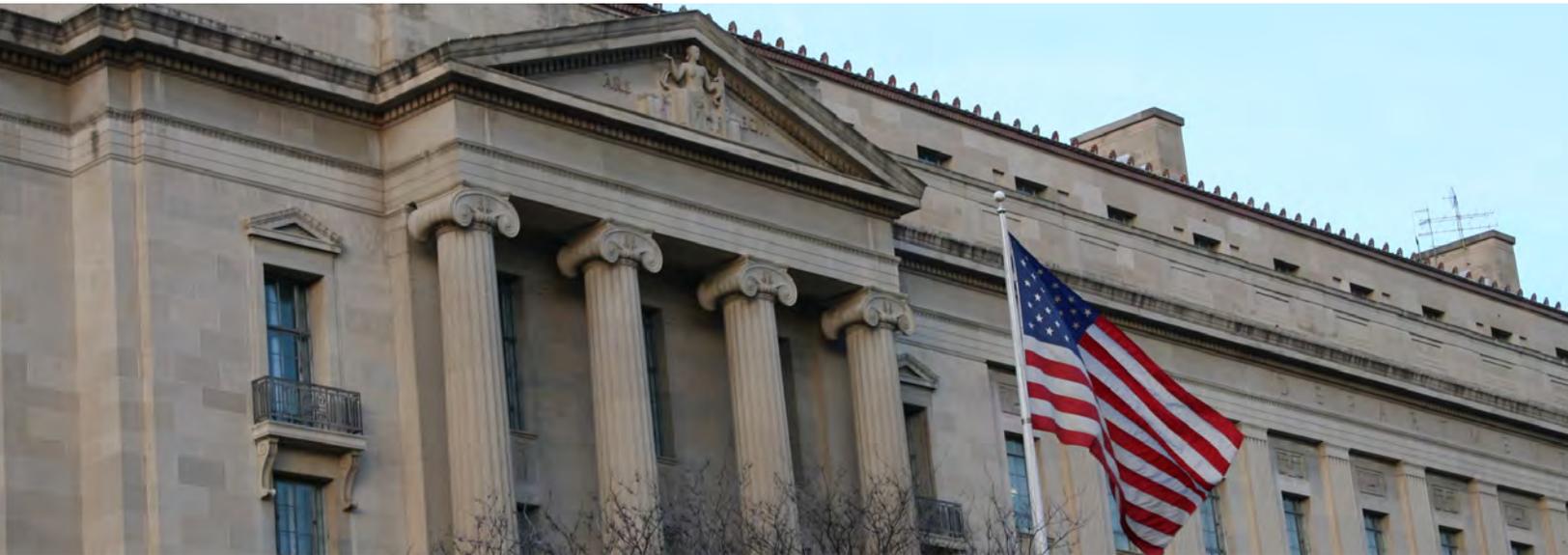




Office of the Inspector General U.S. Department of Justice

OVERSIGHT ★ INTEGRITY ★ GUIDANCE



Review of the Department's Clemency Initiative



Executive Summary

Review of the Department's Clemency Initiative

Introduction

While the power to grant clemency in federal cases rests solely with the President, federal regulations provide that clemency requests are directed to the U.S. Department of Justice (Department, DOJ) and require the Attorney General to make a recommendation to the President on the merits of those requests. The Attorney General has delegated this authority to the Office of the Pardon Attorney (OPA), which, under the direction of the Deputy Attorney General, reviews clemency petitions and provides recommendations to the President.

In April 2014, the Department, at the behest of President Barack Obama, announced the Clemency Initiative (Initiative), which encouraged federal inmates who would not pose a threat to public safety to petition to have their sentences commuted, or reduced, by the President. The Initiative specifically focused on non-violent drug offenders who likely would have received substantially lower sentences if convicted of the same offense in April 2014, due to recent changes in **applicable federal laws. The Department's** announcement stated that it would prioritize consideration of petitions from inmates who met all six specified criteria. As part of the Initiative, a non-governmental effort by volunteer attorneys, called the Clemency Project 2014 (CP 14), was formed to provide "assistance in identifying appropriate clemency petitions under this initiative." Pursuant to the Initiative, President Obama commuted the sentences of 1,696 inmates (including some inmates convicted of non-drug offenses) and denied commutation for approximately 12,000 others.

In September 2011, the Office of the Inspector General (OIG) **reported on OPA's processes and procedures and identified significant weaknesses in them. OIG initiated this review to evaluate the Department's clemency** process and handling of pardons since fiscal year 2014, as well as the implementation and management of the Initiative. While the Administration has changed since we initiated this review, we believe the lessons learned **from the Department's implementation of the Initiative** can assist it in handling its clemency process in the future.

Results in Brief

We found that the Department did not effectively plan, implement, or manage the Initiative at the outset. However, subsequent actions by Department leadership enabled the Department to not only meet its goal of making recommendations to the White House on all drug petitions received by the deadline of August 31, 2016, but also to make recommendations on over 1,300 petitions received by OPA after the deadline. In total, as a result of the Initiative, the Department made recommendations to the White House on over 13,000 petitions, resulting in 1,696 inmates receiving clemency.

Our review identified several shortcomings in the **Department's planning and implementation** of the Initiative. Because of philosophical differences between how the Office of the Deputy Attorney General (ODAG) and OPA viewed clemency, Department leadership did **not sufficiently involve OPA in the Initiative's pre-**announcement planning. Moreover, despite the **Department's stated commitment** to provide OPA with the necessary resources, the Department did not sufficiently do so once the Initiative began.

The Department also did not effectively implement the **Initiative's inmate survey, which was intended** to help the Department identify potentially meritorious clemency petitioners. For example, rather than survey only those **inmates who likely met the Initiative's** six criteria, the survey was sent to every Federal Bureau of Prisons inmate. As a result, CP 14 and OPA received numerous survey responses and petitions from inmates who clearly **did not meet the Initiative's criteria, thereby delaying** consideration of potentially meritorious petitions. We found other problems with the survey, resulting in OIG's issuance of a Management Advisory Memorandum to the Department, which is attached as an appendix to this report.

Further, the Department experienced challenges in working with external stakeholders to implement the Initiative. For example, the Department did not anticipate that CP 14 attorneys would have challenges in obtaining inmate Pre-sentence Investigation Reports and, as a result, it took almost a year before the Administrative Office of the U.S. Courts allowed CP 14 attorneys to access them, **which hampered CP 14's** ability to make timely eligibility determinations. We also found that the Department and CP 14 had very **different perspectives regarding CP 14's role in the** Initiative. In particular, while the Department expected CP 14 to focus on identifying and submitting petitions on behalf of inmates who were strong candidates for



Executive Summary

Review of the Department's Clemency Initiative

clemency, CP 14 instead viewed its role as assisting and advocating for any inmate who wished to file a petition. As a result, the Department believes CP 14 took longer to complete its work.

Our review also identified several weaknesses in the management of the Initiative in its early stages. For example, there were differing views on how to interpret **the Initiative's six criteria**. The **Initiative's** announcement stated that the criteria would be used to prioritize consideration of clemency petitions. However, we were told by then Deputy Attorney General James Cole that petitions from inmates who did not meet all six criteria would not be considered. Yet, then Pardon Attorney Deborah Leff directed OPA staff to review and provide recommendations to ODAG on every clemency petition, regardless of whether the inmates met all six criteria. We found that OPA continued to view the criteria as subjective even after being advised by ODAG that it was applying the criteria strictly. Lastly, although not one of the six criteria, the Administration decided that non-citizens would not be considered for clemency. This was a significant criterion given that, at the time, approximately 25 percent of all federal inmates were non-citizen; yet the Administration did not publicly announce this decision and, as a result, non-citizen inmates filed clemency petitions and OPA spent time reviewing and processing them. While under Deputy Attorney General Sally Yates, the Department did recommend clemency for some non-citizens, President Obama ultimately did not grant clemency to any non-citizens under the Initiative.

Additionally, we found that U.S. Attorneys did not always provide their views on clemency petitions to OPA within 30 days, as required by Department policy. For example, as of December 1, 2016, nearly 600 OPA requests to U.S. Attorneys had been awaiting a response for more than 30 days.

As a result of the initial planning, implementation, and management challenges, by the end of 2015 both OPA and ODAG had substantial backlogs of petitions pending their respective consideration and very few petitions with favorable recommendations had been sent to President Obama. These challenges resulted in Cole instructing OPA in September 2014 to suspend consideration of pardon petitions in order to focus on commutation petitions. By the end of 2015, President Obama had issued 175 commutations under the Initiative, compared to the total of 1,696 commutations he issued by January 20, 2017. Moreover, by the end of 2015, the Department had provided recommendations to the White House on 1,755 commutation petitions, compared to the total of

13,892 recommendations provided by January 20, 2017.

Although the Department made efforts to address OPA's backlog in 2015, significant strides were made during the final year of the Initiative. Specifically, in February 2016, the Department reformed how it managed the **Initiative, which we believe expedited OPA's processing** of petitions and substantially increased the number of favorable recommendations sent to the White House. In fact, during the final year of the Initiative, the Department submitted 12,137 recommendations to the White House. Among the most important changes was the temporary increase in **OPA's staffing** to meet the demands of the Initiative. Additionally, acting Pardon Attorney Robert Zauzmer prioritized the review of petitions from inmates who were strong candidates for clemency. Further, the Department streamlined its review process by delegating authority to Zauzmer to submit all non-favorable commutation recommendations directly to the White House, without ODAG review. Zauzmer also introduced a short-form U.S. Attorney referral template to make it easier for U.S. Attorneys to provide OPA their views on petitions and to ensure they were providing the necessary information. Moreover, the Department reinstated its review of pardon petitions, which had been suspended for about 14 months, and implemented an expedited pardon process that limited **ODAG's** direct involvement.

In addition, the White House permitted Yates to apply **the Initiative's criteria with more flexibility**. This decision enlarged the pool of eligible inmates and resulted in a substantial increase in the number of favorable recommendations sent to the White House. For example, Yates allowed OPA to recommend commutations for inmates who, at sentencing, had received a variance from the otherwise applicable sentencing guidelines range. Similarly, the Department no longer automatically excluded from consideration inmates who were eligible to obtain a sentence reduction through the retroactive application of the U.S. **Sentencing Commission's "Drugs Minus Two" guideline**. Further, in determining whether inmates met the **Initiative's criteria for the minimum time served** (10 years), OPA started taking into account good time credit. Additionally, despite what we were told was previous opposition from the White House **during Cole's** tenure, the Department started recommending term commutations to the White House, which, unlike typical commutations, are sentence reductions that provide for an earlier release from prison at some date in the future rather than immediately. This change particularly benefited inmates who had not yet served 10 years in prison, even with good time credit.



Executive Summary

Review of the Department's Clemency Initiative

As a result of these modifications, Zauzmer instituted the Reconsideration Project, an OPA effort to determine whether any of the over 3,000 inmate petitions that received denial recommendations prior to February 1, 2016, would have instead received a favorable recommendation under the **Department's more flexible** approach. OPA leadership reviewed all of the prior denials, which Zauzmer told us resulted in an additional 20 to 30 inmates being granted clemency by President Obama. However, due to time constraints, in many instances OPA conducted summary reviews rather than full re-reviews of these case files. As a result, there

remains a question as to whether the Department treated all petitions consistently over the course of the Initiative.

On January 20, 2017, the Department discontinued the Initiative and as a result, we do not make recommendations to the Department to address the issues we found throughout the course of our review. Nevertheless, we believe that the lessons learned from **the Department's implementation of the Initiative can** be of assistance to the Department in handling any future clemency programs.

TABLE OF CONTENTS

INTRODUCTION.....	1
Background.....	1
The Department’s Role in the Clemency Process	2
The Department’s Clemency Initiative	4
Previous OIG Work Regarding Clemency	8
Scope and Methodology of the OIG Review	9
RESULTS OF THE REVIEW.....	10
The Department Did Not Effectively Plan and Implement the Clemency Initiative, but Subsequent Changes Made by Department Leadership Enabled the Office of the Pardon Attorney to Substantially Complete Its Work	10
CONCLUSION	42
APPENDIX 1: METHODOLOGY OF THE OIG REVIEW.....	44
Standards	44
Data Analysis	44
Email and Document Analysis.....	46
Interviews.....	46
APPENDIX 2: NOTICE TO INMATES: INITIATIVE ON EXECUTIVE CLEMENCY	47
APPENDIX 3: PARDON ATTORNEY DEBORAH LEFF’S RESIGNATION LETTER	52
APPENDIX 4: OIG’S MANAGEMENT ADVISORY MEMORANDUM TO THE DEPARTMENT	53
APPENDIX 5: THE DEPARTMENT’S RESPONSE TO OIG’S MANAGEMENT ADVISORY MEMORANDUM	60
APPENDIX 6: THE DEPARTMENT’S RESPONSE TO THE DRAFT REPORT.....	63

INTRODUCTION

Background

Under the U.S. Constitution, individuals may petition the President “to grant reprieves and pardons for offenses against the United States.”¹ The authority to grant clemency vests solely with the President and 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.² Clemency may take several forms, **depending on the petitioner’s sentence and** whether or not the petitioner has been released from prison. According to 28 C.F.R. §§ 1.1–1.3, clemency includes:

- **Pardon.** A pardon is an indication of forgiveness and will restore certain rights lost as a result of the pardoned offense. However, it will not erase or expunge the record of conviction. According to 28 C.F.R. § 1.2, “no petition for pardon should be filed until the expiration of a waiting period of at least five 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 five 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.”
- **Commutation of Sentence.** Commutation of sentence reduces the sentence being served or to be served, but it does not affect the conviction itself.³ Generally, in order for a petition to be considered, the petitioner must have begun serving his or her sentence and cannot be currently in the process of challenging the conviction or sentence or have other available relief.⁴

According to statistics on the website of the Office of the Pardon Attorney (OPA), as of June 30, 2017, Presidents had granted 14,491 pardons and 6,670 commutations since fiscal year (FY) 1900.⁵ Of these, President Barack

¹ Constitution of the United States, Article II, Section 2, Clause 1.

² **The President’s clemency authority does not extend to state criminal convictions.** Clemency for state criminal convictions falls under the authority of the Governor or other appropriate authorities for the state in which the conviction occurred.

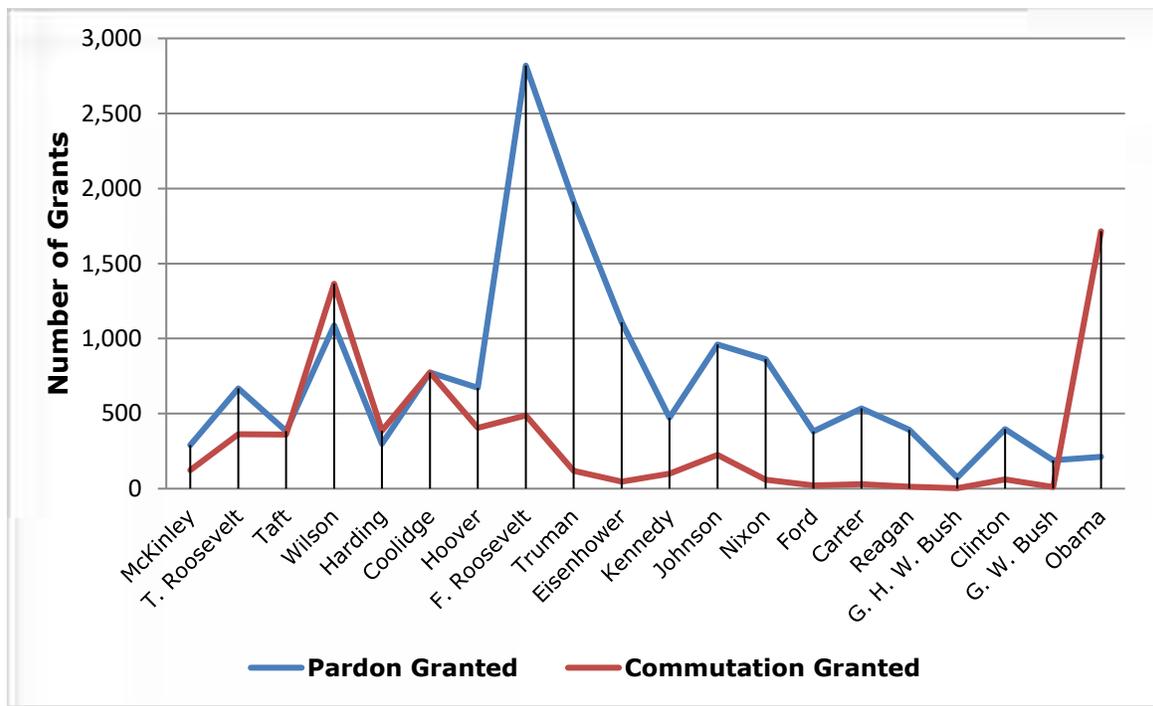
³ Commutation petitions can also include a request for (1) a full or partial remission of any fines or restitution imposed by the court and (2) a reprieve, which delays the impending punishment or sentence, including a temporary delay in the execution of capital punishment.

⁴ 28 C.F.R. § 1.3.

⁵ DOJ OPA, “Clemency Statistics,” www.justice.gov/pardon/clemency-statistics, June 30, 2017 (accessed June 26, 2018). This number excludes persons granted clemency by proclamation, such as certain Vietnam-era offenders granted clemency by President Jimmy Carter’s proclamation and offenders granted clemency after action by President Gerald Ford’s Presidential Clemency Board. See [Appendix 1](#) for more information.

Obama granted 212 pardons and 1,715 commutations, or approximately 1 percent of all pardons and 26 percent of all commutations granted by any U.S. President. The increase in commutation grants can be attributed to the Clemency Initiative (Initiative), which we discuss later in this section. See Figure 1 for the number of pardons and commutations Presidents have granted since FY 1900.

Figure 1
Number of Presidential Pardons and Commutations since FY 1900⁶



Source: OIG analysis of OPA statistics

The Department’s Role in the Clemency Process

While the power to grant clemency rests exclusively with the President, federal regulations provide that such petitions are to be submitted to OPA at the U.S. Department of Justice (Department, DOJ). As set forth in 28 C.F.R. § 1.6, the Attorney General **is obligated to** “review each petition and all pertinent information developed by the investigation” and “determine whether the request for clemency is of sufficient merit to warrant favorable action by the President.”⁷ Pursuant to the authority under 28 C.F.R. § 1.9, the Attorney General has delegated this authority

⁶ The increase in the number of pardons during the Roosevelt Administration is the result of the number of pardons President Franklin Roosevelt granted to individuals who evaded conscription during World War II. See DOJ OPA, “Clemency Statistics.” See [Appendix 1](#) for more information on the data presented in this figure.

⁷ 28 C.F.R. § 1.6.

to OPA, which, under the direction of the Deputy Attorney General, reviews clemency petitions and provides recommendations for their disposition.

