan documents, transfer of false securities title, and concealment.

⁶³ The column "Number of Petitions Decided by the President" only includes the numbers related to the types of offenses for which favorable decisions were granted. However, there were an additional 334 denied petitions related to offenses for which no favorable decisions were granted during FYs 2005 through 2010. Therefore, the total reflects all 5,806 petitions decided by the President during FYs 2005 through 2010. As a result, the sum of the individual numbers in the "Number of Petitions Decided by the President" column does not equal the total reported in the table.

being received than were being decided by the President or administratively closed by the OPA. The average length of time, 142 days (4.7 months), it took the ODAG to review OPA reports and recommendations may have also contributed to the backlog. Thus, even though the OPA has been recently successful in increasing the number of petitions processed to the ODAG, the backlog will likely continue to grow if petitions, recommendations, and reports await review by the ODAG and the President for extended periods of time.

II. TIMELINESS OF PROCESSING CLEMENCY PETITIONS

During our audit scope, on average, it took nearly 2 years from the time the OPA received a petition until a final clemency decision was made by the President. We concluded the delay in processing a clemency petition was caused in part by the failure of the entities receiving OPA referrals to consistently respond to the referrals within their own established timeframes or the period of time requested by the OPA. DOJ components, excluding the FBI, are generally requested to respond to the OPA within 30 days. However, we found that for petitions included in our audit scope, clemency petitions pending at the beginning of FY 2005, and clemency petitions opened between FYs 2005 and 2010, referrals were at DOJ components, excluding the FBI, for an average of 112 days (3.7 months) before a response was provided to the OPA. We also found that the OPA did not always follow up on outstanding referrals or did not follow up within its own prescribed timeframes.

We identified 10 DOJ components that received referrals from the OPA during the period covered by our audit. We found that five components - the Drug Enforcement Administration (DEA), Antitrust Division, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Tax Division, and Civil Division - had an average referral response time that did not materially exceed their own established timeframes or the OPA's requested response time. However, we found that the average response times for the remaining five components - the BOP institutions and contract facilities, USAOs, Civil Rights Division, FBI, and Criminal Division - materially exceeded the established timeframes.

Overall Clemency Petition Processing Time

We found that for clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010, it took an average of 721 days (nearly 2 years) from the time the OPA received a

petition until a final clemency decision was made by the President, as shown in Exhibit 15.⁶⁴

**EXHIBIT 15
AVERAGE TIME BETWEEN
THE OPA'S RECEIPT OF A PETITION AND
THE FINAL CLEMENCY DECISION BY THE PRESIDENT
BY FORM OF RELIEF
FISCAL YEARS 2005 - 2010**

FORM OF RELIEF	AVERAGE TIME BETWEEN THE OPA'S RECEIPT OF A PETITION AND FINAL CLEMENCY DECISIONS
Pardon	1,194 days (3.27 years)
Commutation	573 days (1.57 years)
Commutation and Remission	791 days (2.17 years)
Remission Only	795 days (2.18 years)
For All Forms of Relief	721 days (1.98 years)

Source: OIG analysis of ECTS data

We further analyzed the average processing time for the petitions included in our audit scope by fiscal year and type of relief, as shown in Exhibit 16.

⁶⁴ Presidential clemency decisions do not include petitions that were administratively closed by the OPA. Our audit scope included four clemency petitions related to commutation of capital punishment, which might take longer to process than non-capital cases. However, all four cases were administratively closed because the petitioner or the petitioner's attorney withdrew the petition, within an average of 799 days (2.2 years). As a result of the administrative closures, the petitions involving capital punishment were not included in our average.

EXHIBIT 16
AVERAGE TIME BETWEEN
THE OPA'S RECEIPT OF A PETITION AND
THE FINAL CLEMENCY DECISION BY THE PRESIDENT
BY FISCAL YEAR AND FORM OF RELIEF⁶⁵
FISCAL YEARS 2005 - 2010

FISCAL YEAR	ALL PETITIONS	FORM OF RELIEF			
		PARDON PETITIONS	COMMUTATION PETITIONS	REMISSION PETITIONS	COMMUTATION & REMISSION PETITIONS
FY 2005	1,198 days (3.28 years)	1,536 days (4.21 years)	1,074 days (2.94 years)	1,428 days (3.91 years)	1,177 days (3.22 years)
FY 2006	963 days (2.64 years)	1,340 days (3.67 years)	794 days (2.18 years)	780 days (2.14 years)	1,146 days (3.14 years)
FY 2007	1,471 days (4.03 years)	1,497 days (4.10 years)	1,042 days (2.85 years)	N/A	N/A
FY 2008	743 days (2.04 years)	1,189 days (3.26 years)	597 days (1.64 years)	898 days (2.46 years)	926 days (2.54 years)
FY 2009	312 days (0.85 years)	799 days (2.19 years)	216 days (0.59 years)	306 days (0.84 years)	260 days (0.71 years)
FY 2010	N/A	N/A	N/A	N/A	N/A

Source: OIG analysis of ECTS data

As shown above, the average processing time significantly decreased in FY 2009. However, we anticipate that the average processing time will increase in FY 2011 because the President did not make any decisions on clemency petitions from the time he took office in January 2009 through FY 2010, meaning that the 2,468 petitions sent to the White House during this time were still pending a presidential decision as of the end of FY 2010. Therefore, for any petitions decided by the President in FY 2011, there will be a corresponding increase in the average processing time related to the fact that 2,468 petitions were pending at the White House as of the end of FY 2010.

We also found that delays in processing petitions frequently create additional work for DOJ because the OPA is often required to send additional referrals to re-verify facts related to the petition and to confirm that there is no new information that would affect the petitioner's merit. In addition, delays in processing petitions, including delays resulting from entities that do not respond to OPA referrals within prescribed timeframes, as discussed later in this report, may result in changes of the petitioner's status, including

⁶⁵ These averages do not include cases that were administratively closed by the OPA. N/A is used when no decisions were made by the President related to this fiscal year or no decisions were made related to this form of relief.

death of the petitioner or the petitioner's release from incarceration, resulting in an administrative closure of the case. During the scope of our audit, we identified 2,377 petitions that were administratively closed before receiving a final decision, of which 729 petitions (31 percent) were administratively closed by the OPA after the report and recommendation had been sent to the White House but before the President made a final clemency decision. We identified two instances in which petitions with favorable recommendations were sent to the White House, but because of changes in the petitioners' status, were subsequently administratively closed before a decision was made by the President. One of the petitioners was released from incarceration and the other petitioner died while the petitions were pending at the White House.

OPA's Clemency Petition Processing Time

We determined that of the 12,897 petitions in our audit scope, the OPA had made at least one referral to an entity for additional information for 12,586 petitions (97.6 percent) within an average of 60 days after its receipt of the petition. For the remaining 311 petitions in which no action had been taken as of the end of FY 2010, we determined that 82 petitions were related to crack or cocaine cases that the OPA had put on hold due to possible changes in the sentencing guidelines. For the remaining 229 petitions, the average amount of time these petitions had been at the OPA without at least one referral was 81 days (2.7 months).

We also determined that the total processing time for a clemency petition by the OPA during our audit scope was an average of 293 days (9.8 months). However, we recognized that while a petition is being processed by the OPA, referrals may be sent to various outside entities. The referrals may include requests for information on the petitioner, the petitioner's offense, or for an opinion on whether clemency should be granted. When we removed the time that these referrals were pending with the various entities, we found that the petition was actually at the OPA for an average of 197 days (6.6 months).

As discussed in Finding I, we found that the number of petitions processed by the OPA increased from FY 2005 to FY 2010. Despite the increased workload, we found significant improvement in the average petition processing time between the OPA's receipt of a petition and the first time a report and recommendation were sent to the ODAG for review and signature. Specifically, the OPA reduced its average total processing time by 188 days (6.3 months), from 381 days (12.7 months) in FY 2005 to 193 days (6.4 months) in FY 2010, as shown in Exhibit 17.

**EXHIBIT 17
AVERAGE TIME FROM
THE OPA'S RECEIPT OF A PETITION AND THE FIRST
REPORT AND RECOMMENDATION WERE SENT TO THE ODAG
FISCAL YEARS 2005 - 2010**

FISCAL YEAR THE REPORT AND RECOMMENDATION WERE INITIALLY SENT TO THE ODAG	AVERAGE TOTAL PROCESSING TIME⁶⁶
FY 2005	381 days (12.7 months)
FY 2006	374 days (12.5 months)
FY 2007	328 days (10.9 months)
FY 2008	253 days (8.4 months)
FY 2009	223 days (7.4 months)
FY 2010	193 days (6.4 months)

Source: OIG analysis of ECTS data

The current Pardon Attorney implemented several changes between 2008 and 2010 to increase the timeliness of processing clemency petitions. Since the fall of 2008, the OPA has increased the number of unpaid law student interns that it utilizes each semester from one to between two and four interns. The interns assist the Pardon Attorney in reviewing and making preliminary recommendations as to whether commutation petitions should be denied or whether they have sufficient merit to warrant further investigation, such as contacting the USAOs and sentencing judges for comments and recommendations. The Pardon Attorney reviews all the case files, and then makes the final determination of what action should be taken on the commutation petitions.

Additionally, in April 2010, the OPA hired two new support staff members, which brought the OPA support staff to six, in addition to the six attorneys. The two new support staff, with the assistance of interns, perform the initial reviews for commutation petitions and provide recommendations to the Pardon Attorney. The Pardon Attorney reviews all recommendations and the supporting case files and makes the final decision on the recommendation that will be sent to the ODAG. According to the Pardon Attorney, having the two support staff dedicated to commutations has greatly improved the timeliness of processing commutation petitions because these responsibilities were mainly handled by the Pardon Attorney in the past.

⁶⁶ This includes the time that referrals for these petitions were pending with the various entities.

DOJ's Clemency Petition Processing Time

We determined that during our audit scope the total processing time for a clemency petition by DOJ before the petition was sent to the White House was an average of 423 days (1.16 years). As shown in Exhibit 18, processing time at DOJ by fiscal year ranged from 669 days (1.83 years) in FY 2005 to 356 days (0.97 year) in FY 2010.

EXHIBIT 18 AVERAGE TIME FROM THE OPA'S RECEIPT OF A PETITION AND THE FIRST REPORT AND RECOMMENDATION WERE SENT TO THE WHITE HOUSE FISCAL YEARS 2005 - 2010

FISCAL YEAR THE REPORT AND RECOMMENDATION WERE INITIALLY SENT TO THE WHITE HOUSE	AVERAGE TOTAL PROCESSING TIME ⁶⁷
FY 2005	669 days (1.83 years)
FY 2006	556 days (1.52 years)
FY 2007	519 days (1.42 years)
FY 2008	285 days (0.78 year)
FY 2009	226 days (0.62 year)
FY 2010	356 days (0.98 year)

Source: OIG analysis of ECTS data

Similar to the OPA's processing time shown previously in Exhibit 17, the processing time at DOJ decreased from FY 2005 to FY 2010. The exception was an increase in the processing time at DOJ in FY 2010. We believe that the increase may be because in February 2010, nearly 1,400 cases were returned from the ODAG to the OPA to change the signature block on the cover page because there had been a change in the person serving as Deputy Attorney General. Due to the length of time that had passed since their original transmittal to the ODAG in 2009 and 2010, the OPA decided it was necessary to review and update all of the clemency cases. The OPA stated that this event had a great effect on the workload of OPA attorneys and staff.

OPA Referrals and Follow-up

As stated previously, during the time a petition is at the OPA, the case may be referred to various entities for information regarding the petitioner,

⁶⁷ This includes the time that the petitions were at the OPA and the time referrals for these petitions were pending with the various entities.

the petitioner's offense, or for an opinion as to whether clemency should be granted. The OPA typically requests a response within 30 days from the date of the referral, with the exception of referrals to the FBI for background investigations. The OPA then allows an additional 30 days before following up on the referral with the entity. Therefore, under its current process, the OPA does not follow up on a referral until at least 60 days after the initial referral. We determined the entities' average time for responding to the OPA's referrals is 124 days (4.1 months), as shown in Exhibit 19.

EXHIBIT 19
AVERAGE NUMBER OF DAYS A PETITION IS AT
AN ENTITY RECEIVING REFERRALS
FISCAL YEARS 2005 – 2010

ENTITY RECEIVING REFERRAL	NUMBER OF PETITIONS REFERRED FOR ADDITIONAL INFORMATION	AVERAGE NUMBER OF DAYS AT EACH ENTITY ⁶⁸
Petitioner	2,011	81
Petitioner's Attorney	413	112
Federal Bureau of Prisons (Wardens)	4,375	105
U.S. Probation Officer	2,335	78
USAOs	788	153
Sentencing Judge	148	59
Drug Enforcement Administration	2	30
Federal Bureau of Prisons (Headquarters)	25	45
Bureau of Alcohol, Tobacco, Firearms and Explosives	4	38
DOJ Antitrust Division	7	34
DOJ Civil Division	1	49
DOJ Criminal Division	19	489 ⁶⁹
DOJ Civil Rights Division	2	263
DOJ Tax Division	28	44
U.S. Immigration and Customs Enforcement ⁷⁰	69	450
Internal Revenue Service	68	87
Military	48	189
Other Field Agency ⁷¹	49	142
FBI	1,110	343
Overall	11,502	124

Source: OIG analysis of ECTS data

⁶⁸ The average number of days column only includes referrals that were closed.

⁶⁹ The average number of days includes three petitioners who were prosecuted by Criminal Division's former Counterespionage Section, which is now part of the National Security Division. We found these to be valid referrals; nonetheless, if these petitions were removed from our calculation, the average response time for the Criminal Division would be 233 days (7.8 months) per petition.

⁷⁰ Prior to the Homeland Security Act of 2002, referrals were made to the Immigration and Naturalization Services.

⁷¹ According to OPA officials, the "Other Field Agency" would be used for any agency not already listed with a particular code in ECTS, and may include the U.S. Parole Commission, U.S. District Courts, and DOJ offices located in Territories of the United States.

Additionally, we analyzed the average entity response time per petition across the 6 fiscal years, based on the last fiscal year the entity responded to the OPA, as shown in Exhibit 20.

EXHIBIT 20
AVERAGE NUMBER OF DAYS A PETITION IS AT
AN ENTITY RECEIVING REFERRALS
BY FISCAL YEAR⁷²
FISCAL YEARS 2005 – 2010

ENTITY RECEIVING REFERRAL	AVERAGE NUMBER OF DAYS AT EACH ENTITY					
	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Petitioner	72	102	70	89	77	125
Petitioner's Attorney	66	208	156	138	82	162
Federal Bureau of Prisons (Wardens)	89	196	92	94	74	143
U.S. Probation Officer	74	64	66	76	79	116
USAOs	168	220	198	154	99	167
Sentencing Judge	26	59	25	21	37	228
Drug Enforcement Administration	N/A	12	N/A	N/A	N/A	N/A
Federal Bureau of Prisons (Headquarters)	48	N/A	36	30	19	98
Bureau of Alcohol, Tobacco, Firearms and Explosives	N/A	32	N/A	N/A	N/A	38
DOJ Antitrust Division	N/A	N/A	37	30	19	47
DOJ Civil Division	N/A	N/A	49	N/A	N/A	N/A
DOJ Criminal Division	N/A	1,025	72	334	120	N/A
DOJ Civil Rights Division	N/A	N/A	N/A	N/A	N/A	N/A
DOJ Tax Division	40	45	74	21	36	N/A
U.S. Immigration and Customs Enforcement	40	75	110	412	9	572
Internal Revenue Service	51	84	73	50	52	118
Military	192	253	56	258	159	178
Other Field Agency	190	421	149	68	80	187
FBI	394	437	383	376	251	291

Source: OIG analysis of ECTS data

As shown above, the average number of days petitions were at entities receiving OPA referrals varies among fiscal years. However, there does not appear to be any trends among fiscal years related to a steady increase or

⁷² The average number of days presented is for the year that the agency receiving the referral provided its most recent response. Therefore, the original referral may have been made in a prior fiscal year.

decrease in the amount of time, with the exception of FY 2010. In FY 2010, the ODAG returned nearly 1,400 cases to the OPA because there had been a change in the person serving as Deputy Attorney General. Due to the length of time that had passed since the OPA originally transmitted these cases to ODAG, the OPA decided it was necessary to review and update all the clemency cases, including its referrals. This may have had an impact on the increased number of days petitions were at the referral entities in FY 2010 in instances where the OPA's review determined it was necessary to issue additional referrals to obtain updated information on a petition.

Also as shown in Exhibits 19 and 20, entities receiving referrals can take a significant amount of time to respond to the OPA's referral, which creates a delay in the OPA's processing of the clemency petitions. However, we also found that the OPA often did not follow up on outstanding referrals within its own prescribed timeframes. During our case file review of 313 petitions, we found that the OPA failed to follow up on 85 (43 percent) of the 198 referrals for which a response was not provided to the OPA within 60 days. Further, for 130 referrals for which the OPA did conduct follow-up, the average follow-up time was 168 days (5.6 months).⁷³ We concluded that untimely responses by the entities receiving referrals and the OPA's lack of follow-up in certain instances contributed to the increased backlog of clemency petitions.

During our audit we brought the lack of timely follow-up on referrals to the attention of the Pardon Attorney, who promptly implemented a new policy in June 2010 to address the timeliness of referrals and the OPA's lack of follow-up. The new procedures consist of running two monthly reports from ECTS. The first report identifies older cases and is discussed in Finding I. The second report, referred to as the "Field Check Tickler Report," details all petitions that, according to ECTS have a referral outstanding for more than 60 days. Originally, this report only included outstanding referrals at the following five entities for pardon petitions: (1) U.S. Immigration and Customs Enforcement, (2) petitioner, (3) U.S. Probation Office, (4) USAOs, and (5) FBI, because these were the only entities that had overdue responses at that time. However, the "Field Check Tickler Report" now covers all referrals older than 60 days for both pardon and commutation petitions.

