

DEPARTMENT OF HOMELAND SECURITY

Office of Inspector General

ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States



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Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the Homeland Security Act of 2002 (*Public Law 107-296*) by amendment to the Inspector General Act of 1978. This is one of a series of audit, inspection, and special reports prepared by our office as part of our oversight responsibilities to promote economy, effectiveness, and efficiency within the department.

This report assesses Immigration and Customs Enforcement's (ICE) compliance with U.S. Supreme Court rulings and ICE's implementation of regulations on the detention of aliens with a final order of removal. This report is based on interviews with employees of relevant government agencies and *pro bono* organizations, file reviews, and direct observation and statistical analysis.

Our recommendations were developed based on the information available to our office. The draft recommendations were discussed with those responsible for implementation. We hope that this report will result in more effective, efficient, and economical operations. We appreciate all of those who contributed to the preparation of this report.


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Contents

Executive Summary	1
Background	3
Results of Review	10
Compliance With Regulations Requires More Attention and Diligence.....	10
Majority of Detainees Are Removed Within 90 Days But More Oversight Is Needed	11
Inconsistent Use of Available Guidance and Resources by Field Offices Contributes to Compliance Issues	14
Resource Allocation and Management Constrains the POCR Process	19
POCR Compliance Oversight Is Limited	20
TDU Support for the POCR Process Is Not Adequate	25
Making Removals a Priority Requires Additional Resources, Support, and Oversight	27
Removals of National Interest Cases and Dangerous Aliens Should Be Prioritized.....	28
Likelihood of Removal Standard Needs to be Documented and Transparent.....	31
Oversight of Aliens Held Longer Than 180 Days Is Insufficient.....	33
Management Comments and OIG Analysis	37

Appendices

Appendix A: Purpose, Scope, and Methodology.....	44
Appendix B: Management Response to Draft Report	46
Appendix C: Supplementary Management Response.....	50
Appendix D: POCR Timeline.....	52
Appendix E: Detentions Past 360 Days, By Region Of Origin	53
Appendix F: Special Circumstances Cases.....	54
Appendix G: Substantive Deficiencies in POCR Worksheets.....	56
Appendix H: Procedural Challenges and Best Practices	57
Appendix I: Major Contributors to the Report	60
Appendix J: Report Distribution.....	61

Abbreviations

DACS	Deportable Alien Control System
DHS	Department of Homeland Security
DRO	Headquarters Office of Detention and Removal Operations
ENFORCE	Enforcement Case Tracking System
GAO	Government Accountability Office
HQCDU	Headquarters Custody Determination Unit
ICE	Immigration and Customs Enforcement
INS	Immigration and Naturalization Service
POCR	Post-Order Custody Review
OIG	Office of Inspector General
TDU	Travel Document Unit

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Executive Summary

In June 2001, the U.S. Supreme Court ruled that an alien with a final order of removal generally should not be detained longer than six months. To justify an alien’s continued detention, current laws, regulations, policies and practices require the federal government to either establish that it can obtain a passport or other travel document for the alien in the “reasonably foreseeable future,” or certify that the alien meets stringent criteria as a danger to society or to the national interest. Immigration and Customs Enforcement (ICE), within the Department of Homeland Security (DHS), is responsible for ensuring compliance with the Court’s ruling and final order case management.

We reviewed ICE’s compliance with detention limits for aliens who were under a final order of removal from the United States, including the reasons for exceptions or noncompliance. ICE has introduced quality assurance and tracking measures for case review; however, outdated databases and current staffing resources limit the effectiveness of its oversight capabilities. Although approximately 80% of aliens with a final order are removed or released within 90 days of an order, among the Post-Order Custody Review (POCR) files we reviewed, required custody decisions were not made in over 6% of cases, and were not timely in over 19% of cases. Moreover, some aliens have been suspended from the review process without adequately documented evidence that the alien is failing to comply with efforts to secure removal. In addition, cases are not prioritized to ensure that aliens who are dangerous or whose departure is in the national interest are removed, or that their release within the United States is adequately supervised. Finally, ICE has not provided sufficient guidance on applying the Supreme Court’s “reasonably foreseeable future” standard, and does not systematically track removal rates — information that is necessary for negotiating returns and for determining whether detention space is used effectively.