OPA's staff consists of Attorney-Advisors, Paralegals, and administrative staff who process and review clemency petitions, conduct necessary investigations, and prepare recommendations.⁸ **OPA's review may include referrals to the Federal Bureau of Investigation to conduct background investigations of petitioners, as well as requests for additional information from other entities such as the Federal Bureau of Prisons (BOP) and the U.S. Probation Office.**⁹ For those clemency petitions that are considered to have sufficient merit, OPA generally also requires recommendations from the U.S. Attorney who prosecuted the defendant and requests recommendations from the judge who sentenced the defendant. The U.S. Attorneys' Manual (USAM) **provides that "the views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President"** regarding clemency petitions.¹⁰ **In addition to the Department's recommendation,** the U.S. Attorney's recommendations are also generally provided in each clemency petition presented to the President.¹¹

Once OPA completes its investigation and prepares a proposed recommendation to the White House, staff in the Office of the Deputy Attorney General (ODAG) assess the petition and provide it to the Deputy Attorney General. If the Deputy Attorney General disagrees **with OPA's** proposed recommendation, the Deputy Attorney General can either request OPA to provide a different recommendation based upon the Deputy Attorney General's assessment or submit to the White House both the Deputy Attorney General's **position and the Pardon Attorney's position on the petition.** Thereafter, the Deputy Attorney General signs and presents the recommendation to the White House Counsel, who reviews it prior to presenting it to the President.¹² After the President makes a final decision, the White House notifies OPA of the decision and OPA completes the necessary documentation and notifications. If a petitioner is denied clemency, he or she may submit a new petition 1 year from the date of denial for commutation and 2 years

⁸ We further discuss OPA staffing later in this report.

⁹ 28 C.F.R. § 1.6(a) and (b).

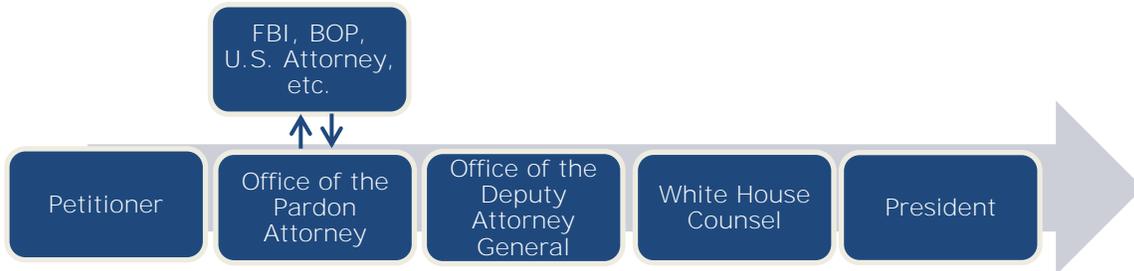
¹⁰ USAM § 1-2.111. See, generally, §§ 1-2.010–1-2.113, which define and explain the role of U.S. Attorneys in executive clemency matters. According to USAM § 1-2.113, appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., 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 a particular case.

¹¹ USAM § 1-2.111.

¹² **In addition to the summary U.S. Attorney's recommendation, a summary of the recommendation of the sentencing judge, if available, is also provided to the White House. In February 2016, the Department began submitting both the Deputy Attorney General's and OPA's recommendations to the President if their recommendations differed.**

for a pardon.¹³ Figure 2 shows the key stakeholders involved in the pardon and commutation process.

Figure 2
Key Stakeholders Involved in Pardon and Commutation Petitions



Source: OIG analysis of the clemency process

The Department's Clemency Initiative

In December 2013, President Barack Obama commuted the sentences of eight inmates who had been sentenced to between 20 years and life in prison for drug trafficking offenses involving, among other drugs, crack cocaine. In announcing the commutations, President Obama referred to the enactment of the

¹³ See DOJ OPA, "Frequently Asked Questions," www.justice.gov/pardon/frequently-asked-questions (accessed June 26, 2018).

Fair Sentencing Act of 2010, which, he stated, “dramatically narrowed the disparity between penalties for crack and powder cocaine offenses” but then noted that the law did not apply to inmates sentenced prior to its enactment, including the eight inmates whose sentences he commuted that day.¹⁴ President Obama further noted that if those inmates had been sentenced after the enactment of the *Fair Sentencing Act*, “many of them would have already served their time and paid their debt to society.”

Afterward, President Obama decided to consider more applications for clemency from inmates who were similarly situated. In

Clemency Initiative Timeline

2013

December: The President grants commutations to eight inmates.

2014

January: Deputy Attorney General James Cole makes remarks on clemency to the New York Bar Association; CP 14 is formed.

April: The Department announces the Clemency Initiative; Deborah Leff replaces Ronald Rodgers as Pardon Attorney.

May: The Department issues a “Notice to Inmates” and clemency survey to inmates.

2015

April: Loretta Lynch replaces Eric Holder as Attorney General.

May: Sally Yates is confirmed as Deputy Attorney General, replacing James Cole.

June: CP 14 negotiates with the Judicial Conference of the United States to gain access to inmate Pre-sentence Investigation Reports.

October: The inmate survey closes; CP 14 stops accepting inmate requests for representation.

2016

January: Deborah Leff resigns as Pardon Attorney.

February: Assistant U.S. Attorney Robert Zauzmer is detailed to OPA as acting Pardon Attorney.

September: The internal deadline for petitions to be submitted to ODAG for consideration under the Initiative

2017

January: The Initiative ends; Zauzmer finishes his detail at OPA; Lawrence Kupers remains Deputy Pardon Attorney.

Source: OIG analysis

¹⁴ President Barack Obama, “Statement by the President on Clemency,” December 19, 2013, www.obamawhitehouse.archives.gov/the-press-office/2013/12/19/statement-president-clemency (accessed June 26, 2018).

Prior to enactment of the *Fair Sentencing Act*, the quantity of cocaine needed to trigger a mandatory minimum was 100 times greater than the quantity of crack cocaine needed to trigger the same mandatory minimum penalty. This 100 to 1 ratio was widely criticized for lacking a scientific basis or empirical support, including by the U.S. Sentencing Commission. The *Fair Sentencing Act* reduced that ratio to 18 to 1. See U.S. Sentencing Commission, “2015 Report to the Congress: Impact of the Fair Sentencing Act of 2010,” www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010 (accessed June 26, 2018).

In 2011, the U.S. Sentencing Commission implemented the *Fair Sentencing Act* by amending the Sentencing Guidelines to lower the offense levels assigned to the quantities of crack cocaine in its drug quantity table. The Commission gave this change retroactive effect, allowing inmates whose sentences would have been lower had the amended guideline been in effect at the time of their sentencing to seek a corresponding sentencing reduction from a federal judge. The effective date of this amendment was November 1, 2011. See U.S.S.C. § 1B1.10(a) and n.5.

Additionally, in 2014, the U.S. Sentencing Commission adopted an amendment that reduced by two levels the Sentencing Guidelines offense levels assigned to the quantities in its drug quantity table. The Commission gave this change retroactive effect, allowing inmates whose sentence would have been lower had the amended guideline been in effect at the time of their sentencing to seek a corresponding sentence reduction from a federal judge. This amendment, often referred to as the “Drugs Minus Two” amendment, became effective November 1, 2014.

January 2014, in remarks before the New York Bar Association, then Deputy Attorney General James Cole announced that the Department would begin to look at potential candidates for commutation similar to the eight inmates whose sentences the President had commuted and that the Department would seek assistance from outside legal organizations to determine candidates' eligibility based on new, broader criteria.¹⁵

In April 2014, the Department officially announced the Clemency Initiative and stated that it would focus on non-violent federal inmates who had received harsh sentences that would not be imposed in 2014 and who would not pose a threat to public safety if released.¹⁶ (See the text box above **for the Initiative's** timeline.) Specifically, the announcement stated that the Department had developed the six criteria listed below that it would consider when reviewing and expediting clemency petitions from federal inmates **and would** "prioritize clemency applications from inmates who met all of the following factors:

1. They are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
2. They are non-violent, low level offenders without significant ties to large scale criminal organizations, gangs or cartels;
3. They have served at least 10 years of their prison sentence;
4. They do not have a significant criminal history;
5. They have demonstrated good conduct in prison; and
6. They have no history of violence prior to or during their current term of imprisonment."¹⁷

In the announcement, the Department also stated that outside legal organizations consisting of lawyers and advocates from the defense bar had formed a group known as the Clemency Project 2014 (CP 14) to help potential candidates in preparing commutation petitions.¹⁸ CP 14 consisted of members of the American Bar Association, American Civil Liberties Union, Families Against Mandatory Minimums, Federal Public and Community Defenders, and National Association of Criminal Defense Lawyers. **CP 14's** role in the Initiative **was to "identify potential**

¹⁵ James Cole, Prepared Remarks (presented at the New York State Bar Association Annual Meeting, January 30, 2014, New York, N.Y.).

¹⁶ DOJ Press Release 14-419.

¹⁷ DOJ Press Release 14-419.

¹⁸ DOJ Press Release 14-419.

clemency petitioners and recruit and train volunteer lawyers to assist them in **securing clemency.**"¹⁹

To assist CP 14 in identifying eligible candidates for commutation under the **Initiative's criteria**, the Department issued to all BOP inmates a **"Notice to Inmates" and a survey regarding the inmate's background and criminal history.**²⁰ The Notice to Inmates explained that inmate surveys, at the inmate's request, would be forwarded to CP 14 and that inmates could also apply for commutation on their own behalf. In total, BOP received 42,808 completed surveys and forwarded 35,717 survey submissions to CP 14.²¹

In turn, CP 14 used the survey to determine the eligibility of potential candidates for commutation under the Initiative. If an inmate appeared to be eligible, CP 14 assigned the case to a pro bono attorney who intensively reviewed **the inmate's court records, the Pre-sentence Investigation Report (PSR), and BOP records regarding the inmate's conduct while in prison.** The attorney would then submit a summary of the case to the CP 14 Screening Committee for review.²² Next, the CP 14 Steering Committee would review the case. If both CP 14 committees determined that an inmate was ineligible for commutation under the Initiative, the inmate was told that he or she could still apply directly to OPA with or without the assistance of CP 14 counsel.²³ If the committees agreed that the case was meritorious, the CP 14 attorney would draft a petition on behalf of the inmate

¹⁹ See Foundation of Criminal Justice, "Clemency Project 2014," www.nacdl.org/annualreport/2015/clemency (accessed June 26, 2018).

²⁰ The Department provided electronic surveys to all BOP inmates through BOP's TRULINCS communications system, as well as in hard copy when TRULINCS was unavailable. The survey consisted of 13 questions regarding the inmates' offense(s) of conviction, criminal history, and conduct while in prison (see [Appendix 2](#)).

Although the Notice to Inmates stated that the Initiative "is limited to" petitioners who met all six of the clemency criteria, the April 2014 public announcement indicated only that the Department would "prioritize" inmate applications that met all of the criteria. The latter construction in the public announcement appears to imply that inmates did not have to meet all of the criteria but those who did would be considered first.

²¹ The remaining 7,091 surveys were not forwarded to CP 14 because the inmates either declined the assistance of CP 14 or did not respond to the question on the survey as to whether they would like the assistance of CP 14.

²² As part of CP 14's review process, its volunteer attorneys worked with BOP and the Administrative Courts of the United States to obtain PSRs and inmate conduct reports. Later in this report, we discuss how CP 14's inability to receive PSRs for nearly a year and a half hampered its ability to determine inmate eligibility and draft petitions.

²³ As of October 2015, CP 14 discontinued accepting surveys from inmates. BOP provided notice to all inmates through TRULINCS, stating that CP 14 would stop accepting surveys but that inmates could still request commutation without assistance from CP 14. Until January 2017, CP 14 submitted petitions to OPA for inmates whose surveys it previously had received.

and forward it to OPA. Of the 35,717 surveys that BOP submitted to CP 14, CP 14 submitted 2,294 petitions for OPA's consideration.²⁴

Previous OIG Work Regarding Clemency

OIG, Audit of the Department of Justice Processing of Clemency Petitions, Audit Report 11-45 (September 2011)

In September 2011, OIG released a report examining whether OPA had established effective procedures for processing and reducing its substantial backlog of clemency petitions and whether Department components had established effective procedures to respond to OPA's referrals for information in a timely manner. OIG found that Department components had failed to respond to OPA within the timeframe established by OPA, which significantly delayed the processing of clemency petitions. Also, OPA did not follow up with the components on outstanding referrals in a timely manner. Further, clemency petitions were under ODAG review for nearly 5 months and under White House review for an additional 9 months before a final decision was made. OIG determined that each petition on **average took nearly 2 years from OPA's initial review to the President's final decision**, which contributed to the backlog of clemency petitions.

Our audit resulted in 10 recommendations to assist OPA, Department components, and ODAG in processing clemency petitions in a more efficient manner. All of those recommendations have since been closed.

OIG, Review of the Pardon Attorney's Reconsideration of Clarence Aaron's Petition for Clemency, Oversight and Review Report (December 2012)

In an OIG review responding to a congressional request regarding allegations related to the handling of the clemency petition of Clarence Aaron, a federal inmate who was considered for a grant of clemency by President George W. Bush, we determined that then Pardon Attorney Ronald Rodgers had inaccurately represented to the White House **the views of the U.S. Attorney's Office that prosecuted Aaron** and had used ambiguous language in an email to the White House describing the sentencing judge's **opinion regarding Aaron's request for commutation**.

OIG further found that ODAG officials, who had oversight of OPA, should **have reviewed and appropriately edited the Pardon Attorney's** email or, alternatively, proposed drafting a new recommendation that more accurately stated the facts for submission to the White House. **Due to the Pardon Attorney's actions**, the President did not have accurate information when he decided to deny **Aaron's** commutation request in 2008. We recommended that OPA review its files to locate any other instances in which its office relied upon a supplementary email to the

²⁴ According to Deputy Pardon Attorney Lawrence Kupers, OPA cannot determine how many of those petitions were submitted exclusively under the Initiative (rather than as a traditional application), and some of the inmates who submitted directly to OPA also had petitions submitted on their behalf by CP 14.

White House Counsel's Office, rather than a new "letter of advice" and, in the event it found such situations, that those files be reviewed to ensure that the information provided to the White House accurately reflected the information contained in any communications from interested parties.²⁵

Scope and Methodology of the OIG Review

This review assessed **the Department's clemency process** since FY 2014, as well as the implementation and management of the Clemency Initiative. The review focused primarily on the commutation process, with a limited discussion of the pardon process. Our fieldwork occurred from March 2016 to March 2017 and consisted of document and policy reviews, email record reviews of former and current OPA and ODAG officials, data analysis, and interviews. We also interviewed former Department officials and staff from ODAG, OPA, and BOP, the Executive Office for U.S. Attorneys, federal inmates, and volunteer attorneys affiliated with CP 14. See [Appendix 1](#) for more information about **OIG's methodology**.

²⁵ Aaron was one of the eight inmates granted clemency by President Obama in December 2013, which we discuss later in this report.

RESULTS OF THE REVIEW

The Department Did Not Effectively Plan and Implement the Clemency Initiative, but Subsequent Changes Made by Department Leadership Enabled the Office of the Pardon Attorney to Substantially Complete Its Work

We found that, initially, the U.S. Department of Justice (Department, DOJ) did not effectively plan, implement, and manage the Clemency Initiative (Initiative). The Office of the Pardon Attorney (OPA) had minimal involvement in planning the Initiative prior to its announcement and, due to logistical and resource challenges, was ill equipped to handle the nearly 25,000 commutation petitions it received. **We found OPA's** limited involvement may have also been due to philosophical differences between how the Office of the Deputy Attorney General (ODAG) and OPA viewed clemency. We also found that the Department sent its clemency survey to the entire Federal Bureau of Prisons (BOP) inmate population and did not exclude inmates who were clearly ineligible for consideration under the **Initiative's criteria** as publicly announced by then Deputy Attorney General James Cole in April 2014. As a result, the Clemency Project 2014 (CP 14) received a significant number of survey responses from BOP inmates who were almost certain to be found to be ineligible by the Department for clemency consideration. Additionally, many of those ineligible inmates submitted clemency petitions, **straining OPA's limited resources.**

In addition, we found that the Department experienced challenges in working with its internal and external stakeholders to implement the Initiative. For instance, the Department **failed to sufficiently engage, in advance of the Initiative's** announcement, with the Administrative Office of the U.S. Courts (AOUSC) regarding access for CP 14 volunteer attorneys to **inmates'** Pre-sentence Investigation Reports (PSR). As a result, for over a year after the Initiative was announced, CP 14 attorneys did not have access to PSRs, which **hampered CP 14's ability to make** inmate eligibility determinations and to prepare petitions. In addition, a difference of opinion regarding **CP 14's role, as well as CP 14's** multi-layered review process, caused delays in identifying potentially meritorious candidates.

Further, despite the time-sensitive nature of the Initiative, we found that initially OPA did not effectively prioritize consideration of clemency petitions that **met the Initiative's criteria.** This was due, in part, to OPA viewing potentially disqualifying conduct under the criteria in a more subjective manner than the Department intended. **We also found that, due to OPA's limited resources and a** desire to prioritize commutation petitions, Department leadership directed former Pardon Attorney Deborah Leff to prioritize commutation petitions over pardon petitions and, for about 14 months during the Initiative, the Department suspended pardon work altogether.

To address **OPA's reluctance** to strictly apply the six criteria and prioritize potentially favorable petitions, in 2015, a then-ODAG official developed a system of prioritization to expedite the petition review process and personally went to OPA to explain the system to staff. The goal of the system was for OPA to make

recommendations on the most favorable inmate petitions in the most efficient manner. However, despite **ODAG's** efforts, the Department struggled to submit favorable recommendations to the White House as OPA continued to view the **Initiative's** criteria subjectively and CP 14 was not submitting favorable petitions as quickly as the Department would have liked.

By the start of 2016, as a result of these problems that the Department was having in managing the Initiative, we found that OPA had a substantial backlog of clemency petitions and that it had provided the White House with relatively few favorable clemency recommendations. In response, starting in February 2016, the Department made a substantial number of changes in how it managed the Initiative, which included applying the Initiative's criteria with more flexibility. In addition, the Department temporarily **increased OPA's staffing in 2016** and former acting Pardon Attorney Robert Zauzmer implemented a number of reforms that expedited the processing of clemency petitions. These reforms increased the pool of eligible inmates and led to a dramatic increase in the number of clemency petitions that OPA and the Department sent to the White House, including a substantial increase in the number of favorable recommendations. We further found that as a result of these program changes some inmates who applied for clemency earlier in the process may have been at a disadvantage because they did not receive the benefit of the more flexible interpretation of the criteria, despite efforts by OPA to reconsider petitions that had previously been summarily denied.

We also found that OPA experienced difficulties in obtaining timely responses from U.S. Attorneys on clemency petitions, which is required under Department policy in order to aid the Department and the President in determining whether an **inmate's release from prison presents a public safety** risk. Finally, while President Barack Obama granted an unprecedented number of commutations by the end of his Administration, we found that he did not make a decision on all of the recommendations the Department had submitted to the White House prior to January 20, 2017.

The Department Did Not Involve OPA Effectively in Planning the Initiative Prior to Its Announcement

We found that OPA, despite its crucial day-to-day operational role in managing the Initiative, had minimal involvement in planning the Initiative prior to its announcement and did not have the resources at the time of its announcement to effectively process the large volume of commutation petitions it received in response. Also, while the Department had projected the number of inmates who might be eligible for clemency consideration, applying the Initiative's six publicly announced criteria, the Department ignored the criteria when it decided to send its clemency survey to the entire BOP population, rather than just to eligible inmates.

Former OPA officials informed us that OPA had minimal involvement in the planning of the Initiative. For example, former Pardon Attorney Ronald Rodgers told us that OPA was not involved in the **Initiative's** early planning discussions prior to **Cole's January 2014** remarks before the New York Bar Association. He said that ODAG did not understand the resource limitations within OPA and that there should

have been earlier discussions on how OPA would use its resources to fulfill the **Initiative's** mandate. Rodgers added that he was thinking about the logistics of the Initiative in the months prior to the April 2014 announcement and did not think he **was "able to make [ODAG] understand the immensity of the logistics of the effort that they were contemplating.... Not just in [OPA] pushing the paper but in us reaching out to BOP for documents needed to evaluate the application."** We further discuss OPA's resource challenges below.