OPA attorneys now use these reports as a management tool for prioritizing their efforts in processing petitions, correcting incorrect information, and assisting them in policing delayed responses. According to

⁷³ This average includes instances in which the OPA conducted follow-up prior to its 60-day deadline.

the Pardon Attorney, although these reports indicated that there were many referrals that were overdue, there were also many erroneous entries identified in the reports because of docketing mistakes. For example, an attorney received a reply to a referral directly from the USAOs via e-mail and failed to docket the reply in ECTS. The OPA stated that the automatic docketing function of the new IQ system should help to reduce these sorts of inaccuracies. Overall, we commend the OPA's effort to implement a policy that will assist OPA staff in identifying referrals that have been outstanding for longer than 60 days and require follow-up. However, we recommend that the OPA establish and implement a policy and procedure ensuring follow-up is conducted within established timeframes for outstanding referrals.

DOJ Component Referrals

We identified 10 DOJ components to which the OPA made referrals requesting information or an opinion on a petition during the time period covered by our audit. These components are the: (1) ATF; (2) BOP Headquarters and Wardens; (3) DEA; (4) FBI; (5) USAOs; (6) Antitrust Division; (7) Civil Division; (8) Civil Rights Division; (9) Criminal Division; and (10) Tax Division. Based on OPA's ECTS data obtained as of May 28, 2010, we interviewed and sent questionnaires to these 10 components, including a sample of BOP Wardens and USAOs.⁷⁴

We found that referrals were at DOJ components, excluding the FBI, for an average of 112 days (3.7 months) before a response was provided to the OPA.⁷⁵ As noted above, we identified 10 DOJ components that received referrals from the OPA during the period covered by our audit.⁷⁶ Eight of the 10 DOJ components have set internal guidelines that require them to respond to the OPA within 30 days or less. For example, the BOP requires its Wardens to respond within 15 working days, while the USAOs and DOJ's litigating divisions fall under the guidelines established in the U.S. Attorneys'

⁷⁴ Our interview and questionnaire questions were specific to the OPA's referrals, the components' responses, and any outstanding referrals or referrals that were closed without a response for clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FY 2005 and May 28, 2010.

⁷⁵ We excluded the FBI from our calculation of the average response time for DOJ components because full background investigations may take significantly longer than the other types of requests included in the OPA's referrals.

⁷⁶ The 10 DOJ components also included USAOs and BOP institutions or contract facilities. Not all of the USAOs and BOP institutions and contract facilities received referrals from the OPA during the period covered by our audit. Referrals were sent to 90 of the 93 USAOs and 124 of the 129 BOP institutions or contract facilities.

Manual or internal guidelines to respond within 30 days or inform the OPA if an unusual delay is anticipated. Because of its unique role of performing background investigations and language translation services for the OPA, the FBI has developed longer timeframes for the services it provides. During the scope of our audit, the FBI's internally established deadlines were 120 calendar days for background investigations and about 1 month for translation services. However, in November 2010, the FBI reduced its internal deadline for background investigations to 60 days. ATF officials stated that it strived to meet the OPA's 30 day timeframe but did not have established internal timeframes for responding to the OPA's referrals.

DOJ Components Generally Meeting Established Timeframes

As discussed in the following sections, we found that on average five components - the DEA, Antitrust Division, ATF, Tax Division, and Civil Division - did not materially exceed their own established timeframes or the OPA's requested response time. The average response time per petition, as shown in ECTS, for these components ranged between 30 days (1 month) and 49 days (1.6 months), as shown in Exhibit 21.

**EXHIBIT 21
AVERAGE REFERRAL RESPONSE TIME PER PETITION
FISCAL YEARS 2005 - 2010**

REFERRAL AGENCY	AVERAGE TIME AT EACH AGENCY	ESTABLISHED TIMEFRAME AT EACH AGENCY
DEA	30 days	30 days
DOJ Antitrust Division	34 days	30 days
ATF	38 days	N/A ⁷⁷
DOJ Tax Division	44 days	30 days
DOJ Civil Division	49 days	30 days

Source: OIG analysis of ECTS data

Drug Enforcement Administration

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent two referrals to the DEA. We determined that the DEA responded to the OPA, or the OPA closed the referral without a response, for

⁷⁷ ATF has not established internal timeframes for responding to OPA referrals. However, ATF officials stated that it strives to meet the OPA's 30 day timeframe and will ask for an extension if the timeframe is not feasible.

both petitions within an average of 30 days per petition.⁷⁸ Additionally, there were no outstanding OPA referrals and there were no referrals for which the case was closed without a response.⁷⁹ According to the information in ECTS as of the September 30, 2010, data query, no additional referrals had been sent to the DEA since the May 28, 2010, ECTS data query.

Antitrust Division

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent six referrals to the Antitrust Division. We determined that the Antitrust Division responded to the OPA, or the OPA closed the referral without a response, for all 6 petitions within an average of 32 days per petition. Additionally, there were no outstanding OPA referrals and there were no referrals for which the case was closed without a response. According to the information in ECTS as of the September 30, 2010, data query, we determined that the Antitrust Division responded to OPA referrals within an average of 34 days per petition and had no outstanding referrals.

Bureau of Alcohol, Tobacco, Firearms and Explosives

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent two referrals to ATF. We determined that ATF responded to the OPA, or the OPA closed the referral without a response, for both petitions within an average of 38 days per petition. Additionally, there were no outstanding OPA referrals and there were no referrals for which the case was closed without a response. According to the information in ECTS as of the September 30, 2010, data query, ATF received and responded to two additional referral requests since the May 28, 2010, ECTS data query. However, with these responses the ATF's average response time remained 38 days per petition.

⁷⁸ The OPA may close a referral without a response when the referral is no longer relevant, for example a commutation petitioner is released from incarceration. Additionally, due to the limitations of ECTS in documenting follow-up, the OPA may close the initial referral without a response and initiate a subsequent referral to illustrate a comprehensive record of follow-up activities in ECTS.

⁷⁹ Outstanding referrals are related to open cases for which the OPA has not yet received a response to its request. Therefore, a response to the referral is still necessary. Referrals that are closed without a response are related to cases that have been closed because of a final decision by the President or administratively closed by the OPA. Therefore, a response to the referral is no longer needed or relevant.

Tax Division

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent 28 referrals to the Tax Division. We determined that the Tax Division responded to the OPA, or the OPA closed the referral without a response, for 27 petitions within an average of 44 days per petition. Additionally, there was one outstanding OPA referral for 1,750 days (4.8 years) and there were no referrals for which the case was closed without a response. According to the information in ECTS as of the September 30, 2010, data query, no additional referrals had been sent to the Tax Division since the May 28, 2010, ECTS data query; however, there was still one referral outstanding for 1,875 days (5.1 years).⁸⁰

Civil Division

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent one referral to the Civil Division. We determined that the Civil Division responded to the OPA, or the OPA closed the referral without a response, within an average of 49 days per petition. Therefore, there were no outstanding OPA referrals and there were no referrals for which the case was closed without a response. According to the information in ECTS as of the September 30, 2010, data query, no additional referrals had been sent to the Civil Division since the May 28, 2010, ECTS data query.

DOJ Components Materially Exceeding Established Timeframes

As discussed in the following sections, we found that on average the response times for the remaining five components - the BOP institutions or contract facilities, USAOs, Civil Rights Division, FBI, and Criminal Division - materially exceeded the established timeframes and the OPA's requested response time. The average response time per petition, as shown in ECTS, for these components ranged between 105 days (3.5 months) and 489 days (16.3 months), as shown in Exhibit 22.

⁸⁰ Tax Division officials stated a response related to the one outstanding referral was provided to the OPA in a memorandum dated September 27, 2005. The OPA confirmed the Tax Division's response.

EXHIBIT 22
AVERAGE REFERRAL RESPONSE TIME PER PETITION
FISCAL YEARS 2005 - 2010

REFERRAL AGENCY	AVERAGE TIME AT EACH AGENCY	ESTABLISHED TIMEFRAME AT EACH AGENCY
BOP (Referrals to Wardens Only)	105 days	15 days
USAOs	153 days	30 days
DOJ Civil Rights Division	263 days	30 days
FBI	343 days	120 days ⁸¹
DOJ Criminal Division	489 days ⁸²	30 days

Source: OIG analysis of ECTS data

Federal Bureau of Prisons

We found that the information in ECTS separately tracks the OPA's referrals made to the BOP Headquarters and BOP Wardens. Therefore, the BOP Headquarters and BOP Wardens are discussed separately.

BOP Headquarters. According to the information in ECTS as of the May 28, 2010, data query, the OPA sent 23 referrals to the BOP Headquarters.⁸³ We determined that the BOP Headquarters responded to the OPA, or the OPA closed the referral without a response, for 18 petitions within an average of 28 days per petition.⁸⁴ Additionally, there was

⁸¹ Referrals to the FBI include limited background investigations, full background investigations, and translation services. We used the established deadline for full and limited background investigations (120 days) because it was the longest period of time established for the three types of referrals sent to the FBI.

⁸² The average number of days includes three petitioners who were prosecuted by Criminal Division's former Counterespionage Section, which is now part of the National Security Division. As stated previously, and as discussed in detail in this section, we found these to be valid referrals.

⁸³ Throughout our review of DOJ components, there may be instances in which the number of referrals exceeds the number of petitions because the OPA sent more than one referral to a component regarding the same petition. Multiple referrals to a component regarding the same petition occur because the referrals are for additional information or are used to document the OPA's follow-up on a previous referral that was unanswered.

⁸⁴ The OPA may close a referral without a response when the referral is no longer relevant, such as a commutation petitioner who is released from incarceration. Additionally, due to the limitations of ECTS in documenting follow-up, the OPA may close the initial referral without a response and initiate a subsequent referral to illustrate a comprehensive record of follow-up activities in ECTS.

one outstanding OPA referral for 396 days (1.1 years) and there were four referrals for which the case was closed without a response for an average of 793 days (2.2 years) per referral.⁸⁵ During our interview we discussed the OPA requests for which the BOP Headquarters did not respond. BOP Headquarters officials explained that one petitioner received a court-ordered shortened sentence and was released the day after the OPA sent the request, while another petitioner requested a stay of execution and the OPA closed the petition due to the petitioner's requested stay. Finally, the third petitioner was involved in the Witness Security Program and the BOP could not provide any details on why there was no response. However, during our exit conference the BOP provided documentation supporting a response that was faxed to the OPA within 43 days for one of the two referrals related to the Witness Security Program petitioner. Even though the BOP Headquarters did not respond to the previously mentioned OPA referrals, we believe that the response and documentation provided to us by BOP Headquarters explained the referrals that were closed without a response. According to the information in ECTS as of the September 30, 2010, data query, we determined that the BOP Headquarters responded to OPA referrals within an average of 45 days per petition and had no outstanding referrals.

BOP Wardens. According to the information in ECTS as of the May 28, 2010, data query, the OPA sent 4,684 referrals to BOP Wardens. We determined that BOP Wardens responded to the OPA, or the OPA closed the referral without a response, for 3,683 petitions within an average of 112 days (3.7 months) per petition. Additionally, there were 363 outstanding OPA referrals for an average of 91 days (3 months) per referral, and there were 152 referrals for which the case was closed without a response for an average of 336 days (11.2 months) per referral. According to the information in ECTS as of the September 30, 2010, data query, we determined that the BOP Wardens responded to OPA referrals within an average of 105 days (3.5 months) per petition, and had 134 outstanding referrals for an average of 126 days (4.2 months) per referral.

We further analyzed specific OPA referrals for which, according to ECTS the referral was pending with BOP Wardens for a significant period of time, to determine the reasons why the referrals were pending, as shown in Exhibit 23.

⁸⁵ Two of the referrals that the BOP Headquarters did not respond to were for the same petitioner. Therefore, the four non-responses related to three petitioners.

EXHIBIT 23
CLEMENCY PETITION REFERRALS TO BOP WARDENS
PENDING IN ECTS FOR SIGNIFICANT PERIODS OF TIME

OPA CASE No.	ECTS INITIAL REFERRAL DATE	ECTS RESPONSE DATE OR DATE CLOSED WITH NO RESPONSE	ECTS TOTAL TIME	BOP WARDEN REASON FOR DELAY
2000-11-0247	12/07/00	04/25/06	1,965 days (5.4 years)	Monitoring procedures were not effective.
2004-09-1060	09/08/04	12/10/07	1,188 days (3.3 years)	No records or inmate file to review regarding the non-response. Inmate was released 04/25/05.
2008-01-0462	01/22/08	---	857 days (2.3 years) ⁸⁶	No record of receiving an OPA request by the inmate or institution.

Source: OIG analysis of ECTS data and sampled BOP institution or contract facility Wardens

BOP Headquarters officials could not address our questions specific to the BOP Wardens and the Wardens' processes for responding to the OPA's requests. Therefore, we selected a sample of 37 BOP institutions and 4 BOP contract facilities and sent questionnaires regarding their procedures for responding to the OPA's referrals. The sampled BOP institutions and contract facilities are listed in the Objectives, Scope, and Methodology in Appendix I.

We received responses from all 41 facilities sampled. Based on the responses received, none of the institutions and contract facilities indicated any local written procedures for responding to the OPA's referrals. However, BOP Program Statement 1330.15 requires that when the OPA needs additional information, a referral will be forwarded directly to the Warden of the institution housing the inmate, with a copy to BOP Headquarters. In these cases, the Warden must ensure the requested documents are forwarded to the OPA within 15 working days and a copy of the transmittal memorandum is provided to BOP Headquarters.

According to the responses to our questionnaire, OPA referrals are generally received by the Warden or the Warden's Office, and are assigned

⁸⁶ This referral was outstanding as of the May 28, 2010, OIG data query that included petitions pending at the beginning of FY 2005 and clemency petitions opened between FY 2005 and May 28, 2010. The referral was still outstanding as of the September 30, 2010, data query.

to an institution or contract facility staff member, usually a case manager or Unit Manager, to compile a response. The staff member is responsible for compiling the documents and a response. The information is then routed for the Warden's signature before being sent to the OPA. For the OPA's referrals, some of the institutions and contract facilities indicated that they did not have any procedures for monitoring or tracking these referrals, while other institutions and contract facilities indicated that referrals were monitored by the Warden's Office or Secretary, the Unit Manager, Case Management Coordinator, or the Executive Assistant. Monitoring was conducted electronically or using log sheets.

In our questionnaire, we asked, "What factors can contribute to a delayed response?" The common responses for the BOP institutions and contract facilities that responded to our questionnaire were: (1) the institution did not receive the initial OPA referral; (2) the institution lacks a designated tracking system or management oversight; (3) some OPA referrals may require more time, possibly due to medical or mental evaluations of the inmate; (4) the inmate was transferred or released from the institution; (5) the institution's responsible staff was on extended leave, such as military leave, or transferred to a different institution; and (6) the OPA's referrals are not sent consistently by either mail, e-mail, or fax, or to a consistent recipient at the institution.

Next, our questionnaire asked, "Why do some petitions take longer than others?" The common responses for the institutions and contract facilities that responded to our questionnaire were: (1) differing staff workloads and priorities; (2) some of the OPA's referrals may require more time, including requests for medical records or progress reports, which are not always readily available; (3) the institution's lack of tracking or monitoring system; and (4) the inmate was transferred from the institution.

Finally, our questionnaire asked, "For the petitions that this institution did not respond to OPA's referral, why did this institution not respond? What factors can contribute to a non-response?" The common responses for the institutions and contract facilities that responded to our questionnaire were: (1) the institution did not receive the OPA's referral; (2) the inmate was transferred or released from the institution; and (3) the institution's lack of tracking or monitoring system.

At the end of our questionnaire, we provided the 41 BOP institutions and contract facilities with an opportunity to provide any suggestions for improving the process. Many institutions and contract facilities suggested that the OPA send all referrals electronically rather than by mail or fax. Doing this would eliminate mail delays and would produce easier tracking

and monitoring by both the OPA and the BOP institutions and contract facilities. In June 2010, the OPA established a separate e-mail address to request and receive documentation electronically from the BOP; previously all referrals were processed through the mail.⁸⁷ We believe that this new procedure should reduce the amount of time for requesting and receiving reports, improve tracking of outstanding referrals, and enhance follow-up.⁸⁸ However, as of the date of this audit, the electronic processing of the OPA's referrals has only been implemented for the BOP.⁸⁹ Therefore, we recommend that the OPA process all future referrals electronically.⁹⁰ The OPA noted during our audit that its new case management system will directly facilitate the electronic transmittal of referrals, so when the case management system is implemented, all referrals will be transmitted electronically.

As mentioned previously, BOP Program Statement 1330.15 governs the responsibilities and timelines for processing clemency petitions and responding to the OPA's referrals. Overall, we believe that the procedures for processing clemency petitions in Program Statement 1330.15 are adequate to respond to the OPA's referrals in a timely manner. However, we found that the BOP Wardens were not consistently adhering to the timeframes outlined in the Program Statement and that the average response time per petition was 105 days (3.5 months). Therefore, we recommend that the BOP issue additional guidance to ensure that its Wardens comply with Program Statement 1330.15. The additional guidance should include procedures for monitoring or tracking these referrals.

⁸⁷ According to the Pardon Attorney, with the implementation of electronic referrals for all BOP requests, the cost for mail services was reduced by approximately \$15,000 as of the spring of 2011.

⁸⁸ According to the Pardon Attorney, with the implementation of electronic requests, the BOP has tremendously improved its timeliness for responding to the OPA. As of July 2011, the Pardon Attorney estimated that the BOP responds timely to 85 percent of the OPA's requests in accordance with the BOP's own policies.

⁸⁹ In 2011, the OPA began sending referrals electronically to the USAOs, FBI, and U.S. Probation Office, but the remaining referrals to other entities are still sent through regular mail.

⁹⁰ The only documents that cannot be transmitted electronically are documents that require original signatures, such as the petition, the report and recommendation transmitted to the ODAG for review and signature, and the signed report and recommendation transmitted to the White House.

U.S. Attorneys' Offices

We interviewed staff from the Executive Office for United States Attorneys (EOUSA) to obtain an understanding of any EOUSA and USAOs procedures for responding to OPA referrals. EOUSA officials explained that EOUSA does not receive referrals from the OPA, nor does EOUSA monitor the USAOs' responses. However, EOUSA staff referred us to the U.S. Attorneys' Manual which states that the OPA generally requests a response within 30 days and when the U.S. Attorney expects an unusual delay in responding to the OPA, the U.S. Attorney should advise the OPA accordingly.