The weaknesses and potential vulnerabilities in the POCR process cannot be easily addressed with ICE’s current oversight efforts, and ICE is not well positioned to oversee the growing detention caseload that will be generated by DHS’ planned enhancements to secure the border.

To address these challenges we are recommending: holding ICE field offices more accountable for the quality and timeliness of the POCR process while also increasing ICE headquarters assistance in obtaining travel documents; prioritizing the removal of aliens who represent a serious threat to society or the public interest; developing an objective and transparent methodology for evaluating the likelihood of removal for all cases; and intensifying the monitoring of long-term detainees. ICE concurred with three of our five recommendations, which we consider resolved but open pending our receipt of ICE's proposed actions.

Background

The June 2001 U.S. Supreme Court decision reversed the former Immigration and Naturalization Service's (INS) practice of indefinitely detaining aliens who were difficult to remove but represented a threat to the community or would likely abscond if released. Aliens affected by the decision include both legal and illegal entrants – those who entered or remained in the United States illegally, and those whose legal permanent residency or other legal status was revoked because of a criminal conviction. The Supreme Court held that indefinite detention of these aliens raised “serious constitutional concerns,” as “[f]reedom from imprisonment – from government custody, detention, or other forms of restraint – lies at the heart of the liberty” that the constitution protects.¹ In 2005, the Supreme Court extended the same protection to inadmissible aliens, namely aliens apprehended at a port of entry.²

The INS Office of Detention and Removals (DRO), which was transferred into ICE in March 2003 with the creation of DHS, drafted regulations and guidance describing the Supreme Court's decision as explaining that “the period of time which can be considered as ‘the reasonably foreseeable future,’ becomes increasingly shorter as the length of time the alien has been held in post-order INS detention increases. In other words, the longer an alien remains in INS custody after being ordered removed, the higher the burden on the government to establish that the alien's removal is going to occur in the reasonably foreseeable future.”³

To justify prolonged detention, current laws, regulations, policies and practices require the federal government to either establish that removal can be secured in the reasonably foreseeable future, or prove that a detainee meets certain stringent criteria outlined below.

Overview of Statutory and Regulatory Requirements

Regulations provide for an initial removal period of 90 days, after which the detainee receives a post-order custody review, or POCR. The 90-day POCR essentially considers three criteria:

¹ Zadvydas v. Davis 533 U.S. 678, 682, 690 (2001).

² Clark v. Martinez 543 U.S. 371 (2005).

³ INS Detention and Removal Manual, Chapter 17.

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- 1) Flight Risk – Whether the alien is likely to abscond if released, based on the alien’s cooperation with the removal process, and ties to the community, such as family and employment prospects.
 - 2) Danger to Community – Whether the alien poses a danger to the general public, based on criminal history, recidivism, and disciplinary record while in prison or ICE custody.
 - 3) Likelihood of Obtaining Travel Documents – Whether travel documents appear forthcoming or have already been obtained, and removal is therefore imminent.

If the alien is not released or removed, and is cooperating with the removal process and has not obtained a stay of removal from the court, the second review in the POCR process is conducted as soon as possible after 180 days have elapsed from the final order of removal. The 180-day review considers two criteria:

- 1) Significant Likelihood of Removal in the Reasonably Foreseeable Future – Whether it is reasonable to believe that travel documents can be obtained, given the federal government’s efforts, the receiving country’s willingness to accept the alien, and other factors for consideration. The regulations require the Headquarters Custody Determination Unit (HQCDU) to “consider all the facts of the case including, but not limited to, the history of the alien’s efforts to comply with the order of removal, the history of the Service’s efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service’s efforts to remove this alien and the alien’s assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question. Where the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien’s removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.”⁴
- 2) Special Circumstances – Regulations outline four categories permitting detention beyond 180 days even if it is not likely that the alien can be removed in the reasonably foreseeable future: (1) aliens

⁴ 8 CFR § 241.13(f).

with a highly contagious disease that is a threat to public safety; (2) aliens detained on account of serious adverse foreign policy consequences of release; (3) aliens detained on account of security or terrorism concerns; and, (4) aliens determined to be specially dangerous. Certifying that an alien meets one of these criteria requires substantial factual support and the concurrence of senior government officials or, for “specially dangerous” aliens, an immigration judge.⁵

Two conditions can extend detention indefinitely, essentially stopping the POCR process amid the 180-day removal period: (1) a court-granted stay of removal pending judicial review; or (2) an alien’s failure to comply with the government’s removal efforts. Aliens with a stay of removal must receive a review from ICE DRO at 90 days, and annually thereafter. Aliens who fail to comply with the government’s efforts to secure their removal must receive regular warnings from ICE DRO of the consequences of their actions, but need not receive a review of continued detention. Aliens who fail to comply with the requirement to assist with obtaining a travel document can be criminally prosecuted.⁶ Although some aliens have been convicted for non-compliance, ICE DRO was not able to provide us with an estimate of successful prosecutions. However, ICE officials explained that they were in the process of establishing a reporting mechanism.