Cole, who served as Deputy Attorney General from December 2010 to January 2015, confirmed that OPA was minimally involved in planning the Initiative, which he said may have been due to philosophical differences between him and OPA regarding what aspect of their work should be prioritized, pardons or commutations. He said that, **prior to the launch of the Initiative, OPA's work** primarily involved reviewing pardon applications from citizens who had already completed their sentence in the federal prison system. Cole stated that changing **OPA's focus to commutations** for those inmates still in BOP custody represented a shift in its work and at first was a difficult transition for its staff to make. In particular, Cole told us that his impression was that OPA viewed commutations as extraordinary and thought that the judge had imposed a prison sentence so there was nothing more to be done about it.

Cole categorized the types of candidates who he said deserved commutation consideration into two groups: (1) inmates who had reformed themselves while in prison and (2) inmates whose sentences were harsh and outdated. With regard to an inmate in the second group, Cole stated that **"if that person** were sentenced today, their sentence would be different, probably in some respects significantly **different, and that did not seem fair."**

With respect to pardons, Cole said that while OPA thought a person might merit a pardon merely by being out of prison for 15 years without engaging in any criminal activity, he viewed pardons as extraordinary and said that he believed an applicant needed to do more than simply comply with the law after being released from prison. This disagreement between Cole and OPA regarding pardons was confirmed by former Deputy Pardon Attorney Helen Bollwerk, who was formally appointed Deputy in OPA from September 2008 to January 2015. Bollwerk, who served at OPA for 19 years, including Cole's entire tenure as Deputy Attorney General, told us that, during this period, OPA viewed pardons differently than ODAG and that it was unclear what more pardon applicants needed to do to receive a presidential act of mercy since they were living a responsible life and seeking forgiveness. Bollwerk stated that the analysis that goes into determining an **applicant's eligibility for pardon** is not as routine as Cole characterized it and is not merely a box-checking exercise.

We concluded that the philosophical disagreement between Deputy Attorney General Cole and OPA about how the Department should assess and consider commutation petitions was in large part responsible for the decision by the Department to exclude OPA from its pre-announcement planning discussions regarding the Initiative. We further found that this decision negatively impacted **OPA's ability to effectively manage the Initiative.**

OPA Was Not Provided With the Resources It Needed to Process the Large Volume of Commutation Petitions in an Effective and Timely Manner

The Department's April 2014 announcement of the Initiative stated, "The Department of Justice...is committed to carrying out this important mission and has **pledged to provide the necessary resources to fulfill this goal expeditiously.**"²⁶ Leff, however, said in her resignation letter that the Department did not fulfill its **commitment to provide the necessary resources for OPA to make "timely and thoughtful recommendations on clemency."** Consistent with what both Rodgers and Leff told us, we found that initially OPA did not have the resources it needed to handle the large volume of petitions it received and that the Department did not develop a mechanism to quickly provide resources to OPA once the Initiative was launched.

OPA Staffing Levels and Workload

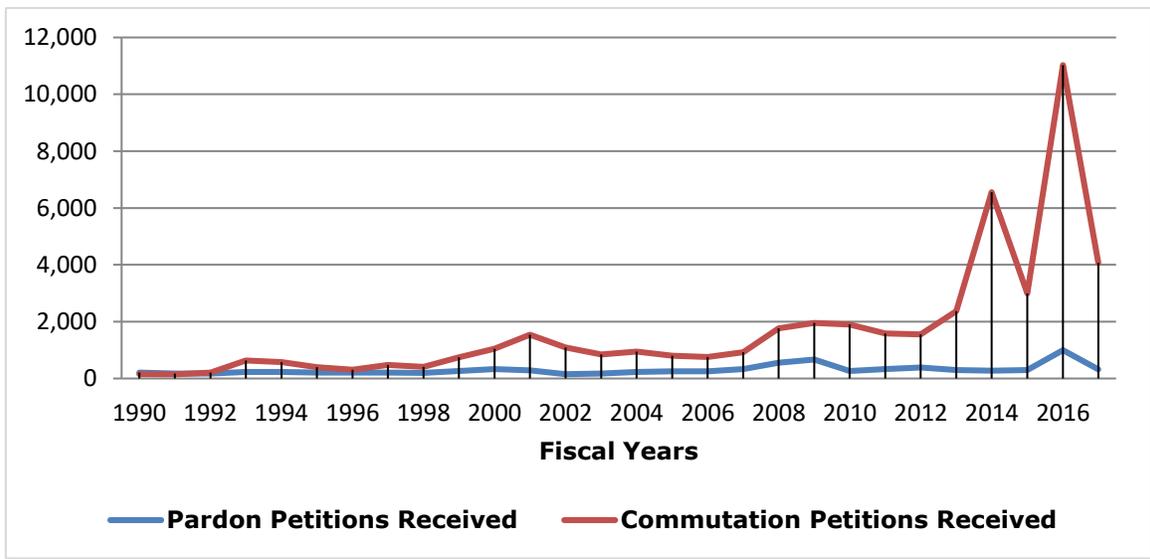
In January 2014, Rodgers emailed two ODAG officials, **Cole's Chief of Staff** and an official involved with the planning of the Initiative, alerting them to his concern that OPA still had only 15 authorized positions, including 7 attorneys, which was the same staffing level OPA had in the mid-1990s. Rodgers pointed out in his email that in FY 2013 OPA received nearly four times as many petitions for commutation than was typical during the mid-1990s. Rodgers further stated that **his staff was "already stretched beyond reasonable limits to address record numbers of newly filed cases."** **These concerns were echoed by Rodgers' successor** as Pardon Attorney, Deborah Leff, in a July 2014 memorandum to officials in the **Department's Justice Management Division (JMD).**²⁷ In that memorandum, Leff **reported that OPA's staffing level had remained the same since 1996, when it was processing approximately 90 percent fewer petitions than it had in 2014.**

Based on our analysis of OPA data, we found that the number of commutation petitions OPA received between FY 1990 and FY 2016 increased over 7,300 percent, from 148 petitions in FY 1990 to 11,028 petitions in FY 2016. Indeed, the number of commutation petitions OPA received after the Initiative was announced (from FY 2014 through January 2017) was more than in the previous 24 fiscal years combined. While OPA was facing this surge in clemency petitions, the number of pardon petitions it received nearly doubled, from approximately 276 pardon petitions on average in the fiscal years **prior to the Initiative's launch to** approximately 521 pardon petitions, on average, each year from FY 2014 through FY 2016. Figure 3 below shows the trends in pardon and commutation petitions received from FY 1990 through January 2017.

²⁶ DOJ Press Release 14-419.

²⁷ JMD provides advice and assistance to senior Department management officials relating to Department policy on budget and financial management; personnel management and training; facilities; procurement; equal employment opportunity; information processing; records management; security; and all other matters pertaining to organization, management, and administration.

Figure 3
Number of Pardon and Commutation Petitions Received
FY 1990–January 2017



Source: OIG analysis of OPA statistics

Due to OPA’s stagnant staffing levels and the historic volume of commutation petitions it received from FY 2014 through FY 2016, we concluded that OPA did not have sufficient staff to effectively process these petitions during this time period. We further found that these resource limitations resulted in ODAG officials directing OPA in FY 2014 to focus all of its resources on commutation petitions and to stop working on pardon petitions. We discuss the review of pardon petitions later in this report.

Former and current Department officials told us that external constraints limited the Department’s ability to provide OPA with more funding to support additional hiring. Former Deputy Attorney General Cole told us that the **Department’s hands were tied because** both the budget sequestration in 2013 and congressional opposition **limited the Department’s ability** to provide OPA with additional funds to support hiring more staff. Cole said that **“when sequestration hit, we were basically going into every sofa and chair to find loose change...because we knew that we did not have the money....** The idea of adding resources to the **Pardon Attorney’s Office was not an option at the time.”** Deputy Pardon Attorney Lawrence Kupers also told us that an increase in **OPA’s** budget was already in place prior to the launch of the Initiative, but it ultimately fell through.

In 2014, the Department considered reallocating approximately \$500,000 from the budget of the Executive Office of Immigration Review (EOIR) to OPA in

order to temporarily increase OPA’s staffing resources and further the Initiative.²⁸ However, **OPA’s Executive Officer told us that**, after careful consideration, the Department instead elected to use FY 2015 funds from JMD’s Special Project Fund and allocated \$280,000 to OPA in FY 2015.²⁹ Although these funds allowed OPA to obtain three full-time attorney detailees in FY 2015, they were on detail for only 6 months and OPA exhausted the remaining funds on other operational expenses. Also, **OPA’s FY 2015 budget request**, which was submitted in FY 2014 (before the **Initiative’s April 2014 announcement**) and was thereafter approved by Congress, increased its hiring ceiling to 22 staff; but OPA staff told us that this increase was to address the backlog that existed at OPA prior to the **Initiative’s announcement**.³⁰ In addition, the Department’s FY 2016 budget request to the President, which was submitted in the fall of 2014, sought to **increase OPA’s staff ceiling by** an additional 12 positions, to 34, to address the increased workflow resulting from the Initiative; thereafter, **the President’s FY 2016 budget** actually proposed to more than double the ceiling, from 22 to 46 permanent staff. While Congress increased the **appropriation for FY 2016 for the Department’s account that funded both OPA and EOIR**, congressional appropriators **objected to the Department’s proposed spending plan** that would have allotted the additional positions from that fund to OPA and the Department revised the allotment for the Initiative from the 46 positions included in **the President’s budget request** to its ceiling of 22 positions.³¹

Detaillee Program

On April 22, 2014, as well as throughout the course of the Initiative, the Department sent out memoranda requesting that Department attorneys volunteer to be detailed to work with OPA on either a full-time or part-time basis and either at OPA or remotely. An April 2015 internal OPA document stated that OPA had 78 part-time detailees from various Department components who were assisting the Initiative, most working from their home offices. We found that the part-time detailees were generally not successful in helping OPA to address its backlog and, in

²⁸ A former ODAG official told us that \$500,000 was the “maximum amount the Department could transfer internally between components without Congressional approval, approval that the Department did not have and was told they would not receive.” According to an OPA official, the Department ultimately determined that it would not be in its best interest to reallocate funds from EOIR because that would mean taking funds from EOIR’s authorized budget.

²⁹ Fiscal Year 2015 began on October 1, 2014, approximately 6 months after the Initiative was announced.

³⁰ In OIG’s 2011 report, we found that, from FY 2005 through FY 2010, there was a 92 percent increase in the backlog of pending clemency and pardon petitions at OPA, which was due in part to the number of clemency petitions more than doubling during that period. See DOJ OIG, [Audit of the Department of Justice Processing of Clemency Petitions](#), Audit Report 11-45 (September 2011).

³¹ A JMD official told us that prior to FY 2017 OPA and EOIR shared the appropriation entitled “Administrative Review and Appeals.” While Congress approved a total amount for the shared appropriation, it also directed the Department to submit a spending plan that allocated funds between EOIR and OPA. The submitted spending plan proposed additional funds for the Initiative, and the **Department’s original allotment letter to OPA reflected the full proposed spending plan request**. However, appropriators for both the U.S. House of Representatives and the U.S. Senate rejected the increase for OPA and the Department sent a revised allotment letter to OPA reflecting the final approved amount (without the proposed additional Initiative funds).

fact, were counterproductive due to the complexity of clemency cases, the difficulty of training detailees on **OPA's database system**, and the fact that many detailees volunteered just 1 day a week. One OPA attorney told us that she had to constantly re-train the part-time detailees on **OPA's complicated database system**, many of whom only worked once a week on this work. Deputy Pardon Attorney Kupers told us that most part-time detailees were not familiar with criminal law. He also said that OPA provided the detailees with a training video on how to review commutation petitions, but that the video was not informative for those who did not understand criminal law. As a result, OPA staff spent valuable time training and monitoring part-time detailees instead of working on commutation petitions. Due to these inefficiencies, OPA discontinued its use of part-time detailees in 2015. Kupers stated, **"If we'd had 20 full-time detailees instead of 100 part-time detailees that would have done it."**

We also found that full-time detailees eventually became crucial in assisting OPA, but that OPA did not obtain the majority of the full-time detailees until April 2016, 2 years after the announcement of the Initiative. On January 15, 2016, Leff submitted her resignation letter to former Deputy Attorney General Sally Yates. In the letter, a copy of which is attached to this report as [Appendix 3](#), Leff complained **that "the Department has not fulfilled its commitment to provide the resources necessary for my office to make timely and thoughtful recommendations on clemency," leaving OPA "to address the petitions of nearly 10,000 individuals with so few attorneys and support staff, mean[ing] that the requests of thousands of petitioners seeking justice will lie unheard."**

After Leff's resignation, the Department identified funding from the *Smart on Crime* initiative, which was used for 10 additional full-time OPA detailees from U.S. Attorney's Offices (USAO) for a period of 12 months starting on April 1, 2016. These full-time detailees nearly doubled the number of attorneys working on commutation petitions, and OPA officials and staff told us that the full-time detailees were helpful in reviewing petitions and providing recommendations. One **OPA attorney told us that there was "clear distinction" in the level of efficiency** between the full-time detailees and part-time detailees. Former acting Pardon Attorney Zauzmer, who was brought in on detail from the USAO for the Eastern District of Pennsylvania to head OPA in February 2016, **following Leff's resignation**, also told us that an important reason that OPA was more productive during the final year of the Initiative was because of the additional full-time detailees. Zauzmer said that if a future Administration wanted to implement a similar program, OPA would need even more resources.

Although the Department ultimately made efforts to provide OPA with additional resources through the addition of full-time detailees, we found that those efforts were made to a significant degree only during the last year of the Initiative. Had the Department coordinated with OPA during the planning stages regarding the resources and expertise necessary to handle the petitions and appreciated the enormous impact the Initiative would have on OPA, it is likely that OPA could have reviewed and made recommendations earlier and more efficiently.

The Department Did Not Effectively Implement the Initiative Following Its 2014 Announcement

We found that the Department poorly implemented the Initiative following its announcement in April 2014, with issues not resolved and corrected until 2016. First, rather than focusing on those inmates who likely met the eligibility criteria, the Department notified all federal inmates of the Initiative and distributed a survey to them, resulting in thousands of ineligible inmates filing clemency petitions. Second, the Department failed to follow up with inmates who had begun to fill out **the Initiative's** electronic survey but did not complete it. Third, the Department did not ensure that adequate assistance was provided to mentally challenged, learning disabled, and non-English speaking inmates so that they could complete the survey. Finally, the Department did not ensure that the survey was distributed to inmates in federal contract prisons.

The Department Sent Its Survey to All Federal Inmates Rather than Limiting Distribution to Potentially Eligible Inmates

To help CP 14 identify potential clemency petitioners and offer legal aid to them, the Department developed a survey for BOP inmates to complete if they sought to have a lawyer assist them in preparing a clemency petition.³² We further found that, prior to announcing the Initiative, the Department made projections regarding the number of federal inmates who might be eligible for commutation of sentence under the Initiative's six criteria. However, rather than using this information to narrow down the inmate population that would receive the Notice to Inmates and the survey, the Department sent the notice and survey to the entire BOP inmate population, resulting in the majority of clemency petitions being filed by ineligible inmates.

As early as May 2013, ODAG had internal discussions with BOP regarding the inmate population that could be affected by possible changes to the clemency policy.³³ At that time, ODAG requested and BOP provided projections of the number of inmates who might be affected by various criteria, including pre-*Booker* crack offenders whose sentences were changed due to the *Fair Sentencing Act of 2010* and Crack Cocaine Amendments to the Federal Sentencing Guidelines in 2007 and 2011.³⁴ One population that BOP identified consisted of 2,034 pre-*Booker*

³² See [Appendix 2](#) for the Notice to Inmates and survey that the Department provided to all inmates in BOP institutions. The survey consisted of a series of questions regarding an inmate's background and criminal history that the Department developed to help CP 14 identify eligible candidates for commutation of sentence under the Initiative's criteria and to determine whether the inmates wanted CP 14's assistance with the process.

³³ See, generally, U.S. Attorneys' Manual (USAM) § 1-2.113, which contains the traditional standards for considering commutation petitions. For example, the traditional standards differed from the Initiative's criteria by requiring petitioners to accept responsibility for their conduct.

³⁴ The Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), had the effect of converting the mandatory minimum sentencing regime codified in the *Sentencing Reform Act* (Cont'd)

crack offenders initially sentenced to 30 years or longer. While 515 of these 2,034 inmates (approximately 25 percent) had changes to their sentence based on these amendments, 1,519 inmates (approximately 75 percent) had no changes to their sentences and we believe were most likely to benefit from the Initiative. Despite the Department **having this information prior to the Initiative's launch** and the fact that pre-*Booker* crack offenders were a key population that the Initiative was intended to reach, the Department did not target the issuance of the Notice to Inmates and survey to a smaller population, but instead sent the notice to all inmates in the BOP population.

For example, one of **the Initiative's criteria** provided that an inmate must have served at least 10 years in order to be eligible for commutation consideration. Former Deputy Attorney General Cole told us that the **Initiative's** eligibility criteria **were "hard and fast"** and that inmates were required to meet all of the criteria to be considered eligible for commutation, including having served at least 10 years of their prison sentence. Cole said that **"the 10 years was more just [a] recognition that you had to be making a statement that these crimes were criminal acts and they do deserve some punishment... You have to be able to say to people, look there are consequences to what you do and we figured that 10 years was probably the appropriate point, as a minimum."**³⁵ During our interviews, we were told that

of 1984, and the Federal Sentencing Guidelines that were promulgated by the U.S. Sentencing Commission pursuant to it, into advisory guidance that judges must consider, but are not bound by, in determining sentences in federal criminal cases. The government is now required to prove every element of the offense to establish that a mandatory minimum sentence is warranted and federal judges may depart from the Federal Sentencing Guidelines if they believe the Guidelines sentence does not fit the crime committed or the circumstances of the case. See *Allelyne v. United States*, 133 S. Ct. 2151 (2013).

The *Fair Sentencing Act of 2010* and the 2007 and 2011 Crack Cocaine Amendments to the Federal Sentencing Guidelines attempted to eliminate the disparity in sentencing for defendants **convicted of drug offenses involving cocaine base, commonly known as "crack" cocaine, and powder cocaine** by, among other things, increasing the amount of crack cocaine necessary to trigger a mandatory minimum sentence of incarceration. Prior to the 2010 Act and 2007 and 2011 Amendments, defendants convicted of an offense involving a cocaine base received longer mandatory minimum sentences than drug defendants convicted on an offense involving powder cocaine. In 2007, the Sentencing Commission lowered the base offense levels for crack cocaine convictions, which the Commission made retroactive in 2008, and in 2011 the Sentencing Commission made retroactive further amendments reflecting the increased quantities of crack cocaine required to trigger 5- and 10-year mandatory minimum sentences under the *Fair Sentencing Act of 2010*.

³⁵ In a Management Advisory Memorandum to Department leadership on July 21, 2016, OIG discussed the confusion surrounding the Department's application of the criteria, specifically whether inmates had to meet "all" of the clemency criteria. For example, as noted above, the Notice to Inmates and the survey that were submitted to the entire BOP population stated that the Initiative was "limited to" petitioners who met all six of the clemency criteria. Michael E. Horowitz, Inspector General, U.S. Department of Justice, Management Advisory Memorandum for the Deputy Attorney General; Robert A. Zauzmer, acting Pardon Attorney; and Thomas R. Kane, acting Director, Federal Bureau of Prisons, Management of the Application Process for the Department's Clemency Initiative, July 21, 2016. By contrast, the April 2014 public announcement indicated that the Department would "prioritize" inmate applications that met all of the criteria. The latter construction in the public

(Cont'd)

BOP institution staff could have determined how many inmates had served at least 10 years of their sentence by **searching BOP's SENTRY database.**³⁶

In fact, institution staff told us that BOP's Central Office could have done these initial searches; provided a roster of names to each institution; and, based on guidance from the Department, allowed staff to determine whether the inmate had demonstrated good and non-violent conduct while in prison. The same staff also told us that they could have done these searches themselves without the assistance of the Central Office. One Warden told us that this would have expedited the survey process, resolved many **inmates' unanswered questions about the process** for consideration under the Initiative, and reduced the amount of information CP 14 attorneys requested from the institutions when they were making initial eligibility determinations.