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent 882 referrals to USAOs. We determined that USAOs responded to, or the OPA closed the referral without a response, for 684 petitions within an average of 152 days (5.1 months) per petition. Additionally, there were 72 outstanding OPA referrals for an average of 293 days (9.8 months) per referral, and there were 32 referrals for which the case was closed without a response for an average of 854 days (2.3 years) per referral. According to the information in ECTS as of the September 30, 2010, data query, we determined that USAOs responded to OPA referrals within an average of 153 days (5.1 months) per petition and had 45 outstanding referrals for an average of 305 days (10.2 months) per referral.

We further analyzed specific OPA referrals for which, according to ECTS, the referral was pending at the USAOs for a significant period of time, to determine the reasons why the referrals were pending, as shown in Exhibit 24.

EXHIBIT 24
CLEMENCY PETITION REFERRALS TO THE USAOS
PENDING IN ECTS FOR SIGNIFICANT PERIODS OF TIME

OPA CASE No.	ECTS INITIAL REFERRAL DATE	ECTS RESPONSE DATE OR DATE CLOSED WITH NO RESPONSE	ECTS TOTAL TIME	USAOS REASON FOR DELAY
2002-09-1239	06/02/03	03/16/10	2,479 days (6.8 years)	USAO believes the original request was received April 2008 and a response was filed in August 2009. However, the office was undergoing several personnel transitions during that time. ⁹¹
2000-01-0330	03/07/00	02/20/07	2,541 days (6.9 years)	USAO does not know reason for no response due to passed time and movement of personnel.
2000-05-0798	09/14/00	01/13/06	1,947 days (5.3 years)	USAO responded to a previous and a subsequent OPA request. After USAO responded to a subsequent request, it considered the previous request closed. ⁹²
2001-08-1682	11/09/05	---	1,661 days (4.6 years) ⁹³	USAO responded on 12/19/08. Delay resulted from misplacement of the petition and file. ⁹⁴

Source: OIG analysis of ECTS data and sampled USAOs

The OPA sends referrals directly to the relevant USAOs and each USAO is responsible for its own procedures and responses to the OPA. Therefore, we selected a sample of 30 USAOs to which we sent a questionnaire regarding the procedures for responding to the OPA's referrals. The sampled USAOs are included in the Objectives, Scope, and Methodology in Appendix I.

⁹¹ According to the OPA, the case file does not have any record of a response in August 2009. The Pardon Attorney also explained that approximately nine additional follow-up requests were made by the OPA.

⁹² According to the OPA, the case file confirmed the USAO's response and the referral should have been closed with no response required.

⁹³ This referral was outstanding as of the May 28, 2010, OIG data query that included petitions pending at the beginning of FY 2005 and clemency petitions opened between FY 2005 and May 28, 2010. The referral was still outstanding as of the September 30, 2010, data query.

⁹⁴ According to the OPA, the response was not received until February 20, 2009.

We received responses from all of the 30 USAOs sampled. Based on the responses received, we found that none of the 30 USAOs had district-specific written policies or procedures for responding to the OPA's referrals. According to the questionnaire responses, the U.S. Attorney generally receives the OPA's referrals. Draft responses are generally the responsibility of either the Assistant U.S. Attorney involved with the original prosecution, another Assistant U.S. Attorney if the prosecuting attorney is no longer at the district, or a supervisory Assistant U.S. Attorney. Using the petitioner's case file, a draft response is prepared and forwarded to the U.S. Attorney for review and signature and then sent to the OPA. As a result of this audit, two USAOs, the Eastern District of Kentucky and the District of Massachusetts, created memoranda describing the district's guidelines for responding to the OPA's referrals.

Of the 30 USAOs that responded to our questionnaire, most offices indicated that they follow the OPA's timeline and request extensions as needed. However, four offices told us their goals were to respond within 30, 45, and 60 days. Eight of the offices responded that they monitor responses to the OPA's referrals using an individual or the district calendar. The offices responded that monitoring typically occurs by supervisors, including the Criminal Chief or First Assistant U.S. Attorney; by the supervisor's personal assistant; or during regular district file reviews. However, most offices indicated that they do not have a formal process for monitoring the OPA's referrals or are implementing a process as a result of this audit.

In our questionnaire, we asked, "For the petitions that took this district longer to respond, what factors can contribute to a delayed response?" The 30 USAOs had the following common responses for factors that can contribute to a delayed response: (1) demands of the responding official's workload and priority of other cases; (2) time needed to become familiar with the original prosecution; (3) coordination with other components; (4) time to contact officials involved with the original prosecution; and (5) time to locate, retrieve, or recreate files.

Next, our questionnaire asked, "Why do some petitions take longer than others?" The 30 USAOs had the following common responses as reasons that some of OPA's referrals take longer than others to respond to: (1) age and complexity of the case; (2) workload demands; (3) time spent locating and reviewing files; (4) attorney from original prosecution is no longer in the USAO; (5) management changes; and (6) time spent contacting the original judge, investigator, probation officer, and victim.

Finally, our questionnaire asked, “For the petitions that this district did not respond to OPA's referral, why did this district not respond?” The 30 USAOs had the following common responses for reasons that the district did not respond to the OPA's referral: (1) internal delay, including a staff issue or a delay during an information request to another component; (2) ECTS was inaccurate and the “non-response” was handled by another DOJ component; (3) the present U.S. Attorney for the district office was unable to explain why the office did not respond because the referral occurred when a previous U.S. Attorney was in that office; and (4) the district did not have a record of receiving the OPA's referral.

At the end of our questionnaire, we provided the 30 USAOs with an opportunity to provide suggestions for improving the process. The USAOs noted the following suggestions: (1) the OPA could send referrals to the USAOs electronically with PDF attachments; (2) the OPA's follow-up on referrals in which the response timelines were not met could include a spreadsheet of open referrals at each USAO; (3) the OPA could allow longer response times for older prosecutions; and (4) the OPA could contact the USAOs prior to sending information to allow the district additional time to research the prosecution and prepare its recommendation.⁹⁵

With regard to the first suggestion offered by the USAOs, this audit recommends that the OPA process all future referrals electronically.⁹⁶ According to the OPA, the new case management system will directly facilitate the electronic transmittal of referrals, so at that point all referrals will be transmitted electronically.

Regarding the USAOs' second suggestion that the OPA's follow-up regarding referrals include a list of all open referrals, the OPA agreed with the suggestion and is presenting it to its contractor to add this capability to the new case management system. Therefore, we recommend that the OPA include an aging report detailing all open referrals when following up with the USAOs.

⁹⁵ We discussed the third suggestion with the Pardon Attorney, who disagreed, since the OPA presently requests a response within 30 days and adds an additional 30 days before following up (60 days). Further, according to the U.S. Attorneys' Manual, the OPA generally requests a response within 30 days. When the U.S. Attorney expects an unusual delay in responding to the OPA, the U.S. Attorney should advise the OPA accordingly. However, we found that the USAOs were not always complying with the U.S. Attorneys' Manual by notifying the OPA of any delays.

⁹⁶ In the spring of 2011, the OPA began sending referrals electronically to the USAOs.

As mentioned earlier in this report, the U.S. Attorneys' Manual states that the OPA generally requests a response within 30 days, and when the U.S. Attorney expects an unusual delay in responding to the OPA, the U.S. Attorney should so advise the OPA. Overall, we believe that these procedures are adequate to respond to the OPA's referrals in a timely manner. However, we found that the USAOs have not always complied with the U.S. Attorneys' Manual by responding to the OPA's referrals within 30 days, nor have the USAOs always complied with the manual by notifying the OPA of expected delays. Therefore, we recommend that EOUSA issue additional guidance to the USAOs reminding them to comply with the timeframes in the U.S. Attorneys' Manual and to notify the OPA of expected delays in responding to the OPA within the 30 day request. The additional guidance should include examples of policies and procedures developed by the U.S. Attorneys in the Eastern District of Kentucky and the District of Massachusetts.

Civil Rights Division

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent two referrals to the Civil Rights Division. We determined that the Civil Rights Division responded to the referral for 1 petition in 263 days (8.8 months). For the other referral, the Civil Rights Division did not respond and the case was closed without a response after 2,267 days (6.2 years). According to the information in ECTS as of the September 30, 2010, data query, no additional referrals had been sent to the Civil Rights Division since the May 28, 2010, ECTS data query.

Civil Rights Division officials explained that the petition that took 263 days (8.8 months) to respond was handled in 2002 by the Section Chief and the Deputy Assistant Attorney General, who both have left DOJ. Further, the documents referencing this matter do not disclose any reason for the period of time it took to recommend against pardon. Therefore, Civil Rights Division Officials could not explain the delayed response. Regarding the other OPA referral that was outstanding for 2,267 days (6.2 years), Civil Rights Division officials stated that it had no record of prosecuting this case, the petitioner, or receiving the request.

Also, Civil Rights Division officials stated the Assistant Attorney General for the Civil Rights Division is responsible for responding to the OPA's requests and does so based on a recommendation made by the Chief of the Criminal Section. The Chief of the Criminal Section follows the standards and procedures as defined in the U.S. Attorneys' Manual, § 1-2.112, Standards for Considering Pardon Petitions. Civil Rights Division officials stated that they seek to meet any timing requests made by the OPA.

We note that the Civil Rights Division only received two referrals during the scope of our audit, and the most recent referral was sent in FY 2002.⁹⁷ Nevertheless, we believe it is important that the Civil Rights Division timely respond to any referrals it receives in the future. As a result, we recommend that the Civil Rights Division develop procedures to ensure that it complies with the U.S. Attorneys' Manual in responding to the OPA's referrals within the established timeframes. The procedures should be developed in collaboration with components that generally respond to the OPA within the established timeframes, including the Antitrust Division and the Civil Division.

Federal Bureau of Investigation

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent 1,359 referrals to the FBI. We determined that the FBI responded to, or the OPA closed the referral without a response, for 1,012 petitions within an average of 342 days (11.4 months). Additionally, there were 99 outstanding OPA referrals for an average of 238 days (7.9 months) per referral, and there were 19 referrals for which the case was closed without a response for an average of 346 days (11.5 months) per referral. According to the information in ECTS as of the September 30, 2010, data query, we determined that the FBI responded to OPA referrals within an average of 343 days (11.4 months) per petition and had 47 outstanding referrals for an average of 311 days (10.4 months) per referral.

We further analyzed specific OPA referrals for which, according to ECTS, the referral was pending at the FBI for a significant period of time, to determine the reasons why the referrals were pending, as shown in Exhibit 25.

⁹⁷ Our interviews and questionnaires were specific to the OPA's referrals related to clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and May 28, 2010. As a result, our audit scope included referrals prior to FY 2005 related to clemency petitions pending at the beginning of FY 2005.

EXHIBIT 25
CLEMENCY PETITION REFERRALS TO THE FBI
PENDING IN ECTS FOR SIGNIFICANT PERIODS OF TIME

OPA CASE No.	ECTS INITIAL REFERRAL DATE	ECTS RESPONSE DATE OR DATE CLOSED WITH NO RESPONSE	ECTS TOTAL TIME	FBI REASON FOR DELAY
2000-07-1008	10/23/00	03/07/08	2,692 days (7.4 years)	FBI response was sent on 02/05/01. A subsequent request was sent on 2/22/07 and the FBI returned a response on 03/07/08. ⁹⁸
2005-10-0002	11/04/05	---	1,431 days (3.9 years)	First request was returned unopened - unable to conduct background investigation because petitioner was not a U.S. citizen. A subsequent request was received 01/17/08 and the FBI returned a response on 03/10/08. ⁹⁹
2005-11-0087	05/10/06	---	1,479 days (4.1 years)	First request was returned unopened. A subsequent request was received 08/25/09 and the FBI returned a response on 02/02/10. ¹⁰⁰

Source: OIG analysis of ECTS data and the FBI

Referrals requesting assistance from the FBI are often more complex than referrals to other DOJ law enforcement agencies like the DEA and ATF. While referrals to agencies like the DEA and ATF generally seek an opinion on the clemency petition, the FBI also performs background investigations and translation services on behalf of the OPA. However, we found that ECTS does not separately track these services. Therefore, we were unable to separate this information and instead could only determine the average

⁹⁸ According to the OPA, the case file confirmed the FBI's response and it should have been docketed in ECTS.

⁹⁹ According to the OPA, its case file confirmed the FBI's response. The Pardon Attorney stated that the OPA should have closed the referral after determining the FBI was unable to conduct the background investigation.

¹⁰⁰ According to the OPA, the case file documented that the FBI incorrectly closed the initial background investigation request. When the OPA discovered the error on July 31, 2009, it issued a subsequent referral on August 25, 2009. The Pardon Attorney stated that the OPA should have closed the initial referral after determining the FBI's error, or at the very least upon issuing the subsequent referral.

amount of time a petition is at the FBI. As a result, the FBI averages noted previously may include both background investigations and translations services.

During our audit we interviewed FBI officials from its Special Inquiry and General Background Investigations Unit (SIGBIU), while officials from the Language Services Section completed our questionnaire. The SIGBIU handles OPA requests for background investigations, while the Language Services Section provides translation services for the OPA. Based on discussions with the OPA, SIGBIU, and the Language Services Section we determined that a majority of OPA's referrals to the FBI are for background investigations.

The FBI stated that pardon-related background investigations are a lower priority, with the priority going to investigations for Presidential appointments and Senate confirmations. According to the FBI, the administration change in January 2009 caused a backlog in pardon background investigations because the FBI was required to conduct background investigations on new Presidential appointees. As of our interview with FBI officials on September 23, 2010, the FBI officials stated it was conducting 43 background investigations related to pardon applicants, with the oldest being from May 2009.

According to the FBI, during the scope of our audit it had an established internal deadline of 120 calendar days for background investigations related to pardon petitions. In November 2010, the FBI reduced its deadline for background investigations to 60 days. FBI officials stated that it utilizes an internal tracking database to monitor the progress of all background investigations. According to this database, background investigations for clemency petitions conducted from FY 2005 to May 2010 averaged 232 days (7.7 months), which materially exceeded its established timeframe. According to the FBI statistics in its database, the average time to conduct background investigations for clemency petitions by fiscal year, for FYs 2005 to 2010, ranged from a low of 174 days (5.8 months) in FY 2009, to a high of 286 days (9.5 months) in FY 2005, as shown in Exhibit 26.

EXHIBIT 26
FBI BACKGROUND INVESTIGATION STATISTICS
FOR CLEMENCY PETITIONS
FISCAL YEARS 2005 - 2010¹⁰¹

FISCAL YEAR	AVERAGE TIME TO CONDUCT A BACKGROUND INVESTIGATION
FY 2005	286 days (9.5 months)
FY 2006	249 days (8.3 months)
FY 2007	224 days (7.5 months)
FY 2008	213 days (7.1 months)
FY 2009	174 days (5.8 months)
FY 2010 ¹⁰²	248 days (8.3 months)

Source: FBI

According to the FBI officials, the reason for the variance in the processing time for pardon-related background investigations is due to the FBI's shifting priorities and as mentioned previously, pardon-related background investigations are a lower priority.

We also sent a questionnaire related to translation services that were completed by the Language Services Section. FBI officials stated that once the materials that require translating are routed to the Language Services Section, the appropriate Translation and Deployment Unit responsible for the language requested is assigned to the referral. According to the FBI, the OPA requested 92 translation services between FYs 2005 through 2010, primarily for pardon petitions in Spanish. The FBI completed the translation services in 14 days on average, which was within established timeframes.

Overall, we believe that the FBI's procedures for responding to referrals requesting translation services are adequate. However, we found that the FBI is not meeting its internal deadlines and responding to the OPA's referrals requesting background investigations on pardon petitions within established timeframes. Therefore, we recommend that the FBI evaluate its established timeframe to process clemency petitions and establish an internal deadline that is attainable based on prioritizations and resources.

¹⁰¹ The FBI statistics from its database are based on the fiscal year the FBI completed the background investigation and returned the information to the OPA.

¹⁰² The FY 2010 statistics provided by the FBI are through September 22, 2010.

Criminal Division

According to the information in ECTS as of the May 28, 2010, data query, the OPA sent 19 referrals to the Criminal Division. We determined that the Criminal Division responded to, or the OPA closed the referral without a response, for 13 petitions within an average of 485 days (1.3 years). Additionally, there were no outstanding OPA referrals but there were six referrals for which the case was closed without a response for an average of 1,054 days (2.9 years) per referral. According to the information in ECTS as of the September 30, 2010, data query, we determined that the Criminal Division responded to OPA referrals within an average of 489 days (1.3 years) per petition and had no outstanding referrals.

According to Criminal Division officials, the Criminal Division uses the same procedures to track OPA referrals that it uses for any other correspondence addressed to the Assistant Attorney General for the Criminal Division. Additionally, the Criminal Division falls under the guidelines established in the U.S. Attorneys' Manual, which establishes guidance for responding to OPA referrals. Criminal Division officials also stated that it strives to respond to all referrals promptly.

In response to our questionnaire and subsequent discussions, Criminal Division officials stated that in their opinion, the ECTS data does not accurately reflect its efforts to respond to OPA referrals as discussed below.

Criminal Division officials stated that the average should not include two cases that were prosecuted by its former Counterespionage Section, (now part of the National Security Division) for which the OPA closed the referrals without a response after more than 5 years on average.¹⁰³ We disagree that these two cases should not be included in the Criminal Division's average because the OPA referrals related to these petitions were made when the Counterespionage Section was part of the Criminal Division. Further, the referrals were closed by the OPA without a response within 5 months after the section became part of the National Security Division; therefore, we found these to be valid referrals to the Criminal Division. In addition, the Criminal Division was the primary prosecuting agency for these

¹⁰³ We followed up with the National Security Division regarding these two referrals. According to National Security Division officials, it did not have a record of responding to the OPA for either referral. However, the National Security Division Counterespionage Section's chronological files for the years 2000 and 2001 (when it was part of the Criminal Division) included correspondence with other agencies regarding the OPA referrals. National Security Division officials stated that at that time, regular procedures would have been to provide oral responses to the OPA.

cases. We also note that the Criminal Division did not dispute one case that was included in our average, which was also prosecuted by its former Counterespionage Section, while it was still part of the Criminal Division. In this case, a response was provided in 40 days, during the time that it was part of the Criminal Division. Nonetheless, if we excluded all three of these petitions from our calculation, according to ECTS, as of September 30, 2010, the average response time for the Criminal Division would be 233 days (7.8 months) per petition.