Previous Post-Order Custody Process Reviews

Since the Supreme Court’s ruling in *Zadvydas*, which placed limits on the federal government’s authority to detain aliens, and the transfer of INS’ responsibility for detained aliens to ICE DRO, there have been a number of reports and evaluations of the POCR process:

- **June 2003:** The Inspector General for the Department of Justice reported that some “September 11 detainees who were held by the INS beyond 90 days after their final orders of removal did not receive a Post-Order Custody Review (POCR) as required by regulation.”⁷

⁵ 8 CFR § 241.14.

⁶ Section 243(a) of *Immigration and Nationality Act*, 8 USC § 1253(a).

⁷ *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, June 2003, Department of Justice Office of the Inspector General, Chapter 6. The Department of Justice Office of the Inspector General had oversight of the INS until 2003. This responsibility transferred to the DHS Office of Inspector General when the INS’ detention programs moved to ICE.

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- **May 2004:** The General Accounting Office (GAO) determined that ICE could not identify detained aliens entitled to a post-order custody review, or POOCR, in part because its database, the Deportable Alien Control System (DACS), is an “outdated, difficult-to-use, inefficient case management system.” In addition, ICE did not provide adequate guidance to its officers to help them prioritize their workload. The GAO reported that while ICE considered its POOCR program inadequately staffed, ICE needed a methodology to determine staffing needs. The GAO concluded from its review of POOCR files that there was a possibility that ICE was not complying with the regulations.⁸
 - **April 2006:** We determined that DACS “lacks the ability to readily provide DRO management with data analysis capabilities to manage the detention and removal program in an efficient and effective manner.” Resources expended to provide a replacement for DACS had not, to date, resulted in measurable progress. We recommended that ICE meet a biannual reporting requirement on upgrading DACS to a system “capable of meeting its expanding data collection and analyses needs.” We also reported that the practice of some countries to block or inhibit repatriation of their citizens, coupled with the Supreme Court rulings, resulted in release of many POOCR cases. We listed China, Eritrea, Ethiopia, India, Iran, Jamaica, Laos, and Vietnam as countries blocking or inhibiting the repatriation of their citizens.⁹

In addition, in 2005 the Catholic Legal Immigration Network, Inc. (CLINIC) published the results of interviews with immigration attorneys representing clients who were in the POOCR process nationwide. The report listed conditions, such as remote detention facilities, local cooperation, record keeping, staffing, and communication as problems contributing to prolonged detention. CLINIC concluded that ICE was not uniformly complying with the POOCR regulations.¹⁰

⁸ *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*,” GAO-04-434, May 2004. In July 2004, the Government Accounting Office was renamed the Government Accountability Office.

⁹ DHS OIG “*Detention and Removal of Illegal Aliens: Immigration and Customs Enforcement*,” OIG-06-33, April 2006.

¹⁰ Catholic Legal Immigration Network, Inc., *Systemic Problems Persist In U.S. ICE Custody Reviews for “Indefinite” Detainees*, Kathleen Glynn, Sarah Bronstein, 2005.