When we asked former Deputy Attorney General Cole why the survey was sent to the entire BOP inmate population as opposed to filtering out ineligible inmates at the outset, he said he was not sure; but he also echoed concerns we heard from a BOP official that qualified inmates might have been filtered out by mistake if the survey had been sent out in a more targeted fashion, which could have resulted in the lawsuits against the Department. Thus, rather than addressing this risk, the Department made the decision to eliminate it by sending the survey to all inmates in the BOP population, resulting in a landslide of petitions, the bulk of which came from inmates who had no reasonable likelihood of obtaining relief.

Indeed, we found that BOP forwarded 35,717 clemency survey responses to CP 14, which CP 14 attorneys reviewed **to determine each inmate's eligibility before** the attorneys could draft commutation petitions for eligible candidates. According to a March 15, 2016, email from then acting Pardon Attorney Zauzmer, CP 14 deemed **ineligible under the Initiative's criteria** 22,349 of the 35,717 inmates who submitted surveys (approximately 63 percent) for commutation. Thus, had the Department focused on potentially eligible inmates at the outset when issuing the Notice to Inmates and survey, it would have significantly decreased the number of inmates who responded to the survey and would have resulted in CP 14 and OPA having to review fewer surveys and petitions. In addition, the Department would have avoided raising unnecessary expectations for inmates who were almost certain not to qualify for commutation under the Initiative.

The Department Failed to Determine Why Inmates Started but Did Not Complete the Clemency Survey

During the course of our review, we discovered that approximately 26,759 inmates started but did not complete the survey. Of these inmates, we found

announcement appears to imply that inmates did not have to meet all of the criteria but would be the first to be considered. See below for discussion and [Appendix 4](#) for **OIG's Management Advisory Memorandum**. See [Appendix 5](#) for the **Department's response** to the Management Advisory Memorandum.

³⁶ **SENTRY is BOP's primary mission support database. It collects, maintains, and tracks** critical inmate information, including location, medical history, behavior history, and release data.

that 19,798 (approximately 74 percent) did not respond to any questions, while the remaining 6,961 (approximately 26 percent) answered at least 1 question. We further determined that 2,816 of these 6,961 inmates answered at least 10 questions and that 333 inmates had answered all 13 questions. We also learned that the Department and BOP failed to follow up with these inmates to ensure that their failure to complete the survey was not a mistake or the result of a computer issue. They also took no action to determine whether any of these inmates might be eligible **candidates for clemency under the Initiative's six criteria**. When we initially inquired about this, Department **officials told us that it was not BOP's responsibility to follow up with inmates who started but did not complete the survey**. Institution staff opined that some of the inmates may have had difficulty using a computer, which could have prevented them from completing the application.

On July 21, 2016, we issued a Management Advisory Memorandum to the Department to alert it to this issue.³⁷ In response to our memorandum, the Department identified inmates who had started but did not submit the survey and who met the following qualifications: (1) their primary offense was a drug offense; (2) they had served at least 7 years in BOP custody as of September 2014 (or 9 years of imprisonment by the end of the Initiative, which would bring the time served to 10 years of imprisonment with good time credit); (3) they were not within 1 year of release; and (4) they were U.S. citizens. Of the 6,961 inmates we identified who answered at least 1 survey question but had not completed the survey, the Department identified 256 inmates who met these 4 criteria and determined that 49 of them had previously filed a petition. The Department encouraged the remaining 207 inmates to file a petition.

The Department Did Not Ensure that Adequate Assistance Was Provided to Mentally Challenged, Learning Disabled, and Non-English Speaking Inmates

We found that it was not clear whether BOP staff had provided adequate assistance to mentally challenged, learning disabled, and non-English speaking inmates. While the survey was issued in both English and Spanish, BOP housed inmates with citizenship from 172 different nations at the end of FY 2014. This is not the first time we have identified this problem in connection with a BOP program. In our 2011 report on the **Department's International Prisoner Transfer Program**, we found that language barriers may have kept some inmates from fully understanding the program.³⁸

³⁷ Horowitz, memorandum for Deputy Attorney General, Zauzmer, and Kane. See [Appendix 4](#) for the memorandum and [Appendix 5](#) for the Department's response.

³⁸ See DOJ OIG, [Review of the Department of Justice's International Prisoner Transfer Program](#), Evaluation and Inspections Report I-2012-002 (December 2011), and DOJ OIG, [Status Review on the Department's International Prisoner Transfer Program](#), Evaluation and Inspections Report 15-07 (August 2015). In response to recommendations in our 2011 report, BOP translated all documents and forms related to the transfer program into every language associated with treaty nations; we found in our 2015 status review that, from FY 2010 to FY 2013, the number of transfer requests increased by 72 percent.

Institution staff told us that, generally, if any inmate needed assistance with the survey, the inmate would have had to reach out to staff for help; yet no institution staff we interviewed recalled having provided such assistance.³⁹ Given the vulnerabilities and challenges of many of these inmates, it is unclear whether these inmates received or understood the survey and whether they would be capable of or comfortable seeking assistance. In response to our Management Advisory Memorandum, the Department instructed BOP to ask all Wardens to identify any inmate they believed might fit into one of the categories we identified: illiterate, disabled, mentally challenged, and/or non-English or Spanish speaking. BOP identified 2,796 inmates who fit these categories, 118 of whom met the 4 criteria discussed above. Of those who met the criteria, 56 had previously filed a petition and the Department encouraged the remaining 62 to apply for commutation.

The Department Did Not Ensure that Inmates in Contract Prisons Received the Notice and Survey

We found that the Department and BOP could not determine whether all inmates in contract prisons had received the notice and survey.⁴⁰ BOP had issued a memorandum to all contract prison Wardens instructing them to distribute the notice and survey.⁴¹ However, unlike inmates in BOP-managed institutions, inmates in contract prisons do not have access to TRULINCS, **BOP's internal inmate** electronic communication system. As a result, contract prison inmates interested in clemency were unable to submit a survey electronically and had to complete a paper copy and then forward it directly to either CP 14 or OPA. BOP left it to each contract prison to develop a process for notifying inmates about the survey, and we found that each contract prison Warden developed his or her own process for distributing the survey and educating inmates about the Initiative. While some **contract prisons distributed the survey to inmates as soon as they received BOP's** initial memorandum, we found that others made the survey available to inmates only upon request.

In response to our Management Advisory Memorandum, the Department said that it did not believe that any additional action was necessary with regard to inmates in contract prisons. The Department stated that in 2014 contract prisons posted a notification of the Initiative in visible areas throughout the prisons and inmates at these facilities could obtain a copy of the survey from their case manager. The Department also noted that contract prisons almost exclusively house non-citizens and that as of September 2016 President Obama had not

³⁹ BOP officials and staff also told us that if no BOP staff **who spoke an inmate's language were available, the institution could use a contract translation service such as the Department's Language Line**, which is available via telephone. BOP did not have any information regarding the extent to which inmates were made aware of or utilized this option to complete their surveys.

⁴⁰ According to BOP FY 2014 data, at that time there were approximately 30,000 inmates, primarily foreign nationals with a drug or immigration offense, incarcerated in contract prisons. **Commutation of sentence has no effect on a person's immigration status and will not prevent removal or deportation from the United States.**

⁴¹ BOP Technical Direction 14-04, Initiative on Executive Clemency.

granted any commutations to non-citizens. The Department also cited a “significant risk” that additional outreach to inmates in contract prisons would create false expectations about the possibility of commutation.

The Department Experienced Challenges in Working with CP 14 to Implement the Initiative

The primary purpose of CP 14, according to former Deputy Attorney General Cole, was to assist the Department by determining which inmates were strong candidates for commutation and then having lawyers prepare and submit petitions to OPA on behalf of those candidates. In this way, the Department believed that CP 14 would narrow the number of petitions it had to review and would receive more complete petitions from stronger candidates than it would if inmates had prepared and submitted petitions by themselves. However, we found that despite the Department’s efforts to delineate this position to CP 14, CP 14 had a very different view of its role. In particular, CP 14 attorneys thought they were to serve as advocates for inmates seeking clemency, including inmates who were clearly ineligible but wanted to submit a petition. Additionally, we found that, initially, the Department did not provide CP 14 with a firm deadline for submitting clemency petitions. Finally, despite the important role that the Department intended CP 14 to play, the Department experienced challenges in working with CP 14 and with the Administrative Office of the U.S. Courts (AOUSC) to ensure that CP 14 attorneys had access to Pre-sentence Investigation Reports (PSR) and other critical documents under the control of AOUSC in order to be able to assess inmates’ eligibility for commutation in a timely fashion.

The Department and CP 14 Had Different Perspectives on CP 14’s Role, and CP 14’s Review Process Caused Delays in Providing Petitions to OPA

Cole told us that **“we need[ed] people to help us screen what we anticipated were going to be thousands and thousands of inmates who would apply...and find the ones who [met] the criteria.”** He said that CP 14 was not supposed to be an advocate for all inmates, but rather was supposed to focus on drafting petitions for **inmates who met the Initiative’s criteria.** Cole said that he met with CP 14 repeatedly to emphasize that its role was to serve as a filtering mechanism for OPA. However, he said that he could not direct how CP 14 accomplished this. Former Deputy Attorney General Yates also told us that she encouraged CP 14 to focus the **majority of its attorneys’ time and effort on potentially favorable** candidates. **Nonetheless, Yates said that she understood CP 14’s perspective on its role in the Initiative** because its attorneys were representing inmates on their petitions and had an ethical responsibility to advocate for them, even if the inmate was clearly ineligible **for commutation under the Initiative’s criteria.**

OPA staff stated that most of the petitions received from CP 14 attorneys were akin to advocacy pieces rather than clear and concise discussions of a petitioner and his or her relevant conduct in prison. As a result, OPA staff told us that the submissions provided them little assistance. Deputy Pardon Attorney Kupers told us that **“CP 14 didn’t do that great a job on discerning which were the favorable [candidates].”** He added that many of the CP 14 attorneys attempted

advocacy by trying to “mitigate judges’ findings and re-litigate judges’ findings.” He further stated that CP 14 could have been more helpful to the Department by investigating or providing additional information regarding **an inmate’s release plan** or other personal information that would not normally be discovered during **OPA’s** review. Zauzmer similarly told us that CP 14 attorneys should have provided **additional details on potential “red flags” that might have affected an inmate’s** eligibility, rather than “re-litigating” **the inmate’s case.**

Moreover, we found that, although both former Pardon Attorneys Zauzmer and Leff set internal deadlines for CP 14, the Department experienced challenges with receiving applications from CP 14 in a timely fashion. **CP 14’s multi-layered** review process may have hampered its ability to follow these deadlines and provide commutation petitions to OPA in a timely manner.⁴² The former Chief of Staff to Deputy Attorney General Yates told us that both Cole and Yates instructed CP 14:

(1) to prioritize drug offenders with lengthy sentences who had good conduct in prison; (2) to submit those petitions as soon as possible, even if the petition was not as perfect or detailed as the lawyer likes; (3) that the President would not be able to act on petitions submitted only a few months before January 2017 so that time was of the essence; and (4) that CP 14 attorneys did not need perfect information to submit petitions.

Yates believed that **CP 14’s review process** caused delays and that **“bureaucracy may have bogged things down.”**

According to Mark Osler, a law professor who handled several individual cases as a volunteer attorney and assisted CP 14 with training attorneys, it took a lot of time to get a potential **candidate’s case through CP 14’s processes** because it **required multiple levels of review and approval from CP 14’s “Screening” and “Steering” Committees**, before a petition could be drafted and forwarded to OPA for review.⁴³ For example, Osler told us that the Steering Committee had representatives from each of the five legal organizations of which CP 14 was composed and that each organization had veto power, which we believe prevented cases from moving forward.⁴⁴ In response to the working draft of this report,

⁴² We learned from OPA leadership and staff that the Department set a deadline to submit recommendations to the White House on all inmate petitions received by OPA by August 31, 2016, **and therefore CP 14’s deadline for submitting petitions was also this date. This internal deadline was** necessary to accommodate the time OPA, ODAG, and White House staff needed to review petitions, as well as for U.S. Attorneys to submit their views for consideration in that process.

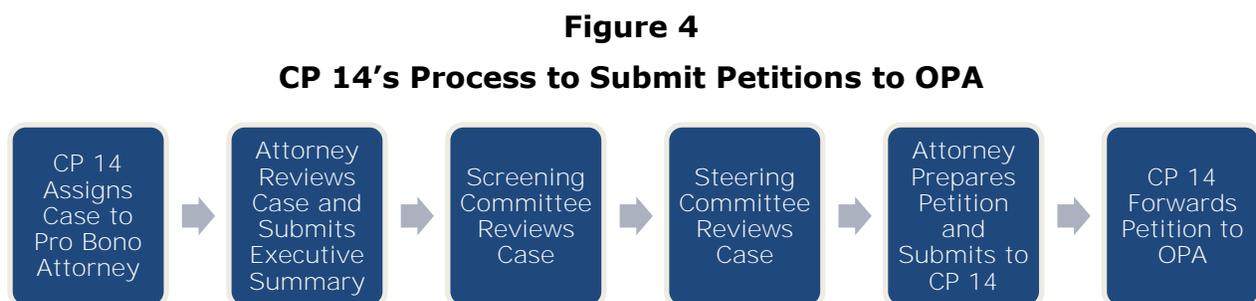
⁴³ Other than providing training, Mark Osler was not affiliated with the management of CP 14. According to our February 2017 interview, Osler was responsible for training CP 14 attorneys at the request of a representative with CP 14. He developed a 20-page Pocket Guide to help attorneys **navigate CP 14’s process and to detail a step-by-step process on how to evaluate an inmate’s** eligibility under the Initiative.

⁴⁴ As noted above, CP 14 drew volunteer attorney reviewers from five groups: (1) the American Bar Association, (2) the American Civil Liberties Union, (3) Families Against Mandatory Minimums, (4) the Federal Public and Community Defenders, and (5) the National Association of Criminal Defense Lawyers.

James Felman, Immediate Past Chair for the American Bar Association and a CP 14 Steering Committee member, stated that:

The Screening Committees were an essential tool to help the volunteer attorneys do the best job possible in identifying clients who appeared to meet the criteria for clemency and to present the most effective petitions for clemency possible. The Steering Committee was essential to ensure consistency in our application of the criteria to the cases selected for submission. Our processes were as streamlined as possible to get the job done.

See Figure 4 for CP 14's review process.



Source: CP 14, Pocket Guide to the Clemency Project 2014 Process

No doubt owing at least in part to this unwieldy review structure, we found that, despite the time-sensitive nature of the Initiative, CP 14 was still submitting petitions to OPA **in January 2017, even though President Obama's term expired on January 20, 2017.** Zauzmer told us that, after he assumed the position of acting Pardon Attorney in 2016, he communicated internal deadlines to CP 14 numerous times, but CP 14 continued to forward petitions to OPA after these internal deadlines had passed.⁴⁵ **Zauzmer told us he was "shocked" that there were CP 14 pro bono attorneys still submitting petitions right before the end of the Obama Administration because some of these petitions could not be acted upon by the President.** Zauzmer said that, in hindsight, there should have been firmer deadlines put in place.

Felman, however, in response to the working draft of our report, dismissed the utility of a deadline and praised CP 14 attorneys for submitting petitions up until the end of the Initiative. Felman stated that CP 14 attorneys "worked up until the very last day to submit petitions, and that personnel at OPA, the DAG's office, as well as the White House, were constantly and consistently urging us to submit **qualifying petitions as soon as possible.**"

⁴⁵ In response to the working draft of this report, Zauzmer told OIG that he repeatedly stressed to CP 14 leadership the need for its attorneys to complete their work by mid-2016. However, **Zauzmer stated that "many CP 14 pro bono attorneys simply did not prioritize or timely complete their assignments. The Department did everything it could...[but] firm deadlines were explicitly communicated, and repeatedly ignored by some attorneys."**

We believe that the Department made attempts to explain to CP 14 its view on how CP 14 could best assist inmates in seeking relief under the Initiative, in particular by identifying inmates who had a realistic chance of receiving favorable consideration and in a timely manner assisting those individuals in drafting clemency petitions. Former Deputy Attorney General Cole told us that he met with CP 14 numerous times regarding its role in the Initiative. However, a disconnect remained and, predictably, resulted in a significant volume of petitions from ineligible inmates, which further delayed **OPA's** work and made the process of preparing and forwarding recommendations for meritorious candidates more difficult—exactly the opposite of what the Department intended **CP 14's** involvement to be. Further, this disconnect **may have raised inmates' expectations** and did little to help the Department identify those inmates who might reasonably have had a chance to obtain clemency from the President.

The Department Failed for Over a Year to Ensure that CP 14 Could Obtain the Court Documents It Needed to Submit Clemency Petitions

We found that delays in **CP 14 attorneys' access to inmate PSRs** further hampered **CP 14's ability to serve as a filtering mechanism for OPA** during the **Initiative's first year**, as much of the information in the PSRs had to be researched and obtained through other disparate sources. The PSR is a fundamental document in a criminal case that, as one BOP official described to us, provides the story of an inmate's life prior to sentencing, which includes **the inmate's** prior arrest and conviction history as well as medical and family history. Without this document, it would be extremely difficult to determine whether an inmate should be considered under the Initiative. However, because PSRs are the property of the court of conviction, and because the CP 14 attorneys had not represented the inmates at their sentencing, the Department needed to obtain **AOUSC's** permission before BOP could allow CP 14 attorneys **access to an inmate's** PSR.