Criminal Division officials also stated that a written response was provided to the OPA for one OPA petition that was not reflected in the ECTS data, which we confirmed with the OPA. If we included this petition in our calculation, as of September 30, 2010, the average response time for the Criminal Division would be 458 days (15.3 months) or slightly less than the Criminal Division average per the ECTS data. Criminal Division officials also indicated that they verbally communicated with the OPA regarding an additional four petitions. If we included all petitions for which written or verbal responses were provided in our calculations, as of September 30, 2010, the average response time for the Criminal Division would be 417 days (13.9 months).

In addition, Criminal Division officials stated that in all but seven cases, the Criminal Division only had an ancillary role and that it would have no basis to opine on any clemency matters related to these cases. Criminal Division officials further stated the response times for the cases in which it only had an ancillary role should not be included in its average response time. We disagree with the Criminal Division's assertions related to the cases for which it states that it was not the primary prosecuting agency. The OPA's goal is to obtain opinions and information from all components that may have information regarding the petitioner, not just the primary prosecuting agency. In fact, in most instances the OPA sent referrals to the other prosecuting agencies at the same time the referrals were sent to the Criminal Division. In our judgment, the Criminal Division should have provided a written response to the OPA for those cases for which it received an OPA referral, including those cases for which the Criminal Division was not the primary prosecuting agency. The OPA's referrals were based on the fact that the Criminal Division had a role in each case, even if it was not the primary prosecuting agency. As a result, the Criminal Division should have provided a written response to all OPA referrals, even if only to inform the OPA that the Criminal Division had a limited role in the case, and therefore believed that it had no basis to opine on clemency matters related to the case. Additionally, despite stating that our calculations should not include cases for which the Criminal Division was not the primary prosecuting agency because it would have no basis to opine on clemency matters, we

found that the Criminal Division provided a formal response to the OPA for seven cases that, according to the Criminal Division, it was not the primary prosecuting agency. Nonetheless, if we remove the petitions for which the Criminal Division stated that it only had an ancillary role, from our calculation, according to ECTS, as of September 30, 2010, the Criminal Division responded to, or the OPA closed the referral without a response, within an average of 612 days (20.4 months).

In sum, the Criminal Division would prefer that its average response time included in this report only include those cases for which it was the primary prosecuting agency, except for those cases prosecuted by its former Counterespionage Section. As a result, the Criminal Division believes that its average response time, as of September 30, 2010, should be reported as 66 days (2.2 months). We disagree with the Criminal Division's assertion for the reasons stated previously.

Finally, Criminal Division officials also stated that we should not include older cases in calculating our averages. However, as stated previously, our audit included clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010. As a result, our audit included clemency petitions and referrals from FYs 1994 through 2010, which is the same scope we used to analyze the efforts of all DOJ components included in this report. In addition, the Criminal Division's average response times for each fiscal year from FYs 2005 through 2010, as shown in Exhibit 20, indicate that although the Criminal Division's response time decreased from FYs 2006 to 2007, its response time increased from FYs 2007 to 2009.

Overall, we concluded that the Criminal Division did not respond to the OPA's referrals within established timeframes. As a result, we recommend that the Criminal Division develop procedures to ensure that it formally responds to all OPA referrals in accordance with established timeframes, including those cases for which Criminal Division's role is ancillary, even if the only response provided is to inform the OPA that based on its limited role in the case, the Criminal Division has no basis to opine on clemency matters related to the case.

Office of the Deputy Attorney General

The ODAG has a significant role in reviewing the OPA's clemency recommendations and reports before they are provided to the White House. We interviewed ODAG officials to obtain an understanding of any procedures it has for reviewing the OPA's reports and recommendations regarding clemency petitions. Our interviews with ODAG officials covered clemency

petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and May 28, 2010.

According to the information in ECTS as of the May 28, 2010, data query, we found that the OPA sent 10,972 reports to the ODAG for review that related to 9,493 clemency petitions.¹⁰⁴ We determined that the average amount of time a petition was pending at the ODAG during this time period was 135 days (4.5 months) per petition. Additionally, according to the information in ECTS as of the May 28, 2010, data query, 1,419 petitions were at the ODAG awaiting review of the corresponding reports. However, according to the information in ECTS as of the September 30, 2010, data query, we determined that petitions were at the ODAG for an average of 142 days (4.7 months) per petition and 860 petitions were at the ODAG awaiting review. Further, we found that the average amount of time a petition was at the ODAG fluctuated over the 6 fiscal years in our scope, as shown in Exhibit 27.

EXHIBIT 27
ODAG REVIEW TIME PER PETITION
FISCAL YEARS 2005 - 2010¹⁰⁵

FISCAL YEAR	AVERAGE TOTAL REVIEW TIME
FY 2005	223 days
FY 2006	210 days
FY 2007	134 days
FY 2008	22 days
FY 2009	6 days
FY 2010	193 days

Source: OIG analysis of ECTS data

As shown above, there was a significant decrease in the average number of days petitions were pending at the ODAG as of the end of FYs 2008 and 2009. This decrease resulted, in part, from a significant decrease in the number of petitions processed by the OPA and forwarded to

¹⁰⁴ More than one report may be sent to the ODAG for a single petition.

¹⁰⁵ The average number of days presented are for the most recent year that the ODAG reviewed and returned the recommendation and report to the OPA. Therefore, the original report and recommendation may have been sent to ODAG in a prior fiscal year. Accordingly, because the nearly 1,400 cases returned to the OPA in February 2010 were returned to the ODAG after FY 2009 for further processing, the average processing time at ODAG for FY 2009 did not include the cases affected by the February 2010 transfer. This transfer is discussed in more detail later in this section.

the ODAG for review during the period that the Pardon Attorney position was vacant from January 2008 through April 2008.

As stated previously, as of the end of FY 2010, 860 petitions were pending at the ODAG. However, subsequent to our review, the ODAG processed almost half of the petitions in the backlog resulting in a decrease in number of petitions pending at the ODAG to 464 as of February 28, 2011.

During our interviews, ODAG officials stated that it does not have any written policies or procedures for reviewing the OPA's reports and recommendations regarding clemency petitions. ODAG officials explained that overall the process is the same for all petitions, but the petitions may be handled slightly differently depending on the type of report they receive from the OPA.¹⁰⁶ ODAG officials stated that once ODAG receives the reports, the reports are logged and assigned to the designated official for review. During the scope of our audit, the ODAG periodically may have had more than one staff member assigned to clemency petitions, but since January 2009, there has been only one reviewer at any given time. In addition, reviewing clemency applications is just one of several duties assigned to the designated official. Other duties include overseeing programs, such as the Office of Justice Programs, United States Trustee Program, and the Office of Tribal Justice. A control sheet is used to log the date a report was received at the ODAG and the date it is returned to the OPA. ODAG officials stated that there are no established timelines for reviewing reports and the ODAG does not track timeliness.

At the time of our interview, ODAG officials stated that the designated official assigned to review clemency petitions assesses the reports and prepares a memorandum with a recommendation to the Deputy Attorney General. ODAG officials stated that they typically do not override the OPA's recommendations. The reviewer generally looks for unusual cases to highlight for the Deputy Attorney General's attention, such as cases involving excessive sentences for the crime. The ODAG reviewer may also suggest changes to the report before sending it to the White House, in which case the report is sent back to the OPA. The Deputy Attorney General reviews all petitions and makes the final determination on whether to approve the recommendation by signing the report. However, ODAG officials stated that the process can vary based on who is reviewing the OPA reports and the Deputy Attorney General in office. Therefore, the process previously described may not be representative of the process used at any given time.

¹⁰⁶ The OPA may prepare a summary report, short report, or a long report for the ODAG to review. Additional information regarding these reports and their uses can be found in Appendix IV.

During our interview with ODAG officials, we discussed the 135-day average. ODAG officials stated that timeliness in processing the reports and recommendations can be impacted by an administration change or the lack of a confirmed Deputy Attorney General. However, we found that during the 11-month period for which there was an Acting Deputy Attorney General, from February 2010 through December 2010, the Acting Deputy Attorney General processed more than 90 percent of the reports and recommendations provided by the OPA. Additionally, reports may be returned to the OPA because significant time has passed while the report has been awaiting review at the ODAG, and the OPA must redo its review to determine if the information in the report is still accurate and the recommendation is still valid. For example, in February 2010, nearly 1,400 cases were returned to the OPA to change the signature block on the cover page because there had been a change in the person serving as Deputy Attorney General. Due to the length of time that had passed since its original transmittal to the ODAG in 2009 and 2010, the OPA decided it was necessary to review and update all the clemency cases. The OPA stated that this event had a great effect on the workload of OPA attorneys and staff.

Overall, we believe the lack of policies, procedures, and timeframes for reviewing clemency recommendations and reports contributes to the ODAG's lengthy reviews, which further increases a petition's processing time and contributes to the overall backlog of clemency petitions. Therefore, we recommend that the ODAG develop policies, procedures, and timeframes for reviewing the OPA's clemency reports and recommendations to help ensure that it responds to the OPA in a timely manner.

We also discussed the use of an aging report with ODAG officials, which would allow the OPA to consolidate the follow-up and provide the ODAG with information regarding the OPA reports that are at the ODAG, by length of time. At the time of our audit, the OPA did not follow up with the ODAG regarding outstanding reports and recommendations. During our audit the OPA concurred with this suggestion and ODAG officials thought that a monthly aging report would be useful. We recommended that the OPA provide the ODAG with a monthly aging report listing clemency petitions that are currently pending at the ODAG. As a result, beginning in March 2011, the OPA implemented our recommendation and began providing the ODAG with a monthly aging report listing the clemency petitions that were at the ODAG and the date the reports and recommendations were provided to the ODAG.

White House

According to the information in ECTS as of the September 30, 2010 data query, we found that petitions were pending at the White House an average of 282 days (9.4 months) before a decision was made by the President. Further, we found that the average amount of time a petition was at the White House fluctuated over the 6 fiscal years in our scope, as shown in Exhibit 28.

EXHIBIT 28 WHITE HOUSE REVIEW TIME PER PETITION FISCAL YEARS 2005 - 2010¹⁰⁷

FISCAL YEAR	AVERAGE TOTAL REVIEW TIME
FY 2005	502 days (16.7 months)
FY 2006	307 days (10.2 months)
FY 2007	348 days (11.6 months)
FY 2008	323 days (10.8 months)
FY 2009	60 days (2.0 months)
FY 2010	335 days (11.2 months)

Source: OIG analysis of ECTS data

The petitions sent to the White House that await decision further increase the backlog because new petitioners continue to file petitions with the OPA.¹⁰⁸

Conclusion

We found that during our audit scope it took almost 2 years on average from the time the OPA received a petition until a final clemency decision was made by the President, which we believe contributed to the growing backlog during that time. In our judgment, a significant factor related to the length of time it takes to process a clemency petition is that the entities receiving referrals did not always respond to the OPA in a timely manner. We also found that the OPA does not always follow up on outstanding referrals or does not follow up within the OPA's prescribed timeframe of 60 days. During our case file review of 313 petitions, we found

¹⁰⁷ The average number of days presented are for the year of the President's decision. Therefore, the original report and recommendation may have been sent to the White House in a prior fiscal year.

¹⁰⁸ We did not conduct audit work at the White House because it is outside of our jurisdiction.

that the OPA failed to follow up on 85 (43 percent) of the 198 referrals for which a response was not provided to the OPA within 60 days. Further, for 130 referrals for which the OPA did conduct follow-up, on average follow-up did not occur for 168 days (5.6 months).¹⁰⁹

Additionally, we found that the average response times for five components - the BOP institutions or contract facilities, USAOs, Civil Rights Division, FBI, and Criminal Division - materially exceeded the established timeframes. The average response time for these 5 components ranged from 105 days (3.5 months) to 489 days (1.3 years). Based on interviews and questionnaires sent to DOJ components that received referrals from the OPA, we found that common reasons provided as to why the components took so long to respond included: (1) workload demands, (2) management and staff changes, (3) time spent locating and reviewing files, (4) the inmate was transferred, (5) time spent contacting or coordinating with other components, and (6) the component lacked a system to track and monitor the request.

Further, we found that petitions were at the ODAG an average of 142 days (4.7 months) pending review of the report and recommendation, while petitions were at the White House for an average of 282 days (9.4 months) before a decision was made by the President. We believe the length of these processing times significantly contributed to the increased backlog of clemency petitions from FY 2005 to the end of FY 2010.

We make the following 10 recommendations to assist the OPA, DOJ components, and the ODAG in more efficiently processing clemency petitions. We believe that these recommendations would facilitate a further reduction of the clemency petition backlog and contribute to a more timely process for deciding clemency petitions.

Recommendations

We recommend that the OPA:

1. Establish and implement a policy and procedure ensuring follow-up is conducted within established timeframes for outstanding referrals.
2. Process all future referrals electronically.

¹⁰⁹ This includes instances in which the OPA may have conducted follow-up prior to its 60-day deadline.

3. Include an aging report detailing all open referrals when following up with United States Attorneys' Offices.
4. Develop procedures to ensure that its case management system is updated and documents changes in the status of referrals.

We recommend that the BOP:

5. Issue additional guidance to ensure that its Wardens comply with Program Statement 1330.15. The additional guidance should include procedures for monitoring or tracking these referrals.

We recommend that EOUSA:

6. Issue additional guidance to the United States Attorneys' Offices reminding them to comply with the timeframes in the U.S. Attorneys' Manual and notify the OPA of expected delays in responding to the OPA within the 30 day request. The additional guidance should include examples of policies and procedures developed by the U.S. Attorneys in the Eastern District of Kentucky and the District of Massachusetts.

We recommend that the Civil Rights Division:

7. Develop procedures to ensure that it complies with the U.S. Attorneys' Manual in responding to the OPA's referrals within the established timeframes. The procedures should be developed in collaboration with components that generally respond to the OPA within the established timeframes, including the Antitrust Division and the Civil Division.

We recommend that the FBI:

8. Evaluate its established timeframe to process clemency petitions and establish an internal deadline that is attainable based on prioritizations and resources.

We recommend that the Criminal Division:

9. Develop procedures to ensure that it formally responds to all OPA referrals in accordance with established timeframes, including those cases for which Criminal Division's role is ancillary, even if the only response provided is to inform the OPA that based on its limited role in the case, the Criminal Division has no basis to opine on clemency matters related to the case.

We recommend that the ODAG:

10. Develop policies, procedures, and timeframes for reviewing the OPA's clemency reports and recommendations to help ensure that it responds to the OPA in a timely manner.

STATEMENT ON INTERNAL CONTROLS

As required by the *Government Auditing Standards* we tested as appropriate, internal controls significant within the context of our audit objectives. A deficiency in an internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to timely prevent or detect: (1) impairments to the effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations. Our evaluation of the OPA's internal controls was *not* made for the purpose of providing assurance on its internal control structure as a whole. The OPA's management is responsible for the establishment and maintenance of internal controls.

Through our audit testing, we did not identify any deficiencies in the OPA's internal controls that are significant within the context of the audit objectives and based upon the audit work performed that we believe would affect the OPA's ability to effectively and efficiently operate, to correctly state financial and performance information, and to ensure compliance with laws, regulations, and other applicable requirements.

Because we are not expressing an opinion on the OPA's internal control structure as a whole, this statement is intended solely for the information and use of the auditee. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

As required by the *Government Auditing Standards* we tested, as appropriate given our audit scope and objectives, selected transactions, records, procedures, and practices, to obtain reasonable assurance that OPA's management complied with federal laws, regulations, and requirements, for which noncompliance, in our judgment, could have a material effect on the results of our audit. The OPA's management is responsible for ensuring compliance with federal laws, regulations, and requirements applicable to the OPA. In planning our audit, we identified the following laws, regulations, and requirements that concerned the operations of the auditee and that were significant within the context of the audit objectives:

- U.S. Constitution Article 2, Section 2
- 28 C.F.R. § 0.35-0.36; and 1.1-1.11

Our audit included examining, on a test basis, OPA's compliance with the aforementioned laws, regulations, and requirements that could have a material effect on OPA's operations, through interviewing auditee personnel, analyzing ECTS data, reviewing a sample of petitions case files, and examining procedural practices. Nothing came to our attention that caused us to believe that the OPA was not in compliance with the aforementioned laws, regulations, and requirements.

OBJECTIVES, SCOPE, AND METHODOLOGY

Objectives

The objectives of our audit were to determine whether the OPA has established effective procedures for processing and reducing the backlog of clemency petitions, and whether DOJ components have established effective procedures to respond to the OPA's referrals in a timely manner.

Scope and Methodology

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The scope of our audit generally included clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010.¹¹⁰ As a result, our audit included 12,897 clemency petitions opened between November 1993 and September 2010, and 40,226 referral and status actions referred between December 1993 and September 2010, reported in OPA's Executive Clemency Tracking System (ECTS).¹¹¹ However, we considered information outside this period if it was relevant to the audit, and the instances in which we considered such information are noted in the report.

While at the OPA, we conducted interviews and obtained information on the OPA's processes. Additionally, we obtained information from OPA's

¹¹⁰ Throughout this audit report we use the term "pending" to indicate the status of clemency petitions included in the backlog. Petitions are pending at the OPA, ODAG, or White House. For example, a petition processed by the OPA that is awaiting review by the ODAG would be considered "pending" at the ODAG.

¹¹¹ The referral actions documented in ECTS track all OPA referrals to the petitioner, petitioner's attorney, and referral agencies, including the USAOs, FBI, and BOP, for information, comments, and recommendations on clemency petitions. Additionally, ECTS tracks the status of the report during the time it is at the ODAG or the White House for review.

ECTS and conducted a case file review of 313 petitions.¹¹² The case file review focused on confirming the information in ECTS, and reviewing the files for any additional information, including OPA referrals requesting information from entities, OPA follow-up with these entities, and the entities' responses.