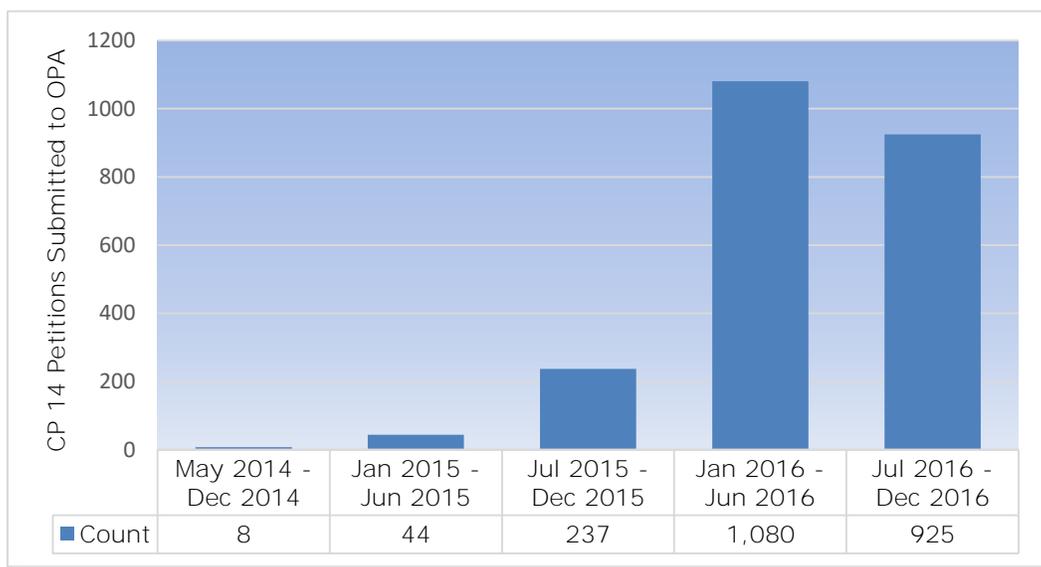
Officials in ODAG became aware of this issue in June 2014, following the decision of the Criminal Law Committee of the Judicial Conference not to allow CP 14 to receive PSRs from BOP.⁴⁶ In a June 2014 email, one ODAG official indicated that she had contacted the Criminal Law Committee and that CP 14 attorneys would need to reach out to the sentencing courts directly to obtain PSRs. Cole stated that ODAG had tried to resolve the issue once he and his staff became aware of it, but we found they were unsuccessful. However, **BOP's Senior Deputy General Counsel** told us that CP 14 was able to convince the courts that CP 14 could be trusted with PSRs and that BOP had to ensure that the transfer of this information was secure, including by updating BOP procedures to provide PSRs to CP 14. Felman told us that it was not until July 2015 that CP 14, in cooperation

⁴⁶ The Committee on Criminal Law, or the Criminal Law Committee, is a committee within the Judicial Conference of the United States responsible for long-range and strategic planning on matters related to criminal law. In 1922 Congress created the Judicial Conference of the United States, formerly known as Conference of Senior Circuit Judges, with the principal objective of framing policy guidelines for the administration of judicial courts in the United States. AOUSC is responsible for carrying out the policies of the Judicial Conference.

with BOP, was able to negotiate a protocol with the Judicial Conference of the United States that allowed BOP to provide CP 14 with access to inmate PSRs.

Deputy Pardon Attorney Kupers told us that, while CP 14’s multi-layered review process was not very efficient, CP 14’s initial lack of access to PSRs contributed to the delay in providing petitions to OPA. Indeed, data on CP 14 submissions showed an increase of over 430 percent in the number of petitions submitted from July 2015 through December 2015, the first 6 months that CP 14 had access to PSRs, as compared to the previous 6 months, January through June 2015, when it did not have access. The number of CP 14 submissions increased even more substantially—614 percent—from January 2016 to December 2016 compared to the previous year. See Figure 5 for the number of petitions CP 14 submitted to OPA over time.

Figure 5
Number of CP 14 Petitions Submitted to OPA⁴⁷



Source: OPA data

In addition to being troubled by the delay in ODAG addressing this issue once it was discussed, we find it surprising that the Department did not anticipate the need for CP 14 attorneys to have access to inmate PSRs at the outset of the Initiative, given **both the Department’s understanding of the importance of the PSR** to the petition process and **the Department’s** unsuccessful attempt in 2013 to make PSRs available to an outside group on a matter unrelated to the Initiative. In that

⁴⁷ We based the data in Figure 5 on applications that were initiated when OPA received the petition from CP 14 or that were still being processed when CP 14 submitted the petition. Some petitions were submitted directly to OPA by the inmate and were pending at the White House when CP 14 submitted an additional petition on the inmate’s behalf. These cases are not captured in Figure 5.

unrelated 2013 request, an ODAG official was informed that AOUSC had denied the **Department's request to make PSRs available to this** outside group, stating that pursuant to Judicial Conference policy and in conformity with local rules, PSRs could be disclosed only with the permission of the sentencing courts.⁴⁸ This was the same position that the Criminal Law Committee took when it was asked to make PSRs available to CP 14 as part of the Initiative.

Moreover, this same ODAG official, who had responsibility in ODAG for issues involving OPA, was a key participant in the planning, implementation, and management of the Initiative. In response to the working draft of this report, former Deputy Attorney General Cole stated that the Department did not anticipate that CP 14 would have difficulty accessing PSRs because CP 14 was acting on the behalf of inmates. Regardless, we concluded that **the Department's delay in recognizing and addressing the PSR issue significantly slowed CP 14's** ability to assist inmates in preparing petitions, thereby undermining the Initiative's success from the outset.

Initially, the Department Did Not Prioritize Its Review of Clemency Petitions

According to the April 2014 announcement of the Initiative, the Department stated that **it would "prioritize clemency applications" from inmates who met all of the Initiative's** six criteria. Despite the time-sensitive nature of the Initiative, we found that OPA initially did not effectively prioritize petitions that met the **Initiative's criteria**. Instead, former Pardon Attorney Leff directed OPA to review and provide a response to each petition, whether meritorious or not, because she believed that each petition deserved full OPA consideration. As a result, we believe **OPA's ability to promptly review petitions from inmates** who were strong candidates for clemency was negatively impacted.

To address Leff's reluctance to prioritize petitions appropriately, starting in early 2015 a then-ODAG official developed a system of prioritization to expedite the petition review process and even visited OPA to facilitate its implementation. As described to us, the system directed OPA attorneys to triage all of their cases and classify them based upon **whether the petition met most, if not all of the Initiative's** criteria. Petitions that were classified as most eligible received an expedited in-depth review and recommendation to the Department, while ineligible inmate petitions were reviewed later. The goal of the system was for OPA to make recommendations on the most favorable inmate petitions in the most efficient manner. Also, **following Leff's departure**, acting Pardon Attorney Zauzmer did prioritize the review of petitions from inmates who were strong candidates for clemency, the impact of which we discuss later in this report.

In addition, OPA staff told us that Leff directed them to draft a response to all inmate petitions in order of receipt, as opposed to filtering out and delaying responses to petitioners who clearly did not meet the **Initiative's** criteria. Leff confirmed this to us and stated that she believed petitioners had a reasonable

⁴⁸ At the time of our review, this ODAG official no longer worked for the Department and was unavailable to be interviewed.

expectation that their petitions would be looked at. She also told us that it was her responsibility to at least provide them with a response saying that their application would be processed later on. OPA staff told us that, even though they used a standard form letter of acknowledgment, **Leff's** instruction took away valuable time that could have been spent on potentially favorable recommendations. One OPA Paralegal told us that Leff **did not maximize OPA's** limited support staff resources because support staff spent most of their time responding to every piece of mail that arrived in the office instead of filtering out non-meritorious cases.

Former Deputy Attorney General Yates told us that there was a fundamental disagreement between ODAG's and Leff's priorities and that Leff did not prioritize **cases consistent with ODAG's** instructions. Yates said that Leff set up a system that was **"designed to review every petition"** and **"did not prioritize [them] in the way that we thought would be necessary to get favorable [recommendations]"** to the White House for review. Yates opined that Leff **"felt that her responsibility as Pardon Attorney was to make a decision on every petition that was pending in her office and that people who were going to be denials were entitled to that denial as much as someone who was entitled to a favorable [decision]."** Yates also told us that in fairness to Leff, **"just like no other DAG had ever done this before...Deborah hadn't either. So trying to set up a process like this is really hard when you have never done it before."** Yates informed us that, due to limited resources and time, ODAG was prioritizing the reviews of petitions that had a greater likelihood of receiving a grant of commutation from the President (see the text box below).

Leff confirmed to OIG that ODAG instructed OPA to prioritize Initiative cases and also to not work on non-Initiative cases. However, she said that this would require setting aside the vast majority of clemency petitions, and she was deeply concerned **with the idea that OPA would "backburner" petitioners** who did not meet the Initiative's criteria. During our interview, she also questioned whether she **"would have taken the job if they [the Department] had said to me that you are going to do the clemency initiative but at the cost of the President not doing [or] fulfilling any responsibility on pardons or traditional commutations."** She said that she believes that since the clemency power is vested in the President, inmates who submit clemency petitions have reason to believe that their petitions will **not "land in a stack of papers and sit there for 10 years, but that their petitions would be considered."** She told us that she decided that OPA would provide a response to each petitioner, informing them that OPA had received their petition and that it was under consideration.

We also found the process by which ODAG initially reviewed OPA's recommendations contributed to delays in the consideration of petitions. **Leff's** decision not to appropriately prioritize petitions meant that OPA was forwarding to ODAG clemency petitions not only from inmates who **met the Initiative's** six criteria but also those of inmates who did not, which we believe contributed to delays in **ODAG's** review. Both OPA and ODAG officials confirmed that approximately 1,000 recommendations, including approximately 900 denial recommendations and 100 favorable recommendations, were pending review at ODAG **prior to Leff's** resignation in January 2016. According to OPA documents, on January 21, 2016,

ODAG had 1,197 petitions from OPA pending its consideration, including 1,074 with OPA denial recommendations and 123 with OPA approval recommendations. Of the 123 favorable recommendations, 17 were pending ODAG review for 6 to 9 months and 35 for 3 to 6 months. According to a then-ODAG official, it was not uncommon for ODAG to hold some favorable recommendations for a number of reasons, including: awaiting additional information from BOP or elsewhere (i.e., state and local jurisdictions), “close calls” in which the Deputy Attorney General wanted additional time to consider the case, and situations in which an inmate might have had a recent BOP infraction and the Deputy Attorney General wanted to allow some additional time to assess **an inmate’s behavior.**

Although most OPA recommendations that were pending ODAG review were denials, we believe that ODAG also could have prioritized reviewing the remaining 123 favorable recommendations, some which were pending review for nearly 9 months. Leff said that she had not been able to obtain an explanation for why they were pending for so long. **Soon after Leff’s resignation, however, ODAG had approximately 261 commutation recommendations pending its review, with more than half of the 123 favorable recommendations having been forwarded to the White House by February 25, 2016.** In interviews, the former Chief of Staff to Deputy Attorney General Yates confirmed that the recommendations had in fact been delayed at ODAG. The Chief of Staff stated, “Nine hundred if not more of those were denials [were] on my desk... **I did not prioritize them because I knew they could wait.**” She added that around April 2016 she stopped reviewing cases because it **was “terribly inefficient”** to have her personally involved and she was slowing down the review process. Yates said that she was not aware of the recommendations that were pending at **ODAG until Leff’s resignation. However, she assumed that her Chief of Staff had not acted on them because the majority were denials and the Department prioritized working on favorable recommendations.**

In addition, OPA staff said that one ODAG official frequently requested that OPA ask BOP for more information about inmate 300- or 400-level disciplinary incidents (described by BOP as “Moderate Severity Level” and “Low Severity Level” offenses).⁴⁹ Leff and Kupers told us that fulfilling these requests was a time-consuming process because an OPA attorney would have to request paper copies of BOP inmate incident reports directly from the institution and the types of incidents were usually very minor—in one instance, for example, the inmate had taken an

The President’s Executive Clemency Policy

On April 23, 2014, White House Counsel Kathryn Ruemmler issued an executive clemency policy memorandum to Deputy Attorney General Cole that reflected **the President’s general guidance to the Department on commutations, which mirrored the Clemency Initiative.** The memorandum did not state that all the criteria were mandatory, but rather **characterized the criteria as “factors to take into account.”** The memorandum also noted that the President agreed with the Department that commutation of sentence **was an “extraordinary remedy that should be granted in extraordinary circumstances.”**

Source: White House

⁴⁹ BOP Program Statement 5270.09, Inmate Discipline Program.

extra sausage from the cafeteria. The former Chief of Staff told us that these requests were necessary because OPA did not provide the details of the incidents. The former Chief of Staff further stated that she made these requests to ensure that the DAG received all relevant information. However, around April 2016, this official stopped reviewing clemency recommendations and ODAG subsequently refrained from making these kind of requests for information to OPA.

While we understand the rationale behind Leff's approach, we believe that as a practical matter it **hampered OPA's ability to effectively utilize its limited resources to focus on the strongest cases for clemency and, therefore, delayed the White House's review of potentially favorable recommendations.** In addition, we believe that ODAG could have prioritized reviewing favorable recommendations earlier during the Initiative and could have either streamlined or eliminated requests for information regarding minor BOP incidents to help improve efficiency. Instead, there were at least 53 favorable recommendations pending ODAG review for a period of 3 to 9 months, **which further delayed the White House's review of these clemency petitions.**

Although ODAG Initially Provided Guidance to OPA Regarding How to Interpret the Initiative's Criteria, OPA Viewed the Criteria in a More Subjective Manner

We found that ODAG provided OPA with guidance early in the Initiative regarding what types of conduct and criminal history would disqualify a petitioner **under the Initiative's criteria**, but OPA viewed the criteria more subjectively. For example, former Deputy Attorney General Cole told us that he had repeated discussions with former Pardon Attorney Leff on how to interpret the Initiative's criteria, but the message never seemed to resonate. Our review of internal documents and discussions with OPA officials found that ODAG provided guidance to OPA concerning conduct that would disqualify a petitioner from receiving a favorable recommendation. Although Cole recalled having conversations with Leff about the interpretation of the criteria during their monthly meetings, former Deputy Pardon Attorney Bollwerk told us that ODAG would often **reverse OPA's** recommendations without providing any guidance or feedback regarding its decision. Cole said this was surprising to him because he recalled documenting his **specific reasons for reversing OPA's recommendation on the correspondence** provided by OPA to ODAG; but it is unclear whether his feedback was provided to OPA.⁵⁰

Although Cole viewed the Initiative's criteria as "hard and fast," as discussed above, OPA attorneys told us that they were not sure how certain criteria could be viewed in that light. For example, according to one OPA attorney, while it was **OPA's understanding that** an applicant who committed a serious crime of violence would be ineligible for commutation **because the Initiative's criteria required that** inmates not pose a public safety risk, there were cases in which inmates were

⁵⁰ The ODAG official who was responsible for the OPA portfolio during this time and would **have communicated this feedback regarding Cole's reasons for reversing OPA's favorable** recommendations did not make herself available to OIG throughout the course of this review despite repeated attempts by OIG.

deemed eligible despite having a criminal history that included an aggravated assault conviction. OPA attorneys also noted that for cases in which the inmate had a domestic violence arrest or conviction, or a significant number of misdemeanors or arrests, OPA did not receive clear guidance as to how such factors should be considered until early 2016, the last year of the Initiative.

Deputy Pardon Attorney Kupers also told us that he and then Pardon Attorney Leff continually had requested feedback from Deputy Attorney General Cole regarding what types of conduct were disqualifying **in ODAG's view** and, conversely, what types of cases OPA should focus on as potentially favorable (even though, as discussed above, Leff continued to look at non-favorable cases as well). In particular, Kupers said that he and Leff had asked whether they should look for petitioners whose backgrounds were similar to the eight inmates whose sentences the President commuted in December 2013 or whether OPA should instead focus exclusively on petitioners who clearly **met the Initiative's criteria**. Kupers and Leff both told us that the eight inmates granted commutation in December 2013 **did not meet the Initiative's criteria** and that this was a point of confusion for OPA (see the text box). Adding to the confusion, Leff told us that **Cole's January 2014** remarks before the New York Bar Association indicated that the Initiative was designed to target inmates similar to these eight grantees. Leff told us that **Cole's** remarks created the impression that the criteria were meant to be applied flexibly, **rather than "hard and fast,"** because the eight did not meet all **of the Initiative's** criteria.

"Hard and Fast" or Flexible Interpretation of the Clemency Criteria

On December 19, 2013, prior to the Clemency Initiative, President Obama commuted the sentences of eight inmates. Cole referred to the eight in his January 2014 public remarks as examples of the type of inmates the Clemency Initiative was intended to target. However, based on our review of internal documents, we note that ODAG and OPA officials believed that under a **"hard and fast" interpretation of the Initiative's criteria**, these individuals would not have met the criteria. For instance, some of them had orchestrated drug trafficking rings while others had a significant criminal history and were sentenced as career offenders. In addition, a few individuals appeared to have a history of violent crimes, such as one who had been arrested for aggravated assault and sexual battery and another who had convictions for battery, being a felon in possession of a firearm, and carrying a concealed firearm.

Source: OPA

Cole not only told us that he had strictly applied the Initiative's criteria, but he also acknowledged that there were other factors that would disqualify an inmate from consideration, which the Department did not explicitly document during his tenure. For instance, if a petitioner was eligible to obtain a judicial reduction in sentence through the retroactive application of the U.S. **Sentencing Commission's** "Drugs Minus Two" guideline, Cole deemed that inmate ineligible for commutation consideration because there was a legal mechanism in place that would address the disparity **in the inmate's sentence**. **In Cole's view, the Initiative was designed to provide relief to inmates who had no other legal remedy**. Further, under Cole, inmates who were sentenced post-**Booker**, and received a sentence that represented a variance below the otherwise applicable sentencing guidelines range, would not be eligible for commutation because the sentencing judge already had

exercised his or her discretion and departed from the guidelines in the interest of justice. Finally, Cole stated that inmates who were non-citizens were not considered as candidates for commutation even though that was not mentioned as one of the **Initiative's** criteria. At time of the Initiative, this was a significant criterion given that approximately 25 percent of all federal inmates were non-citizens. Still, Cole said he believed that the Department should channel its limited resources to inmates who, if granted clemency, would be returning to U.S. communities as opposed to non-citizen inmates, who would instead be immediately deported.

We found that the **Initiative's** criteria were applied more flexibly under former Deputy Attorney General Yates. Former acting Pardon Attorney Zauzmer was also a strong advocate for greater flexibility. Deputy Pardon Attorney Kupers confirmed this and told us that **"there clearly was very gradual movement with some of the criteria and they became applied more flexibly as time went on."** For example, Zauzmer told us that he believed certain non-citizen inmates warranted consideration under the Initiative and lobbied the White House to reconsider its **position. During Zauzmer's tenure,** the Department sent favorable recommendations to the White House for approximately 31 non-citizen inmates serving life sentences. However, the President denied clemency for all of these inmates.⁵¹

We also learned that OPA maintained a "non-citizen on hold" queue in its database for managing non-citizen petitions that met the Initiative's criteria. According to Zauzmer, by the end of the Obama Administration, OPA had about 112 **non-citizen petitioners in the queue. In OPA's final submission to the White House** in January 2017, ODAG sent the list of 112 non-citizen inmates to the White House for clemency consideration; however, President Obama denied clemency to all 112 non-citizens.

Another example in which criteria became more flexible involved inmates who violated 18 U.S.C. § 924 by possessing a firearm during the commission of a drug crime. We were told that under Deputy Attorney General Cole those inmates would not have received a favorable recommendation but in some cases they did under Deputy Attorney General Yates. In addition, Kupers told us that under Cole OPA could not apply good conduct time to satisfy the 10-year time served requirement. However, during the last year of the Initiative this changed and OPA was allowed to credit good conduct time when determining whether an inmate met the 10-year requirement. Further, an OPA attorney told us that, over time, the Department began to make favorable recommendations for inmates who were eligible for a reduction in sentence under the U.S. Sentencing **Commission's** Drugs Minus Two guideline, and the OPA attorney told us that this shift caused an increase

⁵¹ Based on our review of Department data, we found that President Obama commuted one **non-citizen inmate's sentence from death to life in prison. According to Zauzmer, this petitioner was considered under traditional clemency criteria.**

in the number of favorable recommendations sent to the White House.⁵² Additionally, **contrary to Cole’s position, Yates allowed OPA to recommend** to the White House commutations for inmates who had received a *Booker* variance from the otherwise applicable sentencing guidelines. Finally, in February 2016, OPA was authorized to recommend term commutations, which unlike typical commutations are sentence reductions that do not result in a prompt release from prison but rather provide for an earlier release some time in the future.⁵³ Yates confirmed to OIG that she interpreted the criteria differently than Cole and that she thought they were not intended to be rigid or to permit deviation in otherwise meritorious cases.

These changes under Deputy Attorney General Yates, which broadened the number of inmates who were eligible for consideration under the Initiative, as well as the evolution of the application and interpretation of the criteria, inevitably raised questions about whether petitioners whose petitions had been considered and denied when the criteria were more strict would have fared better under the new, more flexible interpretation. Later in this report we discuss the reforms acting Pardon Attorney Zauzmer put in place to allow for the reconsideration of certain inmate petitions submitted prior to 2016.