We conducted additional audit work at the ODAG, BOP, FBI, Executive Office for U.S. Attorneys, and Criminal Division. Additionally, we sent questionnaires to 10 DOJ components and judgmental samples of 30 of 93 USAOs, 37 of 116 BOP institutions, and 4 of 13 BOP contract facilities, which are listed in Exhibit 29.¹¹³ The BOP institutions and contract facilities included Federal Prison Camps (FPC), Federal Correctional Institutions (FCI), United States Penitentiaries (USP), Federal Medical Centers (FMC), Federal Transfer Center (FTC), Federal Detention Centers (FDC), Metropolitan Correctional Centers (MCC), and Medical Centers for Federal Prisoners (MCFP).

¹¹² A statistical sample of 313 petitions was selected to provide effective coverage of audit relevant characteristics that include relief type, the number of referrals per petition, referral dates, and petition date through stratified sample designs.

¹¹³ Not all of the 93 USAOs, 116 BOP institutions, and 13 BOP contract facilities were included in the OPA's ECTS data covering clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FY 2005 and May 2010. Of the 93 USAOs, 90 were represented in the OPA ECTS data. Additionally, of the 116 BOP institutions and 13 BOP contract facilities as of October 2010, respectively 112 and 12 were represented in the OPA ECTS data.

EXHIBIT 29
DOJ COMPONENTS, U.S. ATTORNEYS OFFICES, AND
BOP INSTITUTIONS AND CONTRACT FACILITIES
THAT RECEIVED OIG QUESTIONNAIRES

DOJ COMPONENTS		
ATF	Civil Rights Division	FBI
Antitrust Division	Criminal Division	Tax Division
Civil Division	DEA	
U.S. ATTORNEY OFFICES		
Alaska	Illinois, Central	New Jersey
Alabama, Northern	Illinois, Northern	New York, Eastern
Alabama, Southern	Kansas	New York, Northern
California, Central	Kentucky, Eastern	Ohio, Northern
District of Columbia	Louisiana, Eastern	Ohio, Southern
Florida, Middle	Massachusetts	South Carolina
Florida, Northern	Michigan, Eastern	Texas, Western
Florida, Southern	Montana	Utah
Hawaii	North Carolina, Western	Virginia, Eastern
Iowa, Southern	New Hampshire	Wisconsin, Western
BOP INSTITUTIONS		
Alderson FPC	Elkton FCI	Oklahoma City FTC
Ashland FCI	Florence High USP	San Diego MCC
Beaumont Low FCI	Forrest City Low FCI	Schuylkill FCI
Beaumont USP	Fort Dix FCI	Seagoville FCI
Big Spring FCI	Fort Worth FCI	SeaTac FDC
Butner Low FCI	Gilmer FCI	Springfield MCFP
Butner Med II FCI	La Tuna FCI	Tallahassee FCI
Carswell FMC	Leavenworth USP	Talladega FCI
Coleman II USP	Lexington FMC	Texarkana FCI
Coleman Med FCI	Manchester FCI	Tucson USP
Danbury FCI	Marianna FCI	Victorville Med I FCI
Dublin FCI	Miami FCI	
Edgefield FCI	New York MCC	
BOP CONTRACT FACILITIES		
Big Spring Correctional Center	Reeves County Detention Center I & II	
Eden Detention Center	Taft Correctional Institution	

Source: OIG

The interview and questionnaire questions that we presented to DOJ components, USAOs, and BOP institutions and contract facilities were to gain an understanding of:

- the entity's past performance of responding to OPA's referrals, specifically the causes of delayed and non-responses;
- processes for receiving, responding to, and monitoring the responses to OPA's referrals requesting information;
- established timelines for responding to OPA's referrals; and
- suggestions for improvement.

Our sampling methodology for the USAOs began by analyzing the ECTS data related to OPA referrals made to the USAOs. We analyzed the data in the following five categories:

- greatest number of outstanding OPA referrals, as of May 28, 2010;
- greatest amount of time outstanding for an OPA referral, as of May 28, 2010;
- greatest number of responses to OPA referrals;
- greatest amount of time for a response to an OPA referral; and
- greatest average response time to OPA referrals.

We ranked the results for each category and selected the top 10 USAOs from each category. Based on our results, 31 USAOs were to be included in our sample since some USAOs were ranked in the top 10 for more than one category. However, 1 USAO was removed from the sample due to ECTS data entry errors and our sample was reduced to 30 USAOs.

Our sampling methodology for the BOP institutions was slightly different from the methodology used for the USAOs. For the BOP institutions, we began by analyzing the ECTS data related to OPA referrals made to the BOP institutions. We analyzed the data into the following five categories:

- greatest number of outstanding OPA referrals, as of May 28, 2010;
- greatest amount of time outstanding for an OPA referral, as of May 28, 2010;

- greatest number of actions on OPA referrals;¹¹⁴
- greatest amount of time for an action on an OPA referral; and
- greatest average amount of time for action on OPA referrals.

We ranked the results for each category and selected the top 10 BOP institutions from each category.¹¹⁵ Based on our results, 37 BOP institutions were included in our sample since some institutions were ranked in the top 10 for more than one category. For the BOP contract facilities, we began by analyzing the ECTS data related to OPA referrals made to BOP contract facilities. The sampling methodology for the 12 BOP contract facilities was based on ranking the contract facilities by number of OPA referrals. We found that the top 4 BOP contract facilities received 468 of the total 597 (78 percent) OPA referrals. Therefore, we selected the top four BOP contract facilities to receive our questionnaire.

In order to evaluate the reliability of the information in ECTS, we reviewed the ECTS data included in our original scope, which was clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FY 2005 and May 28, 2010. This included 12,208 petitions with 37,122 referral and status actions. We found that this ECTS data included 62 data entry errors. Specifically, we found:

- 30 instances in which the date of the referral to an entity was after the date of the entity's response,
- 26 instances in which the date the petition was received at the OPA was after the date a referral was made to an entity, and
- 6 instances in which there was a response date but there was no date for the referral to an entity.

We provided lists of all ECTS data entry errors to the Pardon Attorney for review and explanation. The Pardon Attorney responded by providing explanations for a few of the errors, but conceded that the majority were data entry errors. When possible the OPA also corrected the ECTS data entry errors.

¹¹⁴ An action includes a response by the BOP Warden to the OPA referral, or the OPA closed the referral due to the number of days outstanding and no response was received.

¹¹⁵ Due to ties in the category "greatest number of outstanding OPA referrals, as of May 28, 2010," 15 BOP institutions were included in the rankings for this category.

We further tested the ECTS data included in the scope of our audit, covering clemency petitions pending at the beginning of FY 2005 and clemency petitions opened between FYs 2005 and 2010. We found that this ECTS data included 31 data entry errors. Specifically, we found:

- 3 instances in which the date of the referral to an entity was after the date of the entity's response,
- 11 instances in which the date the petition was received at the OPA was after the date a referral was made to an entity,
- 2 instances in which there was a response date but there was no date of the referral to an entity,
- 11 instances in which the date of the referral to an entity was after the date of the final decision by either the White House or by the OPA, and
- 4 instances in which there is a referral but there are no dates for the referral to the entity or the entity's response.

Therefore, we removed the data errors from our scope, which resulted in 12,897 petitions opened between November 1993 and September 2010, resulting in 40,226 referral and status actions referred between December 1993 and September 2010. Based on the small percentage of errors (less than 0.1 percent), we determined the ECTS data to be reliable.

LAWS AND REGULATIONS

U.S. Constitution Article 2, Section 2

The President may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the U.S., except in cases of impeachment.

28 C.F.R. § 1.1 to 1.11

§ 1.1 Submission of petition; form to be used; contents of petition

A person seeking executive clemency by pardon, reprieve, commutation of sentence, or remission of fine shall execute a formal petition. The petition shall be addressed to the President and shall be submitted to the OPA, except for petitions relating to military offenses.¹¹⁶ Petitions and other required forms may be obtained from the OPA. Petition forms for commutation of sentence also may be obtained from the wardens of federal penal institutions. Each petition for executive clemency should include the information required in the form prescribed by the Attorney General.

§ 1.2 Eligibility for filing petition for pardon

No petition for pardon should be filed until the expiration of a waiting period of at least 5 years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least 5 years after the date of the conviction of the petitioner. Generally, no petition should be submitted by a person who is on probation, parole, or supervised release.

¹¹⁶ A petitioner applying for executive clemency with respect to military offenses should submit his or her petition directly to the Secretary of the military branch that had original jurisdiction over the court-martial trial and conviction of the petitioner. In such a case, a form furnished by the Pardon Attorney may be used but should be modified to meet the needs of the particular case.

§ 1.3 Eligibility for filing petition for commutation of sentence

No petition for commutation of sentence, including remission of fine, should be filed if other forms of judicial or administrative relief are available, except upon a showing of exceptional circumstances.

§ 1.4 Offenses against the laws of possessions or territories of the U.S.

Petitions for executive clemency shall relate only to violations of laws of the U.S. Petitions relating to violations of laws of the possessions of the U.S. or territories subject to the jurisdiction of the U.S. should be submitted to the appropriate official or agency of the possession or territory concerned.

§ 1.5 Disclosure of files

Petitions, reports, memoranda, and communications submitted or furnished in connection with the consideration of a petition for executive clemency generally shall be available only to the officials concerned with the consideration of the petition. However, they may be made available for inspection, in whole or in part, when in the judgment of the Attorney General their disclosure is required by law or the ends of justice.

§ 1.6 Consideration of petitions; notification of victims; recommendations to the President

Upon receipt of a petition for executive clemency, the Attorney General shall cause such investigation to be made of the matter as he or she may deem necessary and appropriate, using the services of, or obtaining reports from, appropriate officials and agencies of the Government, including the Federal Bureau of Investigation.

When a person requests clemency for a conviction of a felony offense for which there was a victim,¹¹⁷ and the Attorney General concludes from the information developed in the clemency case that investigation of the clemency case warrants contacting the victim, the Attorney General shall

¹¹⁷ For the purposes of this paragraph, "victim" means an individual who: (1) Has suffered direct or threatened physical, emotional, or pecuniary harm as a result of the commission of the crime for which clemency is sought (or, in the case of an individual who died or was rendered incompetent as a direct and proximate result of the commission of the crime for which clemency is sought, one of the following relatives of the victim (in order of preference): the spouse; an adult offspring; or a parent); and (2) Has on file with the Federal Bureau of Prisons a request to be notified pursuant to 28 C.F.R. 551.152 of the offender's release from custody.

cause reasonable effort to be made to notify the victim or victims of the crime for which clemency is sought:¹¹⁸

- That a clemency petition has been filed;
- That the victim may submit comments regarding clemency; and
- Whether the clemency request ultimately is granted or denied by the President.

In determining whether contacting the victim is warranted, the Attorney General shall consider the seriousness and recency of the offense, the nature and extent of the harm to the victim, the defendant's overall criminal history and history of violent behavior, and the likelihood that clemency could be recommended in the case.¹¹⁹

The Attorney General shall review each petition and all pertinent information developed by the investigation and shall determine whether the request for clemency is of sufficient merit to warrant favorable action by the President. The Attorney General shall report in writing his or her recommendation to the President, stating whether in his or her judgment the President should grant or deny the petition.

§ 1.7 Notification of grant of clemency

When a petition for pardon is granted, the petitioner or his or her attorney shall be notified of such action and the warrant of pardon shall be mailed to the petitioner. When commutation of sentence is granted, the petitioner shall be notified of such action and the warrant of a commutation shall be sent to the petitioner through the officer in charge of his or her place of confinement, or directly to the petitioner if the petitioner is on parole, probation, or supervised release.

§ 1.8 Notification of denial of clemency

Whenever the President notifies the Attorney General that he has denied a request for clemency, the Attorney General shall so advise the petitioner and close the case. Except in cases in which a sentence of death

¹¹⁸ For the purposes of this paragraph, "reasonable effort" is satisfied by mailing to the last-known address reported by the victim to the Federal Bureau of Prisons under 28 C.F.R. 551.152.

¹¹⁹ The provisions of this paragraph apply to clemency cases filed on or after September 28, 2000.

has been imposed, whenever the Attorney General recommends that the President deny a request for clemency and the President does not disapprove or take other action with respect to that adverse recommendation within 30 days after the date of its submission to him, it shall be presumed that the President concurs in that adverse recommendation of the Attorney General, and the Attorney General shall so advise the petitioner and close the case.¹²⁰

§ 1.9 Delegation of authority

The Attorney General may delegate to any officer of DOJ any of his or her duties or responsibilities under § 1.1 through 1.8.

§ 1.10 Procedures applicable to prisoners under a sentence of death imposed by a U.S. District Court¹²¹

The following procedures shall apply with respect to any request for clemency by a person under a sentence of death imposed by a U.S. District Court for an offense against the U.S. Other provisions set forth in this part shall also apply to the extent they are not inconsistent with this section.

Clemency in the form of reprieve or commutation of a death sentence imposed by a U.S. District Court shall be requested by the person under the sentence of death or by the person's attorney acting with the person's written and signed authorization. No petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner's direct appeal of the judgment of conviction and first petition under 28 U.S.C. 2255 have terminated. A petition for commutation of sentence should be filed no later than 30 days after the petitioner has received notification from the BOP of the scheduled date of execution. All papers in support of a petition for commutation of sentence should be filed no later than 15 days after the filing of the petition itself.¹²² The petitioner's clemency counsel may request to make an oral presentation of reasonable duration to the OPA in support of

¹²⁰ According to OPA officials, the OPA does not employ the 30 day rule and does not believe the rule has ever been enforced. This is because the OPA believes that the President may have more pressing matters to deal with than deciding on clemency petitions.

¹²¹ The provisions of § 1.10 apply to any person under a sentence of death imposed by a United States District Court for whom an execution date is set on or after August 1, 2000.

¹²² Papers filed by the petitioner more than 15 days after the commutation petition has been filed may be excluded from consideration.

the clemency petition.¹²³ The family or families of any victim of an offense for which the petitioner was sentenced to death may, with the assistance of the prosecuting office, request to make an oral presentation of reasonable duration to the OPA.

Clemency proceedings may be suspended if a court orders a stay of execution for any reason other than to allow completion of the clemency proceeding. Only one request for commutation of a death sentence will be processed to completion, absent a clear showing of exceptional circumstances.

§ 1.11 Advisory nature of regulations

The regulations contained in this part are advisory only and for the internal guidance of DOJ personnel. They create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, Section 2 of the Constitution.

U.S. Attorneys' Manual § 1-2.110 – 1-2.113

§ 1-2.110 Office of the Pardon Attorney

The OPA assists the President in the exercise of his power under Article II, Section 2, clause 1 of the Constitution. The OPA, under the direction of the Deputy Attorney General, receives and reviews all petitions for executive clemency, which includes pardon after completion of sentence, commutation of sentence, remission of fine and reprieve; initiates and directs the necessary investigations; and prepares a report and recommendation for submission to the President in every case. In addition, the OPA acts as a liaison with the public during the pendency of a clemency petition, responding to correspondence and answering inquiries about clemency cases and issues.

§ 1-2.111 Role of the U.S. Attorney in Clemency Matters

The OPA routinely requests the U.S. Attorney to provide comments and recommendations on clemency cases that appear to have some merit, as well as on cases that raise issues of fact.¹²⁴ These requests are made to the U.S. Attorney in the district(s):

¹²³ The presentation should be requested at the time the clemency petition is filed.

¹²⁴ While the decision to grant clemency generally is driven by considerations that differ from those that dictate the decision to prosecute, the U.S. Attorney's prosecutorial perspective lends valuable insights to the clemency process.

- of conviction,
- in which a petitioner currently resides, and
- in which the petitioner cooperated with the government.

The views of the U.S. Attorney are given considerable weight in determining what recommendations DOJ should make to the President. For this reason, and in order to ensure consistency, it is important that each request sent to the district receive the personal attention of the U.S. Attorney. Each petition is presented for action to the President with a report and recommendation from DOJ, and the recommendation by the U.S. Attorney is included in this report.¹²⁵

As a general matter, in clemency cases the correctness of the underlying conviction is assumed and the question of guilt or innocence is not generally at issue. However, if a petitioner refuses to accept guilt, minimizes culpability, or raises a claim of innocence or miscarriage of justice, the U.S. Attorney should address these issues.

In cases involving pardon after completion of sentence, the U.S. Attorney is expected to comment on the petitioner's post conviction rehabilitation, particularly any actions that may evidence a desire to atone for the offense. In pardon cases, the OPA will forward to the U.S. Attorney copies of the pardon petition and relevant investigative reports. These records should be returned to the OPA along with the response.

In commutation cases, U.S. Attorney comments may be sought on developments after sentencing that are relevant to the merits of a petitioner's request for mercy. In cases involving requests for commutation of sentence or remission of fine, copies of the clemency petition and such related records as may be useful, including the presentence report, judgment of conviction, prison progress reports, and completed statement of debtor forms will be provided.

¹²⁵ The U.S. Attorney can contribute significantly to the clemency process by providing factual information and perspectives about the offense of conviction that may not be reflected in the presentence or background investigation reports or other sources, such as the extent of the petitioner's wrongdoing and the attendant circumstances, the amount of money involved or losses sustained, the petitioner's involvement in other criminal activity, the petitioner's reputation in the community and, when appropriate, the victim impact of the petitioner's crime. On occasion, the OPA may request information from prosecution records that may not be readily available from other sources.

The OPA also routinely requests the U.S. Attorney to solicit the views and recommendation of the sentencing judge. If the sentencing judge is retired, deceased, or otherwise unavailable for comment, the U.S. Attorney's report should so advise. In the event the U.S. Attorney does not wish to contact the sentencing judge, the OPA should be advised accordingly so that the judge's views may be solicited directly.¹²⁶

The U.S. Attorney may support, oppose or take no position on a pardon request; however, it is helpful to have a clear expression of the office's position. The OPA generally asks for a response within 30 days. If an unusual delay is anticipated, the OPA should be advised when a response may be expected. If desired, the official views of the U.S. Attorney may be supplemented by separate reports from present or former officials involved in the prosecution of the case. The U.S. Attorney may of course submit a recommendation for or against clemency even if the OPA has not yet solicited comments from the district. The OPA informs the U.S. Attorney of the final disposition of any clemency petition on which he or she has commented.

§ 1-2.112 Standards for Considering Pardon Petitions

In general, a pardon is granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence. DOJ's regulations require a petitioner to wait a period of at least 5 years after conviction or release from confinement (whichever is later) before filing a pardon petition. In determining whether a particular petitioner should be recommended for a pardon, the following are the principal factors taken into account.

- 1. Post-conviction conduct, character, and reputation** - An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation customarily conducted by the FBI in pardon cases focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record. In assessing post-conviction accomplishments, each petitioner's life circumstances are considered in their totality: it may not be appropriate or realistic to expect "extraordinary" post-conviction achievements from

¹²⁶ Absent an express request for confidentiality, the Pardon Attorney may share the comments of the U.S. Attorney with the sentencing judge or other concerned officials whose views are solicited.

individuals who are less fortunately situated in terms of cultural, educational, or economic background.

- 2. Seriousness and relative recentness of the offense** - When an offense is very serious, a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. Victim impact may also be a relevant consideration.
- 3. Acceptance of responsibility, remorse, and atonement** - The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication. While the absence of expressions of remorse should not preclude favorable consideration, a petitioner's attempt to minimize or rationalize culpability does not advance the case for pardon. Persons seeking a pardon on grounds of innocence or miscarriage of justice bear a formidable burden of persuasion.
- 4. Need for relief** - The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. However, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness.
- 5. Official recommendations and reports** - The comments and recommendations of concerned and knowledgeable officials, particularly the U.S. Attorney whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision.¹²⁷

¹²⁷ Apart from the significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system.

§ 1-2.113 Standards for Considering Commutation Petitions

A commutation of sentence reduces the period of incarceration; it does not imply forgiveness of the underlying offense, but simply remits a portion of the punishment. It has no effect upon the underlying conviction and does not necessarily reflect upon the fairness of the sentence originally imposed. Requests for commutation generally are not accepted unless and until a person has begun serving that sentence. Nor are commutation requests generally accepted from persons who are presently challenging their convictions or sentences through appeal or other court proceeding.

The President may commute a sentence to time served or he may reduce a sentence, either merely for the purpose of advancing an inmate's parole eligibility or to achieve the inmate's release after a specified period of time. Commutation may be granted upon conditions similar to those imposed pursuant to parole or supervised release or, in the case of an alien, upon condition of deportation.

Generally, commutation of sentence is an extraordinary remedy that is rarely granted. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, such as cooperation with investigative or prosecutorial efforts that has not been adequately rewarded by other official action. A combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case.

The amount of time already served and the availability of other remedies (such as parole) are taken into account in deciding whether to recommend clemency. The possibility that DOJ itself could accomplish the same result by petitioning the sentencing court, through a motion to reward substantial assistance under Rule 35 of the Federal Rules of Criminal Procedure, a motion for modification or remission of fine under 18 U.S.C. § 3573, or a request for compassionate relief under 18 U.S.C. § 3582(c)(1), will also bear on the decision whether to recommend Presidential intervention in the form of clemency. When a commutation request is based on the serious illness of the petitioner, transmission of the U.S. Attorney's response by facsimile in advance of mailing the original is always appreciated.

When a petitioner seeks remission of fine or restitution, the ability to pay and any good faith efforts to discharge the obligation are important considerations. Petitioners for remission also should demonstrate satisfactory post-conviction conduct.

On January 21, 1977, the President by Proclamation 4483 granted pardon to persons who committed non-violent violations of the Selective Service Act between August 4, 1964, and March 28, 1973, and who were not Selective Service employees. Although a person who comes within the described class was immediately pardoned by the proclamation, the OPA issues certificates of pardon to those within the class who were actually convicted of a draft violation and who make written petition to the Department on official forms. When these petitions are received by the OPA, they are forwarded to the U.S. Attorney for the district in which the applicant was convicted to verify the facts of the case. The verification should be returned to the OPA promptly.

CLEMENCY DEFINITIONS AND GUIDELINES

Pardons

A pardon is an indication of forgiveness. While a Presidential pardon will restore certain rights lost as a result of the pardoned offense and should lessen to some extent the stigma arising from a conviction, it will not erase or expunge the record of conviction.¹²⁸

Under DOJ's rules governing petitions for executive clemency, there is a minimum waiting period of 5 years after completion of sentence before petitioners are eligible to apply for a Presidential pardon. The waiting period begins on the date of the petitioner's release from confinement. Alternatively, if the conviction resulted in probation or a fine, but no term of imprisonment, the waiting period begins on the date of sentencing. A waiver of any portion of the waiting period is rarely granted and then only in the most exceptional circumstances. In order to request a waiver, a petitioner must complete the pardon petition and submit it with a letter explaining why the petitioner believes the waiting period should be waived.

Pardon petitions for individuals who are not residents of the United States cannot be processed by the OPA. If the petitioner is in the United States unlawfully, the OPA returns the petition to the petitioner with a letter explaining that the petition cannot be processed because the petitioner is breaking the law with their unlawful presence in the country. If the petitioner resides outside the United States, the OPA is still unable to process the pardon petition because the FBI would not be able to conduct a background investigation.

Military Pardon

A person wishing to seek a Presidential pardon for a military conviction may apply under the regular pardon procedure. Petitioners for pardon of military courts-martial are subject to the same 5-year waiting period as a regular pardon petitioner. However, petitions for pardon of a military offense should first be sent to the Secretary of the military branch that had

¹²⁸ In 1992, a Presidential pardon became the sole means by which a federally convicted felon could seek relief from the firearms disabilities attendant to his or her conviction. Since that time, Congress has prohibited the Bureau of Alcohol, Tobacco, Firearms and Explosives from expending appropriated funds to process and investigate petitions for relief from firearms disabilities pursuant to the program authorized by 18 U.S.C. § 925(c).

original jurisdiction. Once the military pardon petition has been reviewed by the appropriate Secretary of the military, the petition along with any required documentation is forwarded to the OPA for processing. Pardon of a military offense will not change the character of a military discharge.¹²⁹

Commutation

A commutation is a reduction of a sentence imposed upon conviction of a federal offense, which is different than a pardon after completion of a sentence. According to the U.S. Attorneys' Manual Standards for Consideration of Clemency Petitions, "[g]enerally, commutation of sentence is an extraordinary remedy that is rarely granted." The President's clemency power also includes the authority to remit, or reduce, the amount of a fine or restitution order that has not already been paid.¹³⁰

Petitioners seeking reduction of a period of probation, supervised release, or special parole should state this on the petition and the particular reasons why this portion of the sentence should be reduced, including the reasons that being on probation, supervised release, or special parole would be an unusual hardship to the petitioner. Petitioners should also explain why requesting the sentencing court to grant early termination of a term of supervision, pursuant to 18 U.S.C. § 3583(e)(1) or 18 U.S.C. § 4211, is not an adequate remedy.

Requests for commutation of a prison sentence generally are not accepted unless and until the petitioner has begun serving the sentence. In addition, commutation requests are generally not accepted from a petitioner who is currently challenging his or her conviction or sentence through appeal or other court proceeding. Accordingly, a petitioner should not complete and submit a commutation petition until they have concluded all judicial challenges to their conviction and sentence and have begun serving their sentence. In evaluating the merits of a commutation petition, clemency authorities take into consideration the amount of time the petitioner has already served and the availability of other remedies to secure the relief sought, such as parole or judicial action.

For individuals who are not United States citizens, it should be noted that commutation of sentence only shortens the prison sentence and will not

¹²⁹ An upgrade or other change to a military discharge may only be accomplished by action of the appropriate military authorities.

¹³⁰ Requests for the remission of a special assessment are not accepted. The special assessment is not considered to be a fine, and should not be included on a clemency petition.

result in a change of immigration status. A full pardon is the only form of executive clemency that might affect a person's immigration status. However, a person who is currently serving a prison term is not eligible to apply for a pardon. Accordingly, if a detainer has been lodged against the petitioner for deportation or removal, commutation of sentence, even if granted, will not prevent deportation or removal from the United States and may actually hasten the process.

Vietnam War Era Draft Evasion Pardon

President Carter, by Proclamation of January 21, 1977, pardoned certain persons who, during the Vietnam War era, violated the Military Selective Service Act by draft evasion acts or omissions committed between August 4, 1964, and March 28, 1973. The certificate of pardon will be issued only if the petitioner was convicted of such an offense. If the petitioner was arrested for or charged with a Military Selective Service Act violation for an offense committed during the relevant time period, but prosecution ended in some fashion other than conviction (such as dismissal of charges or an acquittal), the petitioner is not eligible to seek a certificate of pardon. Furthermore, President Carter's Pardon Proclamation applies only to violations of the Military Selective Service Act by civilians. In addition, the Proclamation does not apply to Military Selective Service Act violations involving force or violence, or to offenses committed by agents, officers, or employees of the Military Selective Service system in connection with duties or responsibilities arising out of their employment.¹³¹

Posthumous Clemency

It is the general policy of DOJ that requests for posthumous pardons for federal offenses are not processed for adjudication. The policy is grounded in the belief that the time of the officials involved in the clemency process is better spent on the pardon and commutation requests of living persons. Many posthumous pardon requests would likely be based on a claim of manifest injustice, and given that decades have likely passed since the event and the historical record would have to be scoured to objectively and comprehensively investigate such petitions, it is DOJ's position that the limited resources which are available to process requests for Presidential clemency are best dedicated to petitions submitted by persons who can truly

¹³¹ Because President Carter's Pardon Proclamation immediately pardoned all members of the class of offenders who met its criteria, the Pardon Attorney will issue a certificate evidencing the fact that the Proclamation applies to a specific individual if that person is able to demonstrate through appropriate court documentation that the Military Selective Service Act offense of which the person was convicted falls within the criteria described in the Proclamation.

benefit from a grant of clemency. The policy also recognizes that requests for posthumous pardons are less likely to involve issues generally explored in routine pardon investigations (such as the recent, or ongoing, rehabilitative efforts of a clemency petitioner), and are therefore less likely to derive benefit from the investigative techniques commonly used in the pardon process. The President, of course, is not bound by this policy.

APPENDIX IV

CLEMENCY PETITION RECEIPT AND PROCESSING

Processing Clemency Petitions

The OPA has few documented policies and procedures for processing clemency petitions. As a result, we identified and documented the following detailed procedures used by the OPA in processing clemency petitions.

Receipt of Clemency Petitions

When a clemency petition is received, the OPA runs a name check in ECTS to determine if the petitioner has filed for clemency previously.¹³² If an open petition is found in ECTS then the new petition is handled as case-related correspondence and given to the assigned OPA staff member for action. If a previously closed petition is found in ECTS, a new case is opened as long as the reason for any previous administrative closure is no longer valid, such as the prior petition was administratively closed because the petitioner had not met the 5-year waiting period. If the petitioner has not filed previously, a case is opened and a hardcopy file is created to include the petition and any other information and documents that were submitted with the petition.

Processing Pardon Petitions

Pardon petitions are processed by OPA attorneys under the supervision of the Pardon Attorney. For new pardon petitions, the OPA verifies the date of conviction and release from incarceration using BOP's SENTRY. For petitioners that served a period of probation, the date of conviction is verified with information from the U.S. Probation Office. If the petitioner has met the 5-year waiting period or a waiver is granted, the Pardon Attorney assigns the petition to one of the OPA attorneys for processing.¹³³

At every stage in the processing of a pardon petition, the merit of the petitioner is assessed using the standards included in the U.S. Attorneys' Manual. These standards include:

¹³² The OPA requires an original signature; therefore, the OPA cannot accept petitions via facsimile and will notify the petitioner of the missing original signature if it is not on the petition.

¹³³ Attorney assignment is designated by the Pardon Attorney, based on the current Attorney caseloads, other workloads, and whether one Attorney has a specific skill or expertise that would assist in processing the petition.

- post-conviction conduct, character, reputation, and involvement in community service, charitable, or other meritorious activities;
- the nature, seriousness, and relative recentness of the offense;
- acceptance of responsibility, remorse, and atonement;
- need for relief; and
- official recommendations and reports.

If at any stage during the process of reviewing and investigating pardon petitions, the petition is found not to be of sufficient merit, a report recommending denial is prepared and submitted to the ODAG for review and signature.

The OPA's initial processing steps include screening the petition to determine whether the petitioner is eligible to apply for a pardon and obtaining additional information from the petitioner or the petitioner's attorney to complete or clarify the petition. In addition, the OPA requests that the U.S. Probation Office in the district of conviction provide: (1) the presentence investigation report; (2) the judgment of conviction, including the statement of reasons the sentence was imposed under the Sentencing Reform Act, if applicable; and (3) information concerning the petitioner's adjustment to supervision and satisfaction of financial obligations imposed as part of the sentence. Based upon the totality of this information, the petition is assessed to determine whether or not the pardon request appears to be of sufficient merit or raises questions of such significance that a further investigation of the petitioner's background should be undertaken by the FBI. The FBI's background check for petitioners is similar in type to the background investigation conducted of federal appointees.

If an FBI background investigation is conducted, the merit of the petition is reassessed based on the information provided by the FBI. If further investigation is still warranted, the OPA requests the views and recommendation of the USAO in the district of conviction and the sentencing judge.¹³⁴ If the petitioner's crime(s) involved an identifiable victim, the OPA will ask the USAOs to contact the victim to inform them of the petitioner's request for pardon and obtain the victim's views, if they wish to comment on

¹³⁴ The OPA may also request the views and recommendation of the USAO in the district in which the petitioner currently resides.

the request. If the case was prosecuted by one of DOJ's litigating divisions, such as the Criminal Division or Tax Division, the OPA requests the views and recommendation of the Assistant Attorney General of the appropriate Division. Additionally, the OPA may request the views of other government components due to the component's involvement or knowledge of the crime, such as the Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms and Explosives; or U.S. Immigration and Customs Enforcement.

After all relevant information is obtained the OPA reassesses the petition and makes a recommendation regarding the clemency request. Based on the OPA's recommendation, the appropriate report is prepared and transmitted to the Deputy Attorney General for review and signature.

Once the ODAG approves the report and recommendation, the Deputy Attorney General signs the report and returns it to the OPA. The OPA prepares a new cover sheet for the White House and transmits the report to the White House for a final decision.

Processing Commutation Petitions

The commutation petition includes check boxes for the petitioner to indicate the form of relief sought, including: (1) reduction of prison sentence only, (2) reductions of prison sentence and remission, (3) remission of fine and/or restitution, and (4) "other" that allows the petitioner to fill in the blank. Presently, the Pardon Attorney processes all commutation petitions with the assistance of two OPA support staff members, rather than assigning the commutations to OPA attorneys. The OPA's initial review includes determining whether the presentence report, order of judgment and conviction, and the most recent BOP progress report were included with the petition. If the required documentation is not provided, the OPA will request the missing information from the BOP Warden of the facility in which the petitioner is currently incarcerated.¹³⁵ Additionally, the petition is reviewed for merit and whether the petition indicates that clemency might be an appropriate remedy. The OPA staff also obtains additional information about the petitioner, the prosecution, and, if relevant, any codefendants from the BOP SENTRY, and the Public Access to Electronic Court Records system, as well as any available, relevant judicial opinions in Westlaw.

¹³⁵ While we were conducting fieldwork, the process for requesting reports from the BOP was revised. The OPA established a separate e-mail address to request and receive documentation electronically from the BOP. Previously, all referrals were processed through the mail.

After required documentation has been provided, the OPA evaluates the merit of the petitioner. If further investigation is still warranted, the OPA refers the matter to the USAO in the district of conviction and sentencing judge for comments and recommendation, and if applicable, requests the USAOs to contact the victim to obtain the victim's views, if they wish to comment on the request. Depending on the circumstances related to the petitioner's offense, the OPA may also contact one of DOJ's litigating divisions or other government components to request comments and recommendations on the petitioner's request for clemency.

After all relevant information is obtained the OPA reassesses the petition and makes a recommendation regarding the clemency request. Based on the OPA's recommendation, the appropriate report is prepared and transmitted to the Deputy Attorney General for review and signature.

Once the ODAG approves the report and recommendation, the Deputy Attorney General signs the report and returns it to the OPA. The OPA prepares a new cover sheet for the White House and transmits the report to the White House for a final decision.

Review of Clemency Report and Recommendations

The Pardon Attorney reviews each report and recommendation to ensure that the recommendation complies with the standards established in the U.S. Attorneys' Manual. In addition, all OPA reports and recommendations are reviewed by the ODAG, as it is the ODAG's recommendation that represents DOJ in these matters. Finally, the recommendation is reviewed by the White House and the power to grant clemency is vested solely in the President. If at any time during the process the reviewer believes that the recommendation should be reconsidered, the report is returned to the OPA for additional review and a revised report is submitted. This process does not necessarily result in a different recommendation; only that additional consideration should be given to the petition.¹³⁶

It is important to note that for petitions for which a final decision has been pending for a significant amount of time, the OPA will conduct additional checks throughout the process to ensure all information is current and that the recommendation is still valid. These checks include follow-up

¹³⁶ Whether the OPA reaffirms a recommendation or makes a "new" recommendation on a petition, the report will be staffed through the ODAG and then back to the White House, as it is the Deputy Attorney General's recommendation that represents DOJ in these matters.

FBI background investigations, contact with the petitioner for additional information, and contact with the USAOs.

Clemency Decisions and Notification

After a final decision is made by the President, the White House notifies the OPA. If the President grants the request for clemency, the OPA prepares the appropriate certificates for the President's signature. Regardless of whether or not the President's final decision is to grant or deny clemency, the OPA notifies the petitioner and all parties contacted during its review and investigation of the President's final decision.¹³⁷

OPA Reports

The OPA produces three types of reports for providing recommendations on clemency petitions to the ODAG and the White House.

- **The summary (group) report** is used to recommend denials of multiple pardon or commutation petitions. This report summarizes the petitions included in the report, and includes the following basic information about the petitioner in an appendix: petitioner's name, offense, district, sentence dates, and release date or projected release date.
- **The summary (short narrative) report** is used for recommending denials of individual pardon and commutation petitions. The report includes a one page or slightly longer narrative summarizing the petition, the results of the OPA's review and investigation, and the basis for recommending denial. This format is utilized when the petition for clemency presently lacks merit, but may become more meritorious in future years, or when the petitioner or the petitioner's offenses are publicly known and higher authority requires sufficient information concerning the petition to answer any inquiries it might receive.
- **The full (long narrative) report** is the only report used for recommendations to grant clemency for pardon and commutation petitions. It may also be used to recommend the denial of clemency for petitioners and cases of great notoriety, when there is considerable prosecutorial importance, or for petitioners of sufficient merit to warrant further investigation, including the views and

¹³⁷ These agencies and individuals may include the BOP, U.S. Probation Office, FBI, USAOs, sentencing judge, and any victims contacted.

recommendations of the investigative agency, USAOs, or prosecuting agency, sentencing judge, any identifiable victims, and investigating agency. This format provides detailed information related to the petitioner, the petitioner's reason for the clemency request, comments of officials, and the OPA's reasons for recommending a grant or denial of clemency.