USAOs Did Not Provide Timely Responses to OPA on Clemency Petitions

According to OPA staff, it has historically been a challenge to obtain feedback on clemency petitions from U.S. Attorneys within the 30-day timeframe required by Department policy, although this feedback is a key component of the clemency process.⁵⁴ In **OIG’s** 2011 report on the clemency process, we found the same concerns and recommended that the Executive Office for U.S. Attorneys issue additional guidance to the USAOs reminding them to comply with the timeframes in **the U.S. Attorneys’ Manual (USAM) and notify OPA of** any expected compliance delays.⁵⁵ The Executive Office for U.S. Attorneys concurred with our recommendation and provided documentation of its additional guidance to the USAOs regarding the need to respond to OPA requests in a timely manner. We were therefore deeply concerned to discover the same issues we identified in 2011,

⁵² Based on our review of clemency recipients, the President commuted sentences for inmates whose sentences were amended on or after November 1, 2014, the date that the Sentencing Commission’s **Drugs Minus Two** guideline went into effect. For more information on inmates who received commutation, see DOJ, “Commutations Granted by President Barack Obama (2009–2017),” www.justice.gov/pardon/obama-commutations (accessed June 27, 2018).

⁵³ According to Cole, he had previously proposed term commutations as an option for inmates with long drug sentences but the White House did not approve.

⁵⁴ According to the USAM, the Pardon Attorney generally asks a U.S. Attorney for a response within 30 days. If the U.S. Attorney anticipates an unusual delay, the U.S. Attorney should advise the Pardon Attorney as to when to expect the response. The views of the U.S. Attorney are to be given considerable weight in determining what recommendations the Department should make to the President. **Each petition is presented to the President with a report that includes the Department’s recommendation and the U.S. Attorney’s views.** See USAM § 1-2.111.

⁵⁵ See DOJ OIG, [Audit of the Department of Justice Processing of Clemency Petitions](#), Audit Report 11-45 (September 2011).

and that the USAOs had been told to address, were still being faced by OPA just a few years later.

According to former Deputy Attorney General Cole, U.S. Attorney feedback is critical to ensuring public safety, as USAOs may have sensitive intelligence about an offender that is not included in court records such as the PSR. For instance, a USAO may not have had enough evidence to bring specific charges against a known violent offender and therefore may have prosecuted the petitioner for a lesser offense; but the USAO could still be aware of relevant factual information about the offender that should be known in considering possible clemency. Consequently, because some USAOs do not provide feedback to OPA in a timely manner, as **required by Department policy, petitioners' applications lingered** at OPA indefinitely.

Based on our review of OPA data, we found that by December 2016 there were 580 overdue USAO responses, including 2 that were overdue by about a year (see the table).⁵⁶ Zauzmer told us that when OPA had not received a USAO response after 60 days he would email the U.S. Attorney directly to obtain his or her views on the case. According to Zauzmer, a few USAOs were continually **"not very responsive"** and disproportionately delayed the processing of petitions from their districts.

Table
Number of Overdue U.S. Attorney Responses
As of December 1, 2016⁵⁷

Months Overdue	Number of Overdue U.S. Attorney Responses	Month Initial Request Sent	Year Initial Request Sent
<1	234	October	2016
1	175	September	2016
2	70	August	2016
3	43	July	2016
4	30	June	2016
5	15	May	2016
6	4	April	2016
7	6	March	2016
8	0	February	2016
9	0	January	2016
10	1	December	2015
11	0	November	2015
12	2	October	2015

Source: OIG analysis of OPA data

⁵⁶ We believe that the number of outstanding U.S. Attorney requests increased near the end of the Obama Administration at least in part because OPA was processing an increasingly large volume of petitions during the last months of the Initiative.

⁵⁷ Out of the 580 overdue U.S. Attorney responses, 512 were for commutation petitioners and 63 for pardon petitioners. It was unclear in the data whether the remaining five outstanding responses were for commutation or pardon petitioners.

Zauzmer told us that during the final week of December 2016 OPA could no longer wait for USAO responses for about 15 cases and submitted favorable recommendations to ODAG without the views of the U.S. Attorney. Based on our document review, we found this issue to be more prevalent. According to a January 4, 2017, email from then acting Pardon Attorney Zauzmer, the Department submitted 72 recommendations to the White House without the views of the U.S. Attorney. We also found that the President granted commutation to 51 of these inmates and that some of the U.S. Attorneys' responses may have come in after the Department initially submitted its recommendation to the White House.⁵⁸ Consequently, some of these clemency decisions may have gone forward without **information that might have influenced the Department's recommendations** or their final resolutions.

As we discuss below, Zauzmer implemented a number of reforms after being appointed as acting Pardon Attorney that were intended to improve the **Department's** clemency review process. One of these reforms was a streamlined template that USAOs could use for their responses. According to former Deputy Attorney General Yates, the streamlined template helped standardize the types of responses OPA received. She said that, prior to the template, USAO responses varied, with some containing a few sentences and others including a **"whole book"** of information regarding the case. The template helped the districts to **"really focus them on what we needed and what we didn't."**

Despite the introduction of the template, as detailed above, several USAOs still did not provide the U.S. Attorneys' responses to OPA in a timely manner. We heard complaints from various Department officials that OPA sometimes requested views from U.S. Attorneys for inmates who clearly did not meet the requirements for commutation, which may have contributed to delayed responses. Yates said that one of the early complaints she received from U.S. Attorneys was that they **were receiving "a fair number of petitions for people who wouldn't even come close to qualifying."** Yates told us that one way to help ensure compliance would be to send requests to USAOs only for candidates who were likely to qualify. Various Department officials told us that in light of the substantial responsibilities of U.S. Attorneys, many of which are time-sensitive, clemency is simply not the top priority for them. Yates told us **that "they're doing this on top of everything else they're doing, and this is the only job of the Pardon Attorney's Office...we were asking U.S. Attorneys to do this stuff in a really short time frame."**

The Initiative Impacted the Department's Handling of Pardon Petitions

The challenges that the Department faced in handling the thousands of clemency petitions generated by the Initiative had a significant impact on the **Department's** processing of pardon petitions. We found that in September 2014

⁵⁸ In response to the working draft of this report, Zauzmer stated that there were a number of instances in which the U.S. Attorney recommendation arrived after OPA's recommendation was made. In those instances, he immediately forwarded the recommendation to both ODAG and the White House Counsel's Office (WHCO), along with a statement of whether the recommendation altered his earlier stated view.

then Deputy Attorney General Cole instructed OPA to prioritize commutation petitions over pardon petitions, effectively suspending their consideration, and to channel its limited resources to support the Initiative. Cole told us that petitioners in BOP custody seeking commutations presented a more urgent need because they were still in custody, **and therefore he suspended OPA's consideration of pardon petitions** for a period of approximately 14 months. Former Pardon Attorney Leff told us that Cole **informed her that** "resources are not going to be forthcoming, and he said you should assign every attorney to work on commutation and the **Clemency Initiative and not work on pardons and traditional commutations.**" Leff said that she ultimately implemented **Cole's** instruction but told us that she believed pardon applicants deserved a notice informing them that OPA would not be working on their **pardon application. She said that "if people are applying for a pardon and if they literally are going to sit in a stack in the office and not get any attention, one could send them a letter."** According to Leff, ODAG told her not to send any notice about delays in reviewing pardon applications.

However, after a news article criticized President Obama for being "stingy regarding pardons," ODAG instructed OPA to resume work on pardons, according to the one attorney who worked exclusively on them. The attorney told us later, in March 2016, that the White House implemented an expedited pardon process to ensure that the President could make a determination on some meritorious pardon recommendations before the end of his Administration. At the time, OPA and ODAG had approximately 1,600 pardon petitions pending.

According to the attorney working exclusively on pardons, to streamline the pardon process and allow ODAG to focus exclusively on commutation recommendations, the White House instructed the Department to send all pending pardon petitions **directly to the White House Counsel's Office (WHCO)** for its review. The OPA attorney told us that WHCO then reviewed and selected 406 petitioners who they believed merited further review by OPA. OPA, in turn, verified the criminal history of these petitioners **and learned that a few of WHCO's selections had misrepresented their criminal histories. These candidates' petitions were** subsequently removed from consideration.

In order to accelerate the turnaround on the Federal Bureau of **Investigation's (FBI)** investigations of the remaining cases, former acting Pardon Attorney Zauzmer met with FBI and negotiated an expedited Application for Pardon after Conviction investigation that required FBI to complete the entire investigation in 30 days instead of the usual 120 days. Once FBI had completed the investigations, OPA submitted its recommendations directly to WHCO, rather than sending them first to ODAG for review. Ultimately, President Obama granted 142 pardons in FY 2017 and ended his Administration having granted a total of 212 pardons.⁵⁹

⁵⁹ See DOJ OPA, "Clemency Statistics," www.justice.gov/pardon/clemency-statistics (accessed June 26, 2018).

The Department Implemented Several Changes to Its Management of the Clemency Process, Which Substantially Streamlined the Process for Sending Recommendations to the White House

In 2016, following Leff's resignation and the appointment of Robert Zauzmer as acting Pardon Attorney, the Department made a number of significant changes to how it handled clemency petitions under the Initiative. As we described previously, the Department addressed staffing shortages at OPA by providing OPA with full-time detailees, OPA put a prioritization process in place for reviewing clemency petitions, and the Department provided OPA with greater clarity on the application of the Initiative's criteria. We describe below several additional actions taken by OPA and the Department to manage the large volume of petitions that were pending in OPA in January 2016.

As mentioned earlier in this report, Leff resigned in January 2016 due to a number of issues she had with the Department's **management of the Initiative**. One issue Leff discussed in her resignation letter, and with OIG, was her belief that the Pardon Attorney should have direct access to the White House and that **OPA's** views should be included in **ODAG's** recommendation when OPA and ODAG disagreed about a petition.⁶⁰ Leff told us that, contrary to her expectations, ODAG did not forward contrary OPA views on recommendations to the White House during her tenure.

We found that, shortly after Leff resigned, the Department started to include the opposing views of the Pardon Attorney in ODAG's recommendations to the White House. Zauzmer told us that the Department implemented this change to address concerns Leff cited in her resignation letter, that **"prior to making the serious and complex decisions underlying clemency, it is important for the President to have a full set of views."** Nevertheless, we learned from Zauzmer that, during the Initiative, the President never once acted contrary to an ODAG recommendation not to grant clemency when there was dissent between OPA and ODAG. The sharing of dissenting views was not completely without effect, though, as Zauzmer told us that in the few times when both ODAG and OPA recommended a term commutation but disagreed on the length of the reduction, the President favored **some of OPA's recommendations**.

Another change made in the handling of clemency petitions was the decision by the Department in July 2016 to delegate authority to Zauzmer to function as the final reviewer for all OPA non-favorable recommendations. During **Leff's tenure**, this authority had been reserved for ODAG officials. However, in light of the large number of favorable recommendations submitted and pending with ODAG, as well as the impending end of the Obama Administration, we believe the Department amended its process so that ODAG officials could reserve their time for reviewing petitions that might result in the President granting commutation.

⁶⁰ Although the Department traditionally provided one recommendation to the White House, we found that there were a few occasions prior to Leff's appointment as Pardon Attorney involving pardon petitions in which both ODAG's and OPA's recommendations were provided.

Former Deputy Attorney General Yates told us that near the end of the Initiative both she and OPA agreed that it was not an efficient use of her time to review non-favorable recommendations because she was not reversing **OPA's** recommendations. Also, in light of the thousands of recommendations OPA was making during the final year of the Initiative, she said that she simply could not have reviewed every recommendation and thus channeled her efforts on reviewing favorable recommendations. Accordingly, from July 2016 until the end of the Obama Administration, inmate commutation petitions for which OPA recommended a denial were submitted directly to the White House without ODAG review.⁶¹ While this streamlined process freed ODAG's time to review petitions that had greater potential to be granted, with the exception of a few cases, it also meant that ODAG was no longer in the position to recommend clemency for those that OPA did not.

In addition, OPA staff told us that Zauzmer implemented a number of changes that helped streamline the review process and improved productivity. For example, OPA attorneys told us that Zauzmer developed a new USAO referral form, which required an expedited response time, from 30 days to 14 days, near the end of the Obama Administration. Zauzmer also eliminated the requirement that OPA attorneys needed to request permission from the Pardon Attorney to send referrals to the USAOs. Two OPA attorneys commented that once Zauzmer came on board, OPA did not have to answer every piece of mail, which had previously slowed their work. We believe that the sum of these individual steps, coupled with increases in **OPA's staffing**, proved highly effective and enabled OPA to provide more recommendations to ODAG and ultimately to the White House. For instance, by the end of 2015, the Department had provided recommendations to the White House on only 1,755 clemency petitions. By contrast, during the final year of the Initiative, **under Zauzmer's tenure**, the Department submitted 12,137 recommendations to the White House.⁶² (See the text box below, which highlights other reforms Zauzmer implemented in 2016, some of which we discussed earlier in this report.)

⁶¹ Yates told OIG that there were a "handful" of non-favorable recommendations that she reviewed at Zauzmer's request. In response to the working draft of this report, Zauzmer stated that whenever he had the slightest doubt on a non-favorable recommendation, it was submitted to ODAG for review.

⁶² According to OPA, some recommendations were sent from the Department to the White House more than once, for a variety of reasons, and the **Department's recommendation may have** changed on a subsequent submission. Therefore, these numbers reflect only when the final recommendation was submitted to the White House.

Reforms Under Zauzmer

- Zauzmer and Yates ended the practice of using courier mail to transport hard copy recommendations to ODAG, which was inefficient, time-consuming, and prolonged the back and forth exchanges between both offices, and replaced it with email.
- Zauzmer discontinued OPA attorneys' use of a lengthy worksheet, which initially was designed as a teaching tool for new OPA attorneys and detailees. Zauzmer also disabled the 1,000-character limit **in OPA's case management system** for micro-summary denials. This character limit often made it more time-consuming for OPA attorneys to draft micro-summary denials, which prevented them from reviewing other petitions.
- Zauzmer introduced a short-form U.S. Attorney referral template that mirrored the format **of OPA's recommendation template** to make it easier for U.S. Attorneys to provide their views on petitions and to ensure they were providing the necessary information to OPA.

Source: OPA officials and staff

OPA Undertook a Reconsideration Project in 2016 for Inmates Who Had Not Received a Favorable Recommendation

In light of the more flexible approach by former Deputy Attorney General Yates that increased the number of inmates who were eligible for commutation consideration, acting Pardon Attorney Zauzmer instituted the Reconsideration Project in March 2016. The Reconsideration Project was an OPA-led effort to determine whether inmates who previously had not received a favorable recommendation from the Department would have received a different recommendation because of the changes in the eligibility criteria applied by the Department. According to Zauzmer, the goal of the Reconsideration Project was to ensure that **"all petitioners under the Initiative were treated fairly and consistently."**

Based on our review of OPA records, it appears that OPA leadership, as part of the Reconsideration Project, reviewed all non-favorable recommendations (over **3,000 inmates' petitions**) made by OPA prior to February 1, 2016. However, we found that OPA did not fully reopen all previously denied cases and review the entire case file, which may have contained additional relevant information. Instead, Zauzmer reviewed the **"micro-summary denial" in OPA's case management system**, which was referred to as a micro-summary denial because the OPA system had limited the length of the summary.⁶³ In addition, a senior OPA attorney simultaneously **reviewed approximately 150 "full denial" recommendations** that contained a more detailed assessment of the **inmate's petition**. After reviewing all non-favorable recommendations, for those petitions that OPA leadership believed warranted further review, OPA attorneys did a series of preliminary screenings of potentially meritorious petitions and identified 85 petitions that warranted full

⁶³ Prior to Zauzmer's tenure, OPA's case management system limited micro-summary denials to 1,000 characters. According to Zauzmer, because of the 1,000-character limit, OPA attorneys would frequently have to condense their summaries and, as a result, we believe, important information may not have been included.

reconsideration by the Department. During our interview in March 2017, Zauzmer estimated that by the end of the Obama Administration the President had granted clemency to approximately 20 to 30 inmates whom OPA had identified through the Reconsideration Project.⁶⁴

Even with the Reconsideration Project, OPA attorneys told us that there were inmates who would have received a different resolution had the Department given full consideration to their petitions in 2016 and applied the more flexible standards. Zauzmer acknowledged this possibility and said that he could not be confident that OPA **did a “perfect” job** and captured all petitions worthy of reconsideration; but he **“was determined to try and be fair to everybody.”**⁶⁵ He explained that the only way OPA could have done so would have been to go back and conduct a regular review of all previously rejected inmate petitions to determine **“what’s lurking in there that nobody mentioned in the micro-summary [denial].”** However, the senior attorney who supported this project stated that OPA did not have the time to do so. Given these comments by Zauzmer and OPA attorneys, we believe there remains a substantial question as to whether the Department treated all petitioners consistently over the course of the Initiative.

The Department Made Recommendations to the White House on Over 13,000 Petitions

As stated previously, the **Department’s goal was to** provide recommendations to the White House on all inmate petitions that were received at OPA by August 31, 2016. We found that the Department exceeded this goal and made recommendations not only on all the petitions that OPA received by this deadline, but also on a number of petitions received after the deadline. In fact, based on our review of OPA data, we found that the Department made recommendations on over 1,300 cases that were opened after this deadline, including some cases opened as late as January 2017, and that 127 petitioners whose cases were opened after August 31, 2016, ultimately received some form of commutation. By the end of the

⁶⁴ According to OPA records, 22 of the 85 petitions that OPA identified as warranting reconsideration were at the time pending review at the White House as recommended denials. Upon **OPA’s request, the White House returned these petitions for further review. With respect to the other 63 petitions, the President had already denied them consistent with the Department’s denial** recommendation. Consequently, with respect to these 63 inmates, the Department and the White House agreed to waive the traditional 1-year waiting period and OPA subsequently reevaluated these inmates’ petitions under the more flexible criteria.

⁶⁵ In response to the working draft of this report, Zauzmer stated that although he may have acknowledged that it is possible that a worthy petition may not have been reconciled by the Reconsideration Project, it was only in the sense that one can **“never say never.”** According to Zauzmer, **OPA devoted all the resources it deemed “necessary to assure [sic] that all petitions from throughout the Initiative were considered on a level playing field and subject to uniform standards” and that “it is highly unlikely that any petitioner was disadvantaged.”** While we recognize OPA’s efforts to treat all petitions under uniform standards, in April 2017 we were told by the senior OPA attorney who screened **“full denial” recommendations that she knew of a handful of petitioners who were overlooked by the Reconsideration Project and since reapplied for a commutation of sentence.**

Initiative, the Department had made recommendations to the White House on 13,892 petitions, resulting in 1,696 inmates receiving clemency.⁶⁶

Zauzmer told us that there were approximately 83 inmates who **were “tough cases”** and who ultimately did not receive a decision by President Obama. He said that, in about 20 of the 83 cases, Deputy Attorney General Yates agreed with OPA and made a favorable recommendation to President Obama. In the remaining 63 cases, OPA had made a favorable recommendation that ODAG reversed to a denial recommendation. Zauzmer also said that in January 2017 OPA sent the White House approximately 2,000 denial recommendations, but the White House mistakenly overlooked about 400 inmates in this submission and did not decide on them (the other 1,600 petitions were denied **consistent with OPA’s** recommendation). Although it is unlikely that these inmates would have received clemency, Zauzmer said that it was unfortunate that there was not a final determination made on their petitions before the end of the Obama Administration.⁶⁷

Attempting to weigh the overall challenges and accomplishments of the Initiative, former Deputy Attorney General Yates told us that with a “massive undertaking” like the Clemency Initiative, which had never been done before, **“there was no playbook.”** She added that while there might have been things that could have been done differently, the challenges that the Department experienced should not dissuade it from attempting programs that **are “big and bold”** in the future because, **otherwise, “we wouldn’t be doing our jobs.”**

⁶⁶ See U.S. Sentencing Commission, *An Analysis of the Implementation of the 2014 Clemency Initiative* (September 2017), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf (accessed June 27, 2018).