U.S. Department of Justice

Office of the Pardon Attorney

Washington, D.C. 20530

AUG 29 2011

MEMORANDUM

TO: Raymond J. Beaudet
Assistant Inspector General for Audit
Office of the Inspector General

FROM: Ronald L. Rodgers *RLR*
Pardon Attorney

SUBJ: Office of Inspector General Audit of Department of Justice Processing
of Clemency Applications; Formal Comments on Draft Report

Subject audit resulted in the issuance of four recommendations to assist the Office of the Pardon Attorney (OPA) in more efficiently processing clemency applications. We agree with each of these four recommendations, which will be discussed in brief detail below.

The first recommendation called for OPA to "Establish and implement a policy and procedure ensuring that follow-up is conducted within established timeframes for outstanding referrals" (requests to external agencies for comment or information regarding clemency applications under review in OPA). Commencing immediately, at the end of each month, the Pardon Attorney will review a report that identifies which referrals have not been answered by the requested completion date (normally 30 days). At the direction of the Pardon Attorney, appropriate support staff personnel will send an electronically generated reminder to the organization to which the request was directed before the expiration of 60 days from the date of the original request. The electronic reminder notices will be repeated thereafter on a monthly basis until the referral response is received.

The second recommendation called for OPA to "Process all future referrals electronically." Since earlier in 2011, OPA has processed the overwhelming majority of its clemency referrals to United States Probation Offices and Department of Justice components by means of electronic transmission. We will continue to send referrals electronically to the United States Probation Offices, which have been very receptive to this form of communication, and henceforth will process all referrals with Departmental components by electronic means. We are committed to the electronic transfer of clemency referrals, but we are mindful that there may be a few situations in which electronic communication with non-Department of Justice agencies or individuals (such as federal district judges who sentenced clemency petitioners) may not be possible because the agency or individual to whom the referral is directed is reluctant to communicate in this fashion. In that event, OPA will be forced to process the referral through standard mailing, but will monitor the response time of the recipient in accordance with the procedures noted in connection with the first recommendation, above, and will conduct

appropriate follow-up efforts by available means within established timeframes

The third recommendation called for OPA to "Include an aging report detailing all open referrals when following-up with United States Attorneys Offices." Commencing immediately, this information will be transmitted in follow-up efforts regarding untimely referral responses from United States Attorneys Offices to which clemency matters have been referred for comment.

The fourth recommendation called for OPA to "Develop procedures to ensure that its case management system is updated and documents changes in the status of referrals." Through the centralization of the follow-up process with the Pardon Attorney described in the response to the first recommendation, the Pardon Attorney and support staff personnel dedicated to this effort will ensure the timely updating of the referral process in the presently employed Executive Clemency Tracking System. With OPA's future adoption of the IQ tracking system (presently in development and projected to become operational in FY 2012), the updating process will be substantially streamlined when follow-up correspondence is initiated.

Our official comments regarding subject audit would be incomplete without our taking the opportunity to express our appreciation to the auditing team from the Denver Regional Audit Office of the Office of the Inspector General, Department of Justice, for their fair and comprehensive audit and review of our activities. The audit team members could not have been more professional in the performance of their duties, and their suggestions to us for improving the efficiency of the manner in which we process applications for executive clemency were extremely useful.

Attached hereto is the record of sensitivity review that has been completed. We are aware of no reason that the audit report cannot be publicly released.

Enclosure

cc: David M. Sheeren
Regional Audit Manager
Denver Regional Audit Office



U.S. Department of Justice

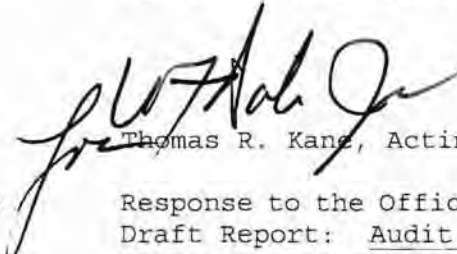
Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

September 1, 2011

MEMORANDUM FOR DAVID M. SHEEREN
REGIONAL AUDIT MANAGER
DENVER REGIONAL AUDIT OFFICE

FROM:  Thomas R. Kane, Acting Director

SUBJECT: Response to the Office of Inspector General's (OIG)
Draft Report: Audit of the Department of Justice
Processing of Clemency Petitions

The Bureau of Prisons (BOP) appreciates the opportunity to respond to the open recommendation from the draft report entitled Audit of the Department of Justice Processing of Clemency Petitions.

Please find the Bureau's response to the recommendation below:

Recommendation #5: Issue additional guidance to ensure that its Wardens comply with Program Statement 1330.15. The additional guidance should include procedures for monitoring or tracking these referrals.

Response: The Bureau concurs with the recommendation. Additional guidance was issued on August 18, 2011, ensuring wardens comply with Program Statement 1330.15, Petition for Commutation of Sentence. This guidance included procedures for monitoring and tracking referrals. We request this recommendation be closed.

If you have any questions regarding this response, please contact H. J. Marberry, Assistant Director, Program Review Division, at (202) 353-2302.



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

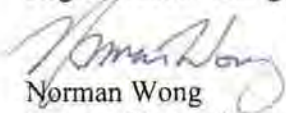
Room 2261, RFK Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

(202) 252-1000

MEMORANDUM

DATE: AUG 30 2011

TO: David M. Sheeren
Regional Audit Mnager

FROM: 
Norman Wong
Deputy Director/Counsel to the Director
Executive Office for United States Attorneys

SUBJECT: Response to OIG's Report Entitled: *Audit of the Department of Justice Processing of Clemency Petitions*

This memorandum is submitted by the Executive Office for United States Attorneys (EOUSA) in response to the August 2011 audit report by the Office of Inspector General (OIG) entitled, "*Audit of the Department of Justice Processing of Clemency Petitions.*"

We appreciate the opportunity to comment on the report. The report makes one recommendation for EOUSA. Recommendation No. 6 on page 65 states that EOUSA:

Issue additional guidance to the United States Attorneys' Offices reminding them to comply with the timeframes in the U.S. Attorneys' Manual and notify the OPA of expected delays in responding to the OPA within the 30 day request. The additional guidance should include examples of policies and procedures developed by the U.S. Attorneys in the Eastern District of Kentucky and the District of Massachusetts.

EOUSA agrees with this recommendation and has already taken responsive action. In response to the OIG recommendation, EOUSA recently issued the attached guidance memorandum to the United States Attorneys' Offices regarding their responses to OPA requests.

In light of this action, EOUSA requests that OIG close recommendation No. 6 in this audit report.

Attachment

Memorandum



Subj: CRT Response re: Draft Audit Report – DOJ Processing of Clemency Petitions	Date September 6, 2011
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To: Office of the Inspector General	From: Roy L. Austin, Jr. Deputy Assistant Attorney General Civil Right Division
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Through this memorandum, the Civil Rights Division (CRT) would respectfully request that you reconsider how it is referenced in your Final Report of the “Audit of the Department of Justice Processing of Clemency Petitions.”

Based on your Draft Audit Report (“Draft Report”), CRT had only two clemency petitions at issue between 2005 and 2010. One of the petitions was referred to CRT on January 10, 2002 and CRT responded on September 30, 2002, 263 days later. Of the employees who worked on the petition, the last one left DOJ in 2005, which is why we cannot explain the delayed response. The fact that this petition was apparently still at issue more than two years later, in 2005, was certainly not the fault of CRT.

The second petition was purportedly referred to CRT on August 9, 2000 and we explained that we have no record of receiving it. Due to the enormous amount of correspondence received by CRT’s Criminal Section, the Section has a robust correspondence management system and this was checked and there is no record of having received this petition. Notably, your Draft Report notes that OPA often failed to follow up on referrals to components. If possible, we would be interested in any information that you have that shows that OPA followed up with CRT during the 6.2 years that this petition was pending. If there is no record of any follow up or a clear record that CRT received the petition, a fair conclusion would be that CRT never received it. It would be highly unlikely that CRT would not respond had it received the petition. I know the United States Attorney’s Offices (“USAO”) also questioned the quality of ECTS data. Considering the poor quality of OPAs follow up in the early 2000s, the fact that some agencies said that they never received petitions supposedly sent should be stated in the Executive Summary in the list of explanations for delayed responses. It is also noteworthy that due to the length of time this second petition was pending, it is not part of your calculation of averages and though CRT is shown with an average of 263 days, it is actually just an average of one and there should probably be a footnote explaining that. (See Exhibit 19). Accordingly, given the considerable uncertainty about whether CRT ever received this petition, it seems reasonable to reflect this fact in the report.

We also are concerned that the manner in which CRT is noted in the report is misleading. On pages vii and xv of the Executive Summary, and pages 27, 41 and 64 of the Report, CRT is

grouped with BOP, the USAOs, FBI and Criminal Division as “components that materially exceeded the established timeframes for responding to OPA referrals.” BOP received approximately 4,400 referrals, USAOs 788, FBI 1,110 and the Criminal Division 19. As noted above, CRT received one petition in a decade, with the receipt of other petition in question. It seems that the reader should get some context as to the nature of your concern from the first time that it is mentioned. At a minimum, the first mention in the Executive Summary and the Report should note the number of referrals reportedly sent to each agency by OPA and the date the most recent referral was sent. We feel that Exhibit 20 supports the need for this clarification. In Exhibit 20, CRT is the only agency for which there are no applications at the agency during the time period analyzed. It is not until very late in the Report, on pages 51 and 52, that some context regarding CRT’s situation is provided.

While we certainly intend to implement your recommendation to ensure that we comply with the United States Attorneys’ Manual (“USAM”) for processing petitions in the future, it should come as little surprise that there is no current formal protocol beyond following the USAM when the Division is aware of having received just one referral in the last decade, if not longer.

Thank you in advance for considering this additional information. I would be happy to further discuss this with you. I can be reached at 202.514.3845.



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

August 30, 2011

Cynthia A. Schnedar
Acting Inspector General
Office of the Inspector General
U.S. Department of Justice
Suite 4706
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Ms. Schnedar:

The Federal Bureau of Investigation (FBI) appreciates the opportunity to review and respond to your draft report entitled, "Audit of the Department of Justice Processing of Clemency Petitions" (hereinafter "Report").

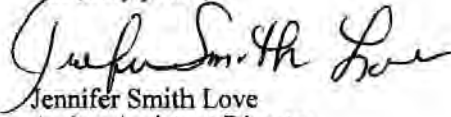
We are pleased that your Report recognizes the "unique role" the FBI plays in the clemency process. Specifically, your report notes that requests made by the Office of the Pardon Attorney (OPA) to the FBI are often "more complex" than referrals to other DOJ law enforcement agencies. This is because, in addition to rendering an opinion on the clemency petition, the FBI performs background investigations on petitioners and provides foreign language translation services to OPA. The need for thoroughness in the FBI's background investigations is self-evident, given the impact of the clemency decision, which affects significant interests, including the petitioner's right to possess a firearm. We are also pleased that your audit reports that the FBI responds to OPA's translation requests within established timeframes -- on average within 14 days.

We remain concerned that readers may mistakenly conclude that OPA's Executive Clemency Tracking System (ECTS) data reported in the examples contained in your Report at Exhibits 7 and 25 reflect FBI's actual processing times. Three examples are listed with "ECTS Total Time" of 1,431 days, 1,479 days and 2,692 days. In fact, it took the FBI 53 days, 161 days and approximately 105 days (respectively) to process those three cases. The Report does not focus on these actual time frames and instead highlights ECTS data. As OPA acknowledged through its case files, the ECTS entries do not accurately reflect FBI's actual processing and response times. Focusing on ECTS information unfairly suggests FBI took up to 27 times longer to process and respond to OPA's request than it actually did take in those three cases. While we acknowledge that we exceeded our internal deadlines for processing and responding to OPA requests, and we concur with your recommendation that the FBI establish an internal deadline to process clemency petitions that is attainable, we do not feel these exhibits fairly represent the FBI's actual processing performance during the review period.

In conclusion, the FBI appreciates the professionalism exhibited by your staff throughout this audit. Enclosed herein is the FBI's response to your recommendation. Please

feel free to contact me at 202-324-2903 should you have any questions or need further information.

Sincerely yours,

A handwritten signature in cursive script that reads "Jennifer Smith Love".

Jennifer Smith Love
Acting Assistant Director
Inspection Division

Enclosure

**The Federal Bureau of Investigation's (FBI) Response to the
Office of the Inspector General's Audit of the Department of Justice Processing of
Clemency Petitions**

Recommendation #1: *Evaluate its established timeframe to clemency petitions and establish an internal deadline that is attainable based on prioritizations and resources.*

FBI Response to Recommendation #1: Concur - The FBI, Security Division, concurs with this recommendation. The FBI has revisited its internal milestones based upon prioritizations and resources and determined that the 120 calendar day timeframe is appropriate for processing clemency petitions. Since May 2011, the FBI has seen a decrease in the average time to process a clemency petition case, averaging 152 calendar days to process clemency petitions for full field cases and 65 calendar days to process clemency petitions for limited cases. The FBI will continue to prioritize caseloads to achieve the 120 calendar day milestone.



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE OFFICE OF THE INSPECTOR GENERAL

TO: Raymond J. Beaudet
Assistant Inspector General For Audit

FROM: Adam S. Lurie *ASL*
Senior Counsel to the Assistant Attorney General, Criminal Division

SUBJECT: Draft Audit Report – Audit of Department of Justice Processing of
Clemency Petitions: Comments on Recommendations

DATE: August 30, 2011

I write on behalf of the Criminal Division to provide comments on the recommendations contained in the Draft Audit Report – Audit of Department of Justice Processing of Clemency Petitions (the “Draft Report”). As discussed in further detail below, and as explained to the Office of the Inspector General (OIG) during the audit, the Criminal Division does not agree with the Draft Report’s findings in support of its recommendation concerning the Criminal Division (the “Recommendation”).

- 1. In concluding that the Criminal Division takes an average of 489 days to respond to an OIG “referral,” the Draft Report unfairly relies upon cases in which the Criminal Division played an ancillary role, and/or does not properly credit the Criminal Division for its prompt response time in cases in which it played a primary litigating role:** In the Draft Report, OIG disagrees with the Criminal Division’s view that cases in which the Criminal Division played an ancillary role should not be relied upon in OIG’s calculation of the number of days taken by the Division to respond to OIG referrals. As we explained to OIG in several emails in July and August 2011, in seven cases that OIG counted in its calculation, the Criminal Division played minor, ancillary roles. For instance, OIG included in its calculation one case in which the Division’s response time was 334 days; the Division’s only role in that case, however, was to mediate a dispute concerning the use of a cooperating witness between two U.S. Attorney’s Offices. In another matter where the Division’s response time was 539 days, the Criminal Division merely helped place an individual in the Witness Security Program. While the Division may have eventually provided some response to OPA in some of these ancillary matters, the delay in providing a formal response would not be unexpected, as the Division would have naturally deferred to the primary prosecuting office for a formal response regarding clemency or other matters.

SUBJECT: Draft Audit Report – Audit of Department of Justice Processing of Clemency Petitions: Comments on Recommendations

Moreover, the Criminal Division submits that – at a minimum – the Draft Report should more fully credit the Criminal Division for its prompt response time where it played a primary litigating role. The Draft Report notes this much shorter response time in cases in which the Division played a primary litigating role (66 days), but states only that OIG “disagree[s] with the Criminal Division’s assertion” that this response time should be the one reported. Draft Report, at 58. We strongly believe that the OIG should credit the Criminal Division in a more meaningful way for this *substantially lower* response time in cases in which the Division played the primary litigating role.

By continuing to emphasize the 489-day calculation throughout the Draft Report, yet failing to credit adequately the Division for its short turnaround time in cases in which the Division had the primary litigating role, the Draft Report fails to credit the number that most accurately reflects the manner in which criminal prosecutions are actually handled by the Department. Further, as written, the Draft Report unfairly leaves readers with the misimpression that the Criminal Division typically fails to respond to referrals in a timely fashion. This, however, is not accurate.

- 2. The Draft Report unfairly relies upon questionable OPA records when calculating the Division’s response time:** During the audit, the Criminal Division repeatedly questioned to OIG the reliability of OPA’s Executive Clemency Tracking System (“ECTS”). Given the age of the Division’s cases that OIG reviewed, and the Division’s ancillary role in many matters (as discussed above), the Division did not have evidence to challenge ECTS’ accuracy in every case. The Criminal Division, however, did provide evidence to OIG that the Criminal Division provided a response to OPA in more than one case; yet, ECTS did not have a record of those responses. For example, as Mythili Raman, Principal Deputy Assistant Attorney General and Chief of Staff, explained to OIG in her email dated July 22, 2011, in one recent case where the Division’s Public Integrity Section served as the primary prosecuting entity, the Criminal Division provided a response to OPA within 30 days of the referral. ECTS records, however, incorrectly indicated that the Division *did not* provide *any* response to OPA.

Notwithstanding OPA’s questionable records, the Draft Report does not account for the possibility that OPA’s data concerning the Criminal Division may not be accurate. The Draft Report’s failure to note this fact is not fair, particularly because the Division has provided clear evidence that ECTS was not always accurate with respect to Division cases.

- 3. The Draft Report, at page 58, erroneously claims that the Criminal Division stated that OIG “should not include older cases” when calculating the Criminal Division’s average response time:** The Division did not suggest that the OIG should not include older cases in its audit. Instead, the Criminal Division suggested that OIG should explicitly note in its Report that the cases that OPA referred to the Criminal Division were very old (involving criminal cases in which the sentences were handed down anytime between 1977

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and 2002), and should note that the age of these cases made it difficult to confirm the accuracy of the Division's response time. Put another way, the Division asked OIG to explicitly provide in its report this much-needed context for the OIG's findings.

In an email dated July 22, 2007, Ms. Raman explained that OIG's "findings cover an extraordinarily broad time period, which has made it difficult for OIG, OPA or the relevant component to find documents relating to those cases." Similarly, in my email dated August 1, 2011, to OIG, I explained that "[g]iven the age of these cases, it has been difficult to find additional information [regarding whether the Criminal Division provided a response to OPA that may not be reflected in OPA's records] - but that should not be counted against" the Criminal Division. As these emails make clear, the Draft Report's claim that the Criminal Division stated that OIG "should not include older cases" is not accurate.

4. **The Draft Report unfairly uses cases that the Counterespionage Section prosecuted when calculating the Criminal Division's average response time:** When calculating the Criminal Division's average response time of 489 days, the Draft Report includes three cases that were prosecuted by the Department's Counterespionage Section. The Counterespionage Section, however, is no longer part of the Criminal Division. Thus, it is not appropriate, in our view, for the Draft Report to make a recommendation to the existing Criminal Division based, in part, upon the apparent practices of a section that is no longer a part of the Criminal Division. As the Draft Report notes, if all three of these cases are excluded from consideration, the "average response time for the Criminal Division would be 233 days" per petition. Draft Report, at 57.
5. **The Draft Report erroneously claims that the Criminal Division did not dispute the inclusion of all three cases that the Counterespionage Section prosecuted:** The Draft Report states that "[w]e also note that the Criminal Division did not dispute the one [Counterespionage Section case where] a response was provided in 40 days, during the time that it was part of the Criminal Division." This statement in the Draft Report is not accurate. In my email dated August 1, 2011, to OIG, I explained that the Counterespionage Section, not the Criminal Division, prosecuted this third matter. Then, in my email dated August 2, 2011, I explained that the Criminal Division continued to "maintain that the Counterespionage cases should not count" in the Criminal Division's average response time. Therefore, the suggestion in the Draft Report that the Division did not object to the inclusion of favorable turnaround times, but did object when the turnaround times were not favorable to the Division, is simply incorrect and leaves a misimpression about the Division's good-faith approach to this OIG audit.



U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 6, 2011

MEMORANDUM

TO: Raymond J. Beaudet, Assistant Inspector General for Audit
Office of the Inspector General

FROM: David A. O'Neil ^{OPM} _{ST/AT}
Chief of Staff and Associate Deputy Attorney General

SUBJECT: Response to the Office of the Inspector General's Draft Report:
Audit of the Department of Justice Processing of Clemency
Petitions

The Office of the Deputy Attorney General (ODAG) appreciates the opportunity to respond to the recommendation contained in the draft report entitled, Audit of the Department of Justice Processing of Clemency Petitions. Please find below the relevant recommendation and ODAG's response.

Recommendation # 10: Develop policies, procedures, and timeframes for reviewing the OPA's clemency reports and recommendations to help ensure that it responds to the OPA in a timely manner.

Response: ODAG concurs in the recommendation to develop policies, procedures, and timeframes for review of the OPA's clemency reports and recommendations. ODAG intends to develop these policies, procedures, and timeframes within the next 60 days. We intend to consult with the U.S. Attorneys' Manual, which states that the OPA generally requests a response within 30 days and when an unusual delay is expected, to advise the OPA accordingly.

APPENDIX XII

OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Office of the Inspector General (OIG) provided a draft of this audit report to the Office of the Pardon Attorney (OPA); Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); Drug Enforcement Administration (DEA); Federal Bureau of Investigation (FBI); Federal Bureau of Prisons (BOP); Executive Office for U.S. Attorneys (EOUSA); Antitrust Division; Civil Division; Civil Rights Division; Criminal Division; Tax Division; National Security Division; and Office of the Deputy Attorney General (ODAG). The OPA, BOP, EOUSA, Civil Rights Division, FBI, Criminal Division, and ODAG responses are incorporated in Appendices V through XI of this final report.¹³⁸

The responses from the Civil Rights Division, FBI, and Criminal Division addressed information in our report that did not pertain to our recommendations. The next three sections present our analysis of this information. The final section provides the OIG analysis of the specific responses to the recommendations and summary of actions necessary to resolve and close the report.

Analysis of Civil Rights Division's Response

In response to our audit report, the Civil Rights Division concurred with our recommendation and stated in its response that it intended to implement our recommendation. However, the Civil Rights Division also responded to information in our report that did not pertain to our recommendation. We provide the following reply to these statements before discussing the Civil Rights Division's specific response to the recommendation and action necessary to close the recommendation.

In its response, the Civil Rights Division correctly noted that it only had two clemency petitions covered by this audit. One of the petitions was referred to the Civil Rights Division on January 10, 2002, and the Civil Rights Division acknowledged that it responded to this referral on September 30, 2002 (263 days later). According to the Civil Rights Division's response, the last employees to work on the referral left DOJ in 2005, which is why it

¹³⁸ Because we did not offer formal recommendations to the ATF, DEA, Antitrust Division, Civil Division, or Tax Division, these components did not formally respond to our report.

cannot explain the delayed response. We recognize that this referral was older and because of its age the Civil Rights Division was not able to explain the delay. However, the Civil Rights Division does not dispute the length of time it took to respond to the referral and we believe this referral serves as an example of why we recommend in our report that the Civil Rights Division implement a procedure that ensures future referrals are handled in accordance with the U.S. Attorneys Manual.

The Civil Rights Division's response also stated that the second referral referenced in our report was purportedly referred to Civil Rights Division on August 9, 2000. According to the Civil Rights Division, it has no record of receiving this referral and it questions the quality of the OPA data that shows that the Civil Rights Division did not respond to the referral. The Civil Rights Division also took issue with Exhibit 19 in Finding II of the report which shows the total number of petitions referred to certain entities and the average number of days referrals spent at each entity. According to the Civil Rights Division's response, we should have included a footnote explaining that the average shown for the Civil Rights Division was based only on the first petition. First, it should be noted that we state in the body of our report that the Civil Rights Division told us during the audit that it had "no record of processing this case, the petitioner, or receiving the request." As for Exhibit 19, we added a footnote explaining that the average number of days column in the exhibit only includes the referrals that were closed.

Finally, in the Civil Rights Division's response it stated that it was concerned in the manner in which Civil Rights Division is grouped with the BOP, U.S. Attorney's Offices, FBI, and Criminal Division as components that materially exceeded the established timeframes for responding to OPA referrals. We disagree with the Civil Rights Division on this point. Our report clearly points out (in places where the Civil Rights Division is discussed) that OPA only sent it two referrals during the scope of our audit. However, as we note above, we believe that the response time of 263 days materially exceeded the response time established by the U.S. Attorneys Manual.

Analysis of FBI's Response

In response to our audit report, the FBI concurred with our recommendation and discussed the action it is taking to implement our recommendation. However, the FBI also responded to information in our report that did not pertain to our recommendation. We provide the following reply to these statements before discussing the FBI's specific response to the recommendation and action necessary to close the recommendation.

Particularly, the FBI stated that it is concerned readers may mistakenly conclude that OPA's Executive Clemency Tracking System (ECTS) data reflects the FBI's actual processing times. According to the FBI, its records indicate processing times that were significantly less than the processing times reflected in ECTS. Nevertheless, the FBI acknowledges in its response that it exceeded FBI internal deadlines for processing and responding to OPA requests.

In our report we clearly state, where appropriate, when ECTS is the source of the information we present. Therefore, we do not share the FBI's concern that a reader could mistakenly conclude that these timeframes were based on FBI data. In addition, we note that our findings and recommendation to the FBI are based solely on FBI data which shows, as the FBI acknowledges in its response, that the FBI materially exceeded its internal timeframes for processing OPA referrals requesting background investigations.

Analysis of Criminal Division's Response

In response to our audit report, the Criminal Division does not concur with our recommendation. Additionally, the Criminal Division responded to information in our report that did not pertain to our recommendation. We provide the following reply to these statements before discussing the Criminal Division's specific response to the recommendation and action necessary to resolve the recommendation.

In its response the Criminal Division highlighted five aspects of our report with which it disagrees. First, the Criminal Division stated in its response that in concluding that the Criminal Division takes an average of 489 days to respond to an OPA referral, the draft report unfairly relies upon cases in which the Criminal Division played an ancillary role, and does not properly credit the Criminal Division for its prompt response time in cases in which it played a primary litigating role. As stated in our report, we disagree with the Criminal Division's assertions that instances where it played an ancillary role should be treated differently than cases for which it was the primary prosecuting agency. As our report states, the OPA solicits information from a number of entities when preparing a recommendation for the President on a clemency petition. Some of these entities have more direct roles than others. For example, the OPA will solicit information from the USAO that prosecuted the case and may also request information from the USAO for the district where the petitioner currently resides. Clearly, the prosecuting USAO would have played a more direct role in the original case; however, that does not mean insight from the USAO in the petitioner's district would be any less valuable. As the report notes, it is the

responsibility of the OPA to assist the President in the exercise of his constitutional pardoning power by providing him with the *best information available* on which to base a fair and just decision in cases in which applicants seek clemency. Therefore, the OPA must solicit, and all DOJ components should provide, any and all information available to assist the President in this process whether the role in the case was direct or ancillary. We also note in the report, in any of the cases where the Criminal Division claims an ancillary role it could have simply informed the OPA that it had a limited role in the case, and therefore believed that it had no basis to opine on clemency matters related to the case.

The second disagreement noted in the Criminal Division's response is the draft report unfairly relies upon questionable OPA records when calculating the Division's response time. According to the Criminal Division's response, the draft report does not account for the possibility that OPA's data concerning the Criminal Division might not be accurate. We disagree with this assertion. In each instance where the Criminal Division provided us with information that supplemented the ECTS data we considered this information and presented a revised average processing time in the report that assumed the validity of the Criminal Division's information. For example, on page 56 of the report we state:

Criminal Division officials also stated that a written response was provided to the OPA for one OPA petition that was not reflected in the ECTS data, which we confirmed with the OPA. If we included this petition in our calculation, as of September 30, 2010, the average response time for the Criminal Division would be 458 days (15.3 months) or slightly less than the Criminal Division average per the ECTS data. Criminal Division officials also indicated that they verbally communicated with the OPA regarding an additional four petitions. If we included all petitions for which written or verbal responses were provided in our calculations, as of September 30, 2010, the average response time for the Criminal Division would be 417 days (13.9 months).

Next, the Criminal Division's response states that the draft report, at page 58, erroneously claims that the Criminal Division stated that OIG should not include older cases when calculating the Criminal Division's average response time. In support of this statement the Criminal Division refers to an August 2011 email which states, "[g]iven the age of these cases, it has been difficult to find additional information on this point - but that should not be counted against us [Criminal Division]." Based on this e-mail and numerous conversations with the Criminal Division, including the exit conference, we reasonably understood that the Criminal Division did not

believe older petitions should be “counted against” it when computing the average processing times. We appreciate the Criminal Division’s clarification of this point and continue to believe that all of the petitions related to the Criminal Division discussed in this report were appropriately considered.

In addition, the Criminal Division’s response states that the draft report unfairly uses cases that the Counterespionage Section prosecuted when calculating the Criminal Division’s average response time. We disagree with the Criminal Division because the OPA referrals related to these petitions were made when the Counterespionage Section was part of the Criminal Division. In addition, as we note in the report (and as the Criminal Division acknowledges in its response) when these cases are excluded the average processing time was 233 days per petition. While we agree that this is significantly lower than the 489 day average processing time when these cases are included, it still materially exceeds the U.S. Attorneys Manual timeframe of 30 days. Therefore, whether these cases are included or not included, our recommendation to the Criminal Division remains valid.

Finally, in its response, the Criminal Division states that the draft report erroneously claims that the Criminal Division did not dispute the inclusion of all three cases that the Counterespionage Section prosecuted. Specifically, the Criminal Division takes issue with the report statement that says:

We also note that the Criminal Division did not dispute one case that was included in our average, which was also prosecuted by its former Counterespionage Section, while it was still part of the Criminal Division. In this case, a response was provided in 40 days, during the time that it was part of the Criminal Division.

Again, the Criminal Division relies on emails sent to us in August 2011. However, the Criminal Division’s response fails to note its response to our questionnaire sent during the audit which only disputed the two cases related to the former Counterespionage Section that were closed without a response after 5 years on average. When we considered this information, along with subsequent conversations with Criminal Division officials, and the non-specific emails referred to in the Criminal Division’s response, we reached the reasonable conclusion that the Criminal Division only took exception to the two cases related to the former Counterespionage Section that were closed without a response after 5 years on average. We appreciate the Criminal Division’s effort to clarify its point, but once again, we note that our report presents the average processing times with, and without, these three Counterespionage cases.

Summary of Actions Necessary to Resolve and Close Report

1. **Resolved (OPA).** The OPA concurred with our recommendation to establish and implement a policy and procedure ensuring follow-up is conducted within established timeframes for outstanding referrals. The OPA stated in its response that at the end of each month, the Pardon Attorney will review a report that identifies which referrals have not been answered by the requested completion date (normally 30 days). At the direction of the Pardon Attorney, appropriate support staff personnel will send an electronically generated reminder to the organization to which the request was directed before the expiration of 60 days from the date of the original request. The electronic reminder notices will be repeated thereafter on a monthly basis until the referral response is received.

This recommendation can be closed when we receive evidence supporting that the procedure described in OPA's response has been fully implemented.

2. **Closed (OPA).** We recommended that the OPA process all future referrals electronically. The OPA concurred with our recommendation and provided evidence in its response regarding a detailed explanation of its procedure to process referrals electronically. Therefore, this recommendation is closed.
3. **Resolved (OPA).** The OPA concurred with our recommendation to include an aging report detailing all open referrals when following up with U.S. Attorneys' Offices. The OPA stated in its response that this information will be transmitted in follow-up efforts regarding untimely referral responses from U.S. Attorneys' Offices to which clemency matters have been referred for comment.

This recommendation can be closed when we receive evidence supporting that the OPA consistently includes an aging report detailing all open referrals when following up with U.S. Attorneys' Offices.

4. **Resolved (OPA).** The OPA concurred with our recommendation to develop procedures to ensure that its case management system is updated and documents changes in the status of referrals. The OPA stated in its response that through the centralization of the follow-up process described in the first recommendation, the Pardon Attorney and support staff dedicated to this effort will ensure timely updating of the referral process in the Executive Clemency Tracking System. The

OPA also stated in its response that with the future adoption of the IQ tracking system (projected to be operational in FY 2012) the updating process will be substantially streamlined when follow-up correspondence is initiated.

This recommendation can be closed when we receive evidence supporting that the procedure described in OPA's response has been fully implemented and ensures that OPA's case management system is updated and documents changes in the status of referrals.

5. **Resolved (BOP).** The BOP concurred with our recommendation to issue additional guidance to ensure that its Wardens comply with Program Statement 1330.15. The additional guidance should include procedures for monitoring or tracking these referrals. The BOP stated in its response that additional guidance was issued on August 18, 2011, ensuring wardens comply with Program Statement 1330.15, Petition for Commutation of Sentence. The BOP also stated in its response that this guidance included procedures for monitoring and tracking referrals.

This recommendation can be closed when we receive a copy of the August 18, 2011, guidance referred to by the BOP in its response and we confirm that the guidance ensures that BOP Wardens comply with Program Statement 1330.15 and includes procedures for monitoring or tracking OPA referrals.

6. **Closed (EOUSA).** We recommended that the EOUSA issue additional guidance to the U.S. Attorneys' Offices reminding them to comply with the timeframes in the U.S. Attorneys' Manual and notify the OPA of expected delays in responding to the OPA within the 30-day request. The additional guidance should include examples of policies and procedures developed by the U.S. Attorneys in the Eastern District of Kentucky and the District of Massachusetts. The EOUSA concurred with the recommendation and provided documentation demonstrating the issuance of additional guidance to the U.S. Attorneys' Offices regarding their responses to OPA requests.

We reviewed the documentation demonstrating the issuance of additional guidance to the U.S. Attorneys' Offices regarding their responses to OPA requests, and determined that it adequately addressed our recommendation. Therefore, this recommendation is closed.

7. **Resolved (Civil Rights Division).** The Civil Rights Division concurred with our recommendation to develop procedures to ensure that it complies with the U.S. Attorneys' Manual in responding to the OPA's referrals within the established timeframes. The recommendation further states that these procedures should be developed in collaboration with components that generally respond to the OPA within the established timeframes, including the Antitrust Division and the Civil Division. The Civil Rights Division stated in its response that it intends to implement our recommendation to ensure that it complies with the U.S. Attorney's Manual for processing petitions in the future.

This recommendation can be closed when we receive evidence that supports the procedures developed by the Civil Rights Division that ensure that it complies with the U.S. Attorneys' Manual when responding to OPA referrals.

8. **Resolved (FBI).** The FBI concurred with our recommendation to evaluate its established timeframe to process clemency petitions and establish an internal deadline that is attainable based on prioritizations and resources. The FBI stated in its response that it has revisited its internal milestones based upon prioritizations and resources and determined that the 120 calendar day timeframe is appropriate for processing clemency petitions.

This recommendation can be closed when we receive evidence supporting that the FBI evaluated its timeframe to process clemency petitions and established an internal deadline that is attainable based on prioritizations and resources.

9. **Unresolved (Criminal Division).** The Criminal Division's response states that it does not agree with the findings in our report that support the single recommendation to the Criminal Division. The Criminal Division's response does not specifically address the recommendation to develop procedures to ensure that it formally responds to all OPA referrals including those cases for which Criminal Division's role is ancillary. Therefore, this recommendation is unresolved.

This recommendation can be resolved and closed when we receive evidence that the Criminal Division has developed procedures to ensure that it formally responds to all OPA referrals in accordance with established timeframes, including those cases for which Criminal Division's role is ancillary.

10. **Resolved (ODAG).** The ODAG concurred with our recommendation to develop policies, procedures, and timeframes for reviewing the OPA's clemency reports and recommendations to help ensure that it responds to the OPA in a timely manner. The ODAG stated in its response that it intends to develop the policies, procedures, and timeframes within the next 60 days.

This recommendation can be closed when we receive documentation of the policies, procedures, and timeframes that the ODAG developed for reviewing the OPA's clemency reports and recommendations to help ensure that it responds to the OPA in a timely manner.