⁶⁷ As referenced on OPA’s website, petitions not decided by one Administration generally remain pending until decided by a subsequent Administration. See DOJ OPA, “Frequently Asked Questions,” www.justice.gov/pardon/frequently-asked-questions (accessed June 26, 2018).

CONCLUSION

OIG found that the Department substantially fulfilled the mandate of the Clemency Initiative in making over 13,000 recommendations on commutation petitions **by the end of President Obama's** Administration. As the Initiative progressed, the Department implemented a series of changes that helped streamline the review of clemency petitions, which ultimately increased the number of favorable recommendations sent to the White House. However, we found several shortcomings that hindered the processing of clemency petitions, particularly during the first 2 years of the Initiative.

We found that, from the outset, the Department did not effectively plan and implement the Initiative. Despite the Office **of the Pardon Attorney's (OPA) key role** in the clemency process, the Department did not sufficiently involve OPA in planning the Initiative. We also found that, contrary to **the Department's stated** commitment to supporting the Initiative, OPA encountered significant resource challenges. We found that while **the Department attempted to address OPA's** limited resources by requesting that Department attorneys volunteer at OPA, a part-time detailee program did not further and may actually have hindered the process of providing clemency recommendations and OPA did not receive the majority of its full-time detailees until 2 years after the announcement of the Initiative. We believe that if OPA had been given greater resources at the outset, it would have been better equipped to handle the predictable influx of petitions and provide more recommendations in a more timely fashion.

Exacerbating OPA's resource limitations, the Department, despite initial projections of the number of inmates who met certain criteria established under the Initiative, sent its clemency survey to the entire BOP population, rather than limiting it to inmates likely to meet the **Initiative's** criteria. If the Department had targeted the survey to inmates who met certain criteria, it would have reduced the backlog of surveys that needed to be reviewed. This would have enabled the limited number of people doing this work to focus on those who were more likely to be favorably considered under the Initiative, thereby avoiding the risk of raising expectations unnecessarily for others who were almost certain not to qualify for relief.

In addition, the Department experienced challenges in working effectively at the outset of the Initiative with the Clemency Project 2014 (CP 14) and the Administrative Office of the U.S. Courts to ensure that CP 14 attorneys would have **access to inmates' Pre-sentence Investigation Reports**, which slowed **CP 14's efforts** considerably. As a result, CP 14 could not effectively provide petitions to OPA for over a year after the announcement of the Initiative, which further hindered the **Department's ability to review petitions.**

Another obstacle that OPA faced was that some U.S. Attorneys did not provide their views on inmate petitions in a timely manner, as Department policy required. **OPA's receipt of a U.S. Attorney's** views is critical and of particular importance in ensuring that an inmate petitioning for commutation does not present a public safety risk.

Moreover, we found that, under the direction of former Pardon Attorney Deborah Leff, OPA failed to prioritize petitions as the Department had directed, instead providing a response to every petition, whether meritorious or not. This insistence on fully considering and responding to every petition as it was received resulted in OPA not utilizing its limited resources to focus on eligible candidates, which likely further delayed the Department in providing favorable recommendations to the White House.

Further, we found that during the first year of the Initiative the Office of the Deputy Attorney General (ODAG) provided OPA with guidance regarding what types of conduct and criminal history would disqualify a petitioner, but OPA viewed the **Initiative's criteria more subjectively**. As a result, OPA made favorable recommendations to ODAG that ODAG reversed. Although former Deputy Attorney General James Cole told us that he provided feedback on recommendations that were reversed, OPA officials told us that, initially, this feedback was not communicated to them, and, if it had been, it would have informed their decisions regarding future recommendations. With the approval of the White House, the Department later applied the Initiative's criteria with more flexibility, which resulted in a larger number of favorable recommendations reaching the White House before the end of the Obama Administration. However, despite an effort to determine whether some summarily denied petitions should have been reconsidered, there remains a substantial possibility that the shift in the interpretation of the **Initiative's** criteria may have put some inmates who applied earlier at a disadvantage. We finally found that although the Department made favorable recommendations for many non-citizen inmates, ultimately no grants of commutation were made to non-citizens under the Initiative.

On January 20, 2017, the Department discontinued the Initiative and as a result, we do not make recommendations to the Department to address the issues we found throughout the course of our review. Nevertheless, we believe that the **lessons learned from the Department's implementation of the Initiative can be of** assistance to the Department in handling any future clemency programs.

METHODOLOGY OF THE OIG REVIEW

In this review, OIG examined the U.S. Department of Justice's (Department) clemency process since FY 2014, as well as its implementation and management of the Clemency Initiative. Our fieldwork, performed from May 2016 to April 2017, included document and policy reviews, email record reviews of former and current Office of the Pardon Attorney (OPA) and Office of the Deputy Attorney General (ODAG) officials, data analysis, and interviews. The following sections provide additional information about our methodology.

Standards

OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation* (January 2012).

Data Analysis

We analyzed several sets of data, including the number of inmates who completed or started the clemency survey, OPA data on grants of pardons and commutations, clemency petitions received and pending, Clemency Project 2014 (CP 14) petitions submitted to OPA, OPA requests to U.S. Attorneys, recommendations sent to the White House, and non-citizens who petitioned for clemency.

The Federal Bureau of Prisons (BOP) provided to us the number of inmates who completed the **Department's clemency** survey (see [Appendix 2](#)) and the number of inmates who started but did not submit the survey. For all inmates who started but did not submit the survey, BOP provided their names and answers. Using this information, we determined the number of questions each inmate answered.

To help us prepare **OIG's Management Advisory Memorandum** (see [Appendix 4](#)), BOP provided a list of names and register numbers of inmates who had completed the survey and forwarded it to CP 14. We compared this list with **BOP's population data**, which included the sentence start date of each inmate, to determine the number of inmates who had served at least 10 years and had forwarded the survey to CP 14.

Regarding grants of clemency, clemency petitions received, and clemency petitions pending, **OIG used OPA's website to determine the number of pardons and commutations since FY 1900.**⁶⁸ **According to OPA's website,** the statistics for petitions granted derive from a count of clemency warrants maintained by OPA:

Cases in which multiple forms of relief were granted are counted in only one category. Cases in which clemency was granted to a person

⁶⁸ See DOJ OPA, "Clemency Statistics," www.justice.gov/pardon/clemency-statistics (accessed June 26, 2018).

who did not file an application with OPA **are counted as "Petitions Granted" but have not been counted as "Petitions Pending" or "Petitions Received" since at least FY 1990.** The figures for commutations exclude one reprieve granted in FY 2000 and one granted in FY 2001. Also excluded from the chart are individual members of a class of persons granted pardons by proclamation, such as President Jimmy **Carter's proclamation granting clemency to certain Vietnam era offenders**, and persons granted clemency after action by President Gerald R. **Ford's Presidential Clemency Board.** "Petitions Pending" means pending at the beginning of the fiscal year, or in the case of a change of administration, the number of cases pending at **the time of the new President's inauguration; that number may not correspond with the number computed from case-processing figures reported for the previous year due to the fact that minor subsequent corrections in case closure for a previous fiscal year to be made.**

With regard to the number of petitions that CP 14 submitted to OPA, OIG received a spreadsheet from OPA that listed each petitioner and the date that OPA received the petition from CP 14. OPA staff noted that, although these dates reflect the date of CP 14's submission to OPA, inmates also may have sent a clemency petition directly to OPA. As a result, OPA may have reviewed petitions sent directly **from inmates if they arrived prior to CP 14's submission.**

The data on overdue U.S. Attorney responses was taken **from OPA "tickler"** records as of December 1, 2016. OPA staff produced monthly reports on spreadsheets to track tickler notices, or reminders to U.S. Attorney's Offices regarding OPA requests for their views.

We based our analysis of the number of favorable recommendations sent to the White House on an OPA spreadsheet containing information on all commutation petitions processed by the office from January 2012 through January 2017. We based our analysis of the number of favorable recommendations forwarded to the White House without U.S. Attorney views on an OPA spreadsheet listing petitions OPA had sent as of January 4, 2017, without U.S. Attorney views, along with the **White House's decisions** on the petitions. The list was attached to an email from former acting Pardon Attorney Robert Zauzmer requesting staff to forward any U.S. Attorney responses for these petitions received after January 4, 2017, to the White House.

Additionally, we used the data that OPA provided on all commutation petitions processed from January 2012 through January 2017 to cross-reference **petitioners' BOP registration numbers with BOP data on the citizenship of inmates.** We were unable to obtain citizenship information for about 200 inmates out of the approximately 26,000 petitioners included in the data due to such issues as incorrectly entered data **and inmates not being captured in BOP's annual population snapshot data.**

Email and Document Analysis

We requested and reviewed documentation related to our review from ODAG, OPA, the Executive Office for U.S. Attorneys, and BOP. The documents we reviewed included memoranda, policies, reports, and meeting agendas.

We had difficulty scheduling interviews and obtaining complete responses to data and document requests from OPA prior to February 2017. OPA told us that, due to its effort to review and process as many cases as possible prior to the end of the Obama Administration, it could not allocate time to respond to **OIG's review** until later that year. In addition, several ODAG and OPA officials had left the Department during the scope of our review. As a result of these factors, OIG requested and obtained email records, through the Justice Management Division (JMD), of several former and current ODAG and OPA officials and staff. The email records had been archived from 2013 through March 2016. The emails we received were limited to those that contained key search terms related to clemency and the Initiative.

Similarly, **OIG received OPA's internal files**, as well as access to its case management system, IQ, by requesting it through JMD. **Within OPA's internal files**, we reviewed documents and policies as well as commutation petition cases, including cases that had **been completed**. **We also examined "flipped" cases**, or cases that OPA had initially recommended as favorable and then changed to denial **per ODAG's request**. Within IQ, we reviewed the process of reviewing commutation petitions, as well as completed petitions and petitions that were under consideration. After January 2017, OPA was able to provide us with additional data and documents.

Interviews

We interviewed over 80 officials and staff from ODAG, OPA, BOP, and the Executive Office for U.S. Attorneys, as well as federal inmates and attorneys affiliated with CP 14. We also interviewed former Department officials, including former Deputy Attorneys General responsible for the Initiative, former Pardon Attorneys, and former OPA staff and detailees. OIG selected these interviewees based on their involvement with the clemency process and the Initiative. OIG conducted interviews with BOP staff and inmates from the following institutions: Federal Correctional Complexes Beaumont and Coleman; Federal Correctional Institutions Cumberland, Fairton, Hazelton, Morgantown, Waseca, and Yankton; and U.S. Penitentiary Big Sandy. Finally, we interviewed Wardens from all BOP contract prisons. We selected these BOP institutions based on analysis of the number of inmates who had submitted surveys to CP 14.

NOTICE TO INMATES: INITIATIVE ON EXECUTIVE CLEMENCY

NOTICE TO INMATES: Initiative on Executive Clemency

On April 23, 2014, the Department of Justice announced an initiative to encourage appropriate candidates to petition for executive clemency, seeking to have their sentences commuted, or reduced, by the President of the United States. In this notice, the Bureau of Prisons (BOP) provides you with information regarding the scope and intent of this new initiative.

Commutation of sentence remains unusual and extraordinarily rare. This initiative, however, invites petitions from non-violent federal inmates who would not pose a threat to public safety if released. In particular, this initiative is limited to inmates who:

- Are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today¹;
- Are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels;
- Have served at least 10 years of their sentence;
- Do not have a significant criminal history;
- Have demonstrated good conduct in prison; and
- Have no history of violence prior to or during their current term of imprisonment.

You may choose to have an attorney to assist you in preparing a petition for clemency. You have the option of retaining counsel of your choice. We have also been asked to inform you that the Clemency Project 2014, a group of experienced criminal defense and non-profit lawyers, has offered to assist qualifying inmates with their petitions at no cost to you. If you would like to request that an attorney from the Clemency Project 2014 assist you with your clemency petition, please complete the Executive Clemency Survey via the TRULINCS Survey Service. At your request, we will forward your survey responses to the Clemency Project 2014. Once they receive the survey, it will be up to the Clemency Project 2014 to determine whether they will provide you with pro bono representation after considering whether or not you meet the criteria for this initiative.

Please note, if you submit the Executive Clemency Survey via TRULINCS, you should *not* submit your responses to the Clemency Project 2014 in writing as well.

¹ You may have received a substantially lower sentence today if, for example, you were sentenced to a mandatory minimum sentence for a crack cocaine offense that has since been lowered by the Fair Sentencing Act of 2010. Another example is if the sentencing guidelines were mandatory in your case and there is evidence that, if the judge was not constrained by the mandatory sentencing guidelines, he or she likely would have sentenced you to a lesser sentence.

If you do not wish to have an attorney assist you with your clemency petition and believe you meet the criteria outlined above, you should contact your unit team for the appropriate forms to complete. In addition to the clemency petition, you should also complete the Executive Clemency Survey by filling in the responses manually (not via the TRULINCS Survey).

If you meet the above-described criteria and have already submitted a petition for commutation of sentence to the Pardon Attorney, which is still under review, your application will be reviewed as part of this initiative. You are not required to submit a new application, but you may supplement your pending application if you wish to do so.

THERE IS NO GUARANTEE THAT PETITIONS SUBMITTED WILL BE GRANTED. This initiative creates no legal rights for petitioners. The rules governing petitions for commutation of sentence (see Title 28, Code of Federal Regulations Part 1, Sections 1.1 – 1.11) apply to all inmates regardless of the Department's new initiative. Petitions for commutation are not generally accepted from inmates who are presently challenging their convictions or sentences. Applicants are expected to be candid in their petitions. The Department may consult the sentencing judge and prosecuting authorities involved in the petitioner's case when considering the appropriateness of each petition. To learn more about these and other issues, you can review BOP Program Statement 1330.15, Petition for Commutation of Sentence.

EXECUTIVE CLEMENCY SURVEY

Commutation of sentence remains unusual and extraordinarily rare. However, if you believe you meet the criteria and would like to apply for commutation of sentence, please answer the following questions:

1. For what offense(s) were you convicted for which you are serving your current federal sentence?

2. What sentence did the judge originally impose?

3. When were you originally sentenced?

4. Were you given a longer sentence for possessing or using a weapon?
Yes No

5. Was your sentence later changed?
Yes No

6. If you answered yes to Question 5, what is your current sentence?

7. How much time have you served on your current sentence?

8. Are you currently appealing or challenging any part of your conviction or sentence?
Yes No

9. If you answered yes to Question 8, is that case pending?
Yes No

10. Have you been convicted of any other crimes besides the one(s) for which you are serving your current federal sentence?

Yes No

11. Have you received any incident reports while serving your current sentence?

Yes No

12. Would you like to request the assistance of an attorney from the Clemency Project 2014 to assist with your petition for commutation of sentence at no cost to you?

Yes No

13. If you answered yes to Question 12, do you understand that your answers will not be forwarded to the Pardon Attorney and that instead the Bureau of Prisons will forward your answers to the Clemency Project 2014, a group of experienced criminal defense lawyers and non-profit organizations formed to address the Department of Justice's Clemency Initiative?

Yes No

14. To the extent possible, please list the following information:

- Name – first, last, middle
- Date of Birth
- District Court Case Number
- Bureau of Prisons Facility Location and Address
- BOP Register Number
- District where sentenced
- Projected Release Date
- Attorney who represented you at sentencing -- please provide name and address if you know it
- Attorney(s) who previously represented you in any appeal, habeas proceeding, sentence reduction proceeding, or application for sentence commutation -- please provide name and address if you know it.
- If you currently have an attorney representing you in any aspect of your federal criminal case including an application for sentence commutation, please provide the attorney's name, address, and any other contact information if

you know it.

Please note that the Pardon Attorney may consult with prosecuting authorities and the judge involved in your case when considering the appropriateness of your petition, and as such, your full candor in this application is critical and will impact the likelihood of the success of your petition.

If you answered no to Question 12 and would like to submit a petition for commutation of sentence without the assistance of an attorney, your answers will be given to the Office of the Pardon Attorney as part of your petition. You may also retain paid or pro bono counsel of your choice to assist you with submitting a petition. If you have retained counsel, you may want to consult with that counsel before submitting responses to this survey.

If you answered yes to Question 12 and would like to request the services of an attorney from the Clemency Project 2014 to assist with your petition at no cost to you, the Bureau of Prisons will forward your answers to the Clemency Project 2014, a group of criminal defense lawyers and non-profit organizations dedicated to advancing the rights of criminal defendants and formed to address the Department of Justice's Clemency Initiative. The Clemency Project 2014 will review requests for assistance and connect those whose cases that the Project determines appear to meet the described criteria with Federal Public Defenders or pro bono counsel trained in the sentence commutation process. The Clemency Project 2014 does not guarantee you will be provided a lawyer to represent you in filing a petition for commutation. They will review your answers and let you know if you appear to meet the criteria, in which case you will be asked for more information. Everyone who requests the assistance of an attorney will receive a response via U.S. mail. PLEASE BE PATIENT AS THE PROJECT WILL BE HEARING FROM MANY PRISONERS. Do not send documents or other information until asked to do so.

PARDON ATTORNEY DEBORAH LEFF'S RESIGNATION LETTER



U.S. Department of Justice
Office of the Pardon Attorney

Washington, D.C. 20530

January 15, 2016

The Honorable Sally Quillian Yates
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Sally:

I write today to resign my position as Pardon Attorney effective January 31, 2016.

I have reached this decision because I am unable to carry out my job effectively, despite my intense efforts to do so. I fully support and admire the Administration's groundbreaking and much-needed launch of the Clemency Initiative and the possibility of justice it brings to so many deserving people. I have worked tirelessly since day one to do all I can to make the Initiative a success. But given that the Department has not fulfilled its commitment to provide the resources necessary for my office to make timely and thoughtful recommendations on clemency to the President, given your statement that the needed staff will not be forthcoming, and given that I have been instructed to set aside thousands of petitions for pardon and traditional commutation, I cannot fulfill my responsibilities as Pardon Attorney.

In addition, as you know, I have been deeply troubled by the decision to deny the Pardon Attorney all access to the Office of White House Counsel, even to share the reasons for our determinations in the increasing number of cases where you have reversed our recommendations. I believe that prior to making the serious and complex decisions underlying clemency, it is important for the President to have a full set of views. For that reason, I am encouraged by the commitment now to share the Pardon Attorney's recommendations and rationale with White House Counsel. This will be important for my staff, who have considerable expertise on clemency matters; for my successor; and most important, for the integrity of the decision-making process.

As you may know, I began my legal career with the Department of Justice, given my deep dedication to its mission and values. I have been honored to serve as Pardon Attorney and to work for a President committed to the reinvigoration of the clemency process and the promise for justice that holds. But the position in which my office has been placed, asking us to address the petitions of nearly 10,000 individuals with so few attorneys and support staff, means that the requests of thousands of petitioners seeking justice will lie unheard. This is inconsistent with the mission and values to which I have dedicated my life, and inconsistent with what I believe the Department should represent.

I want to be as helpful as possible during the transition process so would appreciate your letting me know how I might best do that.

Sincerely,


Deborah Leff
Pardon Attorney

OIG'S MANAGEMENT ADVISORY MEMORANDUM TO THE DEPARTMENT



U.S. Department of Justice

Office of the Inspector General

July 21, 2016

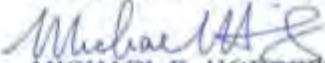
MANAGEMENT ADVISORY MEMORANDUM FOR:

THE DEPUTY ATTORNEY GENERAL

ROBERT A. ZAUZMER
ACTING PARDON ATTORNEY
OFFICE OF THE PARDON ATTORNEY

THOMAS R. KANE
ACTING DIRECTOR
FEDERAL BUREAU OF PRISONS

FROM:


MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT:

Management of the Application Process for the
Department's Clemency Initiative

The purpose of this memorandum is to advise you of potential significant systemic issues we discovered in the course of the Office of the Inspector General's (OIG) ongoing review of the Department of Justice's (Department) clemency process. According to the Department's website, the Clemency Initiative (Initiative), which the Department announced in April 2014, is designed "to encourage qualified federal inmates to petition to have their sentences commuted, or reduced, by the President of the United States."¹ While our review is still in progress, we believe the systemic issues we have identified, as described below, may require the Department's immediate attention.

As part of the Initiative, the Department directed the Federal Bureau of Prisons (BOP) to provide a notice to all federal inmates about the Initiative along with a survey that was designed to assist the Department in determining inmates eligible for clemency consideration. On May 2, 2014, the BOP issued to all inmates in BOP-managed institutions a "NOTICE TO INMATES: Initiative on Executive Clemency."

¹ Department of Justice (DOJ), "Clemency Initiative," <https://www.justice.gov/pardon/clemency-initiative> (accessed July 20, 2016).

along with an “Executive Clemency Survey.”² The survey consisted of 13 questions and a list of requested information. The notice outlined the purpose of the Initiative and said it “invites petitions from non-violent federal inmates who would not pose a threat to public safety if released.” The notice went on to state that “this initiative is limited to inmates who” met six criteria, including that they had served at least 10 years of their sentence. Inmates could complete the survey either in writing or electronically via the TRULINCS system, which is a BOP electronic messaging system. However, inmates were advised that if they wished to have an attorney from the Clemency Project 2014 (“CP 14”) assist them in preparing a clemency petition, they should complete the form via TRULINCS.³

To date, we have identified several significant potential issues with the Department’s and the BOP’s implementation of this survey effort. First, there appears to be significant confusion about the Initiative’s criteria and specifically whether inmates must meet all six designated criteria, particularly the provision regarding having “served at least 10 years of their prison sentence,” in order to be eligible for consideration. As noted above, the Notice to Inmates states that the Initiative “is limited to” inmates who meet the six designated criteria, including that they had served at least 10 years of their sentence. The notice, in addition to being provided to all inmates in BOP-managed institutions, also was posted on the BOP’s website and was provided to CP 14 attorneys. BOP staff told us that it was their understanding that the Initiative was limited to inmates who had served at least 10 years of their sentence, and it was therefore unclear to them why the BOP made the survey available to all inmates rather than targeting distribution to those inmates who had met the 10-year requirement. Moreover, in an attachment to an email dated May 7, 2014, a senior Department official wrote that the White House understood the 10-year requirement to mean “a hard 10 years served, but I will verify.”⁴ Additionally, Office of the Pardon Attorney (OPA) attorney training materials, developed by the

² As discussed below, based on our interviews with BOP officials and contract prison staff, we could not confirm whether all inmates in contract prisons received the notice and survey. It is our understanding that the Department and the BOP did not intend to exclude these inmates from the Initiative.

³ CP 14 consists of private attorneys from several independent legal organizations who volunteered their time to determine the eligibility of the inmates and filed clemency petitions on behalf of eligible inmates.

⁴ See Kathryn H. Ruemmler, White House Counsel, memorandum to Deputy Attorney General James Cole, April 23, 2014, which notes that inmates should “have served at least 10 years of their sentence” as one of the additional factors the Department should take into account when recommending commutation of sentence for inmates who would have received a substantially lower sentence if convicted of the same offense today.

same senior Department official and the former Pardon Attorney, clearly indicate that inmates must have served at least 10 years of their sentence to be eligible under this Initiative.⁵

However, in contrast to the mandatory language used in the Notice and the understandings outlined in the documents described above, the Department used permissive language about the criteria in both its announcement of the Initiative and on its website, stating that the Department was seeking to “prioritize” clemency applications from inmates who met the six eligibility requirements.⁶ Consistent with this permissive language, another senior official in the Office of the Deputy Attorney General, who was involved in developing the Initiative and training materials, told us that the six criteria were not, in fact, considered “hard and fast rules,” and that inmates do not have to meet all of the criteria to be considered for clemency. According to the senior official, the Department had the BOP send the survey to all inmates in BOP-managed institutions, not just those who met the six criteria, because the Department was interested in considering applications from all inmates who had received unjust sentences and who would not pose a public safety risk if they were released. Consistent with the permissive language found on the Department’s website and in the announcement of the Initiative, we found that of the 337 inmates granted commutation by the President since December 2014, 41 inmates had not served 10 years of their sentence.

We also found that the BOP received 42,808 surveys from inmates and that it forwarded 35,717 of those surveys to CP 14 attorneys for eligibility determinations.⁷ However, our analysis of BOP data has found that only 22,720 inmates of the 189,146 inmates in BOP-managed institutions and contract prisons as of September 2014 would have served at least 10 years of their sentence by October 2015, the end of the survey period, meaning that a significant number of inmates who had not served 10 years of their sentences submitted surveys and that a substantial number of the surveys forwarded to CP 14 for review were for inmates who had not served at least 10 years of their sentence.

⁵ See “Commutations, Implementing the Deputy Attorney General’s Executive Clemency Initiative,” presented on September 4, 2014, at the National Advocacy Center, Columbia, South Carolina.

⁶ See DOJ, “Clemency Initiative.”

⁷ Of these 42,808 inmate surveys, 7,091 either declined the assistance of CP 14 or did not answer the question asking them whether they would like the assistance of CP 14. Therefore, these 7,091 surveys were not forwarded to CP 14.

According to an email dated March 15, 2016, from the Acting Pardon Attorney to all OPA staff, of the 35,717 inmate surveys that the BOP sent to CP 14, CP 14 determined that 22,349 (63 percent) were ineligible for commutation under the Initiative's criteria. Since our review is not focused on the decision-making by CP 14 attorneys, we do not know whether or how many of these inmates were determined to be ineligible for consideration because of the 10-year criteria. Further, while it is clear that many inmates who do not meet the 10-year criteria applied for clemency under the Initiative, we do not know how many inmates decided *not* to apply because of the mandatory language used in the notice and in the survey that the inmates received, or based on the understanding of BOP staff related thereto.

By not clearly advising inmates that the 10-year criterion was permissive rather than mandatory, there was a significant risk created that many inmates who may not have met that criterion did not submit a survey. It may also have resulted in CP 14 failing to send to the Department potentially meritorious applications of inmates simply because they did not meet the 10-year criterion. The Department should consider whether and how to notify inmates, the BOP, and CP 14 that the 10-year criterion is permissive and should provide inmates who have not previously applied with the opportunity to do so in a timely fashion.

Additionally, we found that the Department and the BOP failed to follow up on inmates who started to prepare an electronic survey using the TRULINCS system but did not complete it. According to the BOP, 26,759 electronic surveys were "In Progress" but were not submitted to the BOP by the time the survey period ended. BOP officials told us that it was not the BOP's responsibility to follow up with inmates who started the survey but did not complete it. Of the 26,759 electronic surveys that were "In Progress," we found that: 11,982 had been opened but the inmate did not provide their register number and no questions were answered; 7,816 had been opened and the inmate provided their register number but did not answer any questions; and the remaining 6,961 had been opened and the inmate both provided a register number and answered at least one question. We further determined that 2,816 of these 6,961 inmates answered at least 10 questions and that 333 inmates actually answered all 13 questions. Institution staff opined that some of the inmates who completed but did not submit the survey may have had difficulties using a computer. Attached to this memorandum as Exhibit A are lists of register numbers for inmates who started the survey, provided their register numbers, but did not submit their surveys electronically. The Department should consider whether to contact in writing the inmates on these lists who did not apply for the Initiative to determine whether they intended to apply, and to provide assistance to

interested and potentially eligible inmates so that they can apply in a timely manner.

In that regard, we found that the BOP did not ensure that all non-English speaking, illiterate, learning disabled and mentally challenged inmates had assistance when completing the survey. While the survey was provided in both English and Spanish, the BOP housed inmates with citizenship from 173 different nations at the end of fiscal year (FY) 2014.⁸ Institution staff told us that, generally, if any inmate needed assistance with the survey, the inmate would have had to proactively reach out to staff for help, yet no institution staff we interviewed recalled having provided such assistance.⁹ The inmates with whom we spoke who had limited English speaking and writing skills indicated to us that, as a result, they were left to rely on other inmates to provide assistance. While some staff also told us there may have been "town halls" or unit meetings about the Initiative, no staff we interviewed recalled providing any assistance to inmates with the challenges described above.

Given the vulnerabilities and challenges of these inmates, it is unclear whether these inmates received or understood the survey, and whether they would be capable of or comfortable with seeking assistance. If the Department wants to make certain that all potentially meritorious candidates for clemency under the Initiative apply for it, then the Department and the BOP should ensure that appropriate resources, including foreign language assistance, are made available to assist inmates in completing the survey, and that inmates are informed about the availability of such assistance.

⁸ In our 2011 report on the Department's international prisoner transfer program (Transfer Program), we found that language barriers may have kept some inmates from fully understanding the program. See DOJ OIG, *The Department of Justice's International Prisoner Transfer Program*, Evaluation and Inspections (E&I) Report I-2012-02 (December 2011). In response to recommendations in our 2011 report, and as described in our 2015 status review of the transfer program, the BOP translated all documents and forms related to the transfer program into every language associated with treaty nations. The BOP also revised its program statement to direct case managers to discuss the transfer program at the inmate's initial classification and at every subsequent program review. See DOJ OIG, *Status Review on the Department's International Prisoner Transfer Program*, E&I Report I-2012-02 (August 2015). After our 2011 report was issued and the BOP took steps to make inmates more aware of the opportunity to request transfer, the number of transfer requests increased substantially — 56 percent from FY 2010 to FY 2011. By the end of FY 2013, requests had risen another 10 percent.

⁹ BOP officials and staff also told us that if no BOP staff who spoke an inmate's language were available, the institution could use a contract translation service such as DOJ's Language Line, which is available via telephone. We do not know the extent to which inmates were made aware of this possibility.

Finally, we found that the Department and the BOP cannot determine whether all inmates in contract prisons received the notice and clemency survey.¹⁰ The BOP issued a memorandum to all contract prison Wardens, instructing them to distribute the Notice to Inmates, which includes the Initiative's criteria, and the survey.¹¹ However, unlike inmates in BOP-managed institutions, inmates in contract prisons do not have access to TRULINCS. As a result, contract prison inmates interested in being considered for clemency were unable to submit an application electronically and had to complete a paper copy of the survey and then forward the completed survey directly to either CP 14 or the OPA.

We found that the BOP left it to each contract prison to develop an adequate process for notifying inmates about the survey and that each contract prison Warden developed their own process for distributing the survey and educating inmates about the initiative. For example, we found that some contract prisons distributed the survey to inmates as soon as they received the memorandum discussed above, while others made the survey available to inmates only upon request. If the Department wants to make certain that all potentially meritorious candidates for clemency under the Initiative, including those inmates in contract prisons, apply for it, then the Department and the BOP need to provide clear instructions to each contract prison Warden, including requiring the contract prisons to confirm, in writing, that all inmates in these facilities have received the survey and have been informed how to complete and submit it.

We are providing this information to the Department and BOP leadership so that they can consider whether to undertake corrective action while our review is ongoing. Please advise us within 60 days of the date of this memorandum of any actions the Department has or intends to take regarding these issues. If you have any questions or would like to discuss the information in this memorandum, please contact me at (202) 514-3435.

Attachment

¹⁰ According to BOP FY 2014 data, there are approximately 30,000 inmates, primarily foreign nationals with a drug or immigration offense, incarcerated in contract prisons. A commutation of sentence has no effect on a person's immigration status and will not prevent removal or deportation from the United States. As noted above, it is our understanding that the Department and the BOP did not intend to exclude inmates in contract prisons.

¹¹ BOP Technical Direction 14-04 – Initiative on Executive Clemency

cc: Andrew J. Bruck
Acting Chief of Staff
Office of the Deputy Attorney General

Carlos Uriarte
Associate Deputy Attorney General
Office of the Deputy Attorney General

Steve Mora
Assistant Director
Program Review Division
Federal Bureau of Prisons

Jill A. Webber
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Audit Liaison Group
Internal Review and Evaluation Office
Justice Management Division

**THE DEPARTMENT'S RESPONSE TO OIG'S
MANAGEMENT ADVISORY MEMORANDUM**



U. S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 21, 2016

MEMORANDUM

TO: Michael E. Horowitz
Inspector General

FROM: Carlos F. Uriarte *CFU*
Associate Deputy Attorney General

Brian Tomney *BT*
Associate Deputy Attorney General

SUBJECT: Management Advisory Memorandum of July 21, 2016

This memorandum responds to your management advisory memorandum of July 21, 2016, regarding the Department's Clemency Initiative (Initiative), which followed the Department's request that you review aspects of the BOP's notification process concerning the Initiative.

We very much appreciate the steps that your team took to identify certain cohorts of inmates where the notification, and subsequent navigation, of the Initiative application process could be improved. The Initiative is an important component of the Administration's ongoing effort to ensure that our criminal justice system is fair and effective and that federal sentences are proportional to the crime. As you note, in April 2014 the Department announced the Initiative, which prioritized review of commutation petitions submitted by low-level offenders serving lengthy federal sentences that, by operation of law, likely would be substantially lower today. Despite this targeted focus, an enormous number of inmates expressed interest in the Initiative; although BOP houses, on average, no more than 13,000 inmates who have completed at least 10 years for a drug offense, more than 30,000 inmates either completed BOP's initial survey and/or submitted pro se petitions. A large number of these inmates fell well outside the heartland of those likely to benefit from the Initiative.

To date, President Obama has granted 672 commutations, more than the previous ten presidents combined.¹ More than one-third of the President's commutation recipients, or 232

¹ In some cases, the President has conditioned clemency on an inmate's agreeing to enroll in residential drug abuse treatment. One inmate who was offered a commuted sentence conditioned on enrolling in the BOP's residential drug abuse treatment program declined the offer of clemency. Therefore, although 673 inmates have been granted or offered a commutation, only 672 have been granted and accepted clemency.

individuals, were serving life sentences. As we approach the end of this Administration, we want to ensure that all inmates likely to benefit from the Initiative have the opportunity to apply.

Your memorandum recommended that the Department consider whether to contact certain inmates who appeared interested in the Initiative but did not otherwise apply. We have taken this recommendation to heart. With your assistance, the Department identified 6,961 inmates who opened the BOP survey, provided their register numbers, answered at least one of the thirteen survey questions included in the BOP survey, but ultimately did not complete the process. While that number represents a broad universe of potential applicants, in order to avoid creating false hope for inmates unlikely to receive clemency, the Department decided to limit its outreach to inmates who met some basic criteria, namely those: (1) whose primary offense was a drug crime; (2) who had served 7 years in BOP custody as of September 2014; (3) who are not within one year of release; and (4) who are U.S. citizens.² Of the 6,961 inmates identified by OIG, 256 inmates met these four criteria. In addition, of those 256 inmates, we determined that 49 previously filed clemency petitions, leaving 207 who have not yet filed. Thanks to the efforts of OIG, BOP will immediately begin the process of re-notifying those 207 inmates.

In addition, your memorandum expressed concerns that some inmates who are illiterate, disabled, mentally challenged, or who do not speak English, might have lacked assistance when completing the Initiative survey and, therefore, might have failed to submit a petition. The Department shares your concern. To address these issues, the Department instructed BOP to ask the wardens at each of its prisons to identify any inmate they believed might fit into one of the categories you identified (illiterate, disabled, mentally challenged, and/or non-English or Spanish speaking). BOP identified 2,796 such inmates. Once again, to avoid creating false hope for inmates unlikely to benefit from the Initiative, the Department applied the same four basic criteria described earlier (drug offense; served 7 years as of September 2014; more than 1 year from release; U.S. citizen) to the identified group of inmates. Of the 2,796 inmates identified by BOP, a total of 118 met these criteria. Of the 118, we determined that 56 previously filed clemency petitions, leaving 62. Again, thanks to the efforts of OIG, BOP will immediately begin the process of re-notifying those 62 inmates.

Finally, you expressed concern with how inmates who are housed in contract prisons were notified of the Initiative. The BOP undertook a multipronged effort to ensure the inmates in contract prisons were made aware of this opportunity. First, in 2014, the private institutions posted notification of the Initiative in visible areas throughout the institutions, including in housing units, dining halls, recreation areas, health services, and other locations. Second, BOP's Privatization Branch, which oversees the management of its contract facilities, sent a follow-up letter to each warden in May 2015 advising of CP14's "Release of Information"

² These criteria were designed to be slightly overinclusive and were based on the Department's analysis of the types of inmates who have already received commutations during this Administration. In particular, although the President has not made any public statement indicating whether he will grant clemency to non-U.S. citizens, we note that all of the 673 inmates who have received (or were offered) clemency thus far are citizens of the United States.

process and providing an example of the Release of Information Consent Form. In addition, at each of these private facilities, inmates had the ability to obtain a copy of the CP14 survey from their case manager and/or unit team. Accordingly, we believe no additional action is necessary for this population.³

Once again, we greatly appreciate the OIG's work to identify certain cohorts of inmates where notification, and subsequent navigation, of the Initiative application process could be improved. As a result of our combined efforts, the Department will re-notify the aforementioned 269 inmates about the Initiative and invite them to submit a petition within 30 days. BOP will also offer its assistance to any inmate in this group that requests help with understanding this re-notification and will make translation services available. Although the Department has publicly stated its confidence that it will review every petition submitted by a drug offender before September 1, 2016, the Department will track petitions by this cohort that are submitted within 30 days and commits to their timely review and submission to the White House before the end of this Administration.

³ It is also worth noting that BOP's contract facilities are used almost exclusively to house non-U.S. citizens, oftentimes during the final months or years of their prison terms. As noted earlier, given that the President has yet to grant any commutations to non-U.S. citizen, there is a significant risk that additional outreach to inmates in contract facilities would create false expectations about the possibility of a commutation.

THE DEPARTMENT'S RESPONSE TO THE DRAFT REPORT



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

Office of the Deputy Attorney General

950 Pennsylvania Ave., N.W. (202) 305-7848
Room 4113, RFK Main Justice Bldg.
Washington, D.C. 20530

MEMORANDUM

TO: Nina S. Pelletier
Assistant Inspector General
Evaluation and Inspections
Office of the Inspector General

FROM: Bradley Weinsheimer
Associate Deputy Attorney General
Office of the Deputy Attorney General

DATE: July 23, 2018

SUBJECT: Status Update in Response to the Office of the Inspector General's Report
Entitled "*Review of the Department's Clemency Initiative, Assignment Number A-2016-002*".

The Office of the Deputy Attorney General (ODAG) appreciates the review undertaken by the Office of the Inspector General (OIG) and the opportunity to comment on the OIG's final draft report regarding the *Department's Clemency Initiative*. As the report acknowledges, the Clemency Initiative has been discontinued and is no longer the policy of the Department. Accordingly, the Department agrees with the OIG's determination not to include recommendations in this report.



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