ICE's Quality Assurance and Oversight Initiatives

In 2004, DRO's HQCDU introduced a program to oversee the POOCR process, and improve the quality and timeliness of POOCR decisions in field offices. The HQCDU also sought to reduce the number of writ of *habeas corpus* petitions filed in federal courts by detainees requesting a review of the HQCDU's justification for continued detention. The primary federal *habeas corpus* statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts to hear petitions for review of continued ICE detention. The petitioners in both the Zadvydas and Martinez decisions used *habeas corpus* petitions to secure their release from detention. ICE does not have a centralized tracking system for *habeas corpus* petitions. However, a standalone database in DRO headquarters, the Detention and Removal Information Management System, records *habeas corpus* petitions in which a field office or United States Attorney's Office requests assistance from headquarters. In the period from the Zadvydas decision to March 2006, the Detention and Removal Information Management System contained 2,152 *habeas corpus* petitions, 958 (46%) of which resulted in release, either from an ICE or United States Attorney's Office decision not to defend continued detention, or by order of a federal judge. In addition, in our previous report we said that the number of detainees released and removed as a result of the Zadvydas and Martinez decisions is not known because DRO did not begin tracking these decisions until FY 2005, and DACS still does not provide accurate reports on whether those no longer in detention were removed or released within the United States.¹¹

The HQCDU developed guidance on the POOCR process and standards, including sample forms and letters, and posted those items on its internal website. The 90-day POOCR decision must be reviewed and signed by a Field Office Director, Deputy Director, or an individual acting in those capacities. The HQCDU provides training to Field Office Directors and staff at the annual DRO conference, to new officers during their initial training, and during field office visits. The unit also conducts follow-up visits: in FY 2005 it conducted 22 site visits; 6 site visits were conducted in FY 2006; and 24 are planned in FY 2007. At present, these field visits are the only opportunity the HQCDU has to review the quality and timeliness of the 90-day detention decision unless such cases fall within the HQCDU's jurisdiction at 180 days,

¹¹ DHS OIG "Detention and Removal of Illegal Aliens: Immigration and Customs Enforcement," OIG-06-33, April 2006, page 19.

and to determine whether field offices are following procedures when aliens fail to cooperate with efforts to secure their removal.

To verify that the 180-day cases are reviewed in compliance with the Zadvydas decision, the HQCDU obtains a monthly DACS update of all the POCR cases and requires field offices to report on those cases that appear to have passed 180 days. However, DACS is not structured to track certain exceptions. As a result, the HQCDU cannot determine from the DACS update which aliens are eligible for a POCR review, and which do not require a review either because the alien has a stay of removal or is failing to comply with the government's removal efforts. The HQCDU therefore relies on monthly updates from the field offices to obtain this information. For those aliens eligible for a post-order custody review, field offices provide the HQCDU with a detailed worksheet, including a recommendation on continued detention or release. The HQCDU makes the final decision on continued detention, based primarily on the worksheets provided by the field offices. In addition, the HQCDU requires that field offices request assistance immediately from the headquarters Travel Document Unit (TDU) in cases that involve certain countries that are usually slow to provide documentation, and for all cases where the field office has not obtained a travel document within 75 days of the alien's receiving a final order. A timeline of the POCR process is contained in Appendix D: POCR Timeline.

We evaluated ICE's compliance with detention time limits for aliens with a final order of removal, including the reasons for exceptions or non-compliance. As described in detail in Appendix A, we reviewed 210 files, which were selected based upon four categories of POCR aliens: (1) those from countries that generally provide travel documents quickly, including El Salvador, Guatemala, Honduras, and Mexico; (2) those from countries that typically either refuse or delay the issuance of travel documents, including Cambodia, China, Cuba, Haiti, India, Laos, Pakistan, and Vietnam; (3) those from countries for which obtaining travel documents is less routine because there are fewer aliens requiring removal, including African and European countries; and, (4) those who had been in detention for an unusually long time, generally longer than 12 months. The requested files included only aliens who were eligible for a post-order custody review based on the Zadvydas and Martinez decisions and identified as such in the DACS database. Both male and female aliens were represented, as well as aliens with and without an aggravated felony conviction. Of the 20 female aliens whose POCR files we requested, only 6 remained in detention, 3 without a criminal record, 2 with aggravated felonies, and 1 with a minor criminal

charge. Our selection method was intended to identify irregularities in the POCR process; generalizations therefore cannot be made from the cases to the POCR population as a whole.

Results of Review

Compliance With Regulations Requires More Attention and Diligence

Approximately 80% of post-order custody aliens are removed or released within 90 days. However, of the 210 alien files we reviewed, 14 (7%) had not received a 90-day post-order custody review, and 3 of those aliens had been detained longer than 180 days without a review. For those aliens remaining in detention, field office compliance with regulatory review requirements was inconsistent. In addition, required notification documents were not consistently provided and when provided, were not consistently timely. Some field offices were using incorrect legal standards and outdated materials, the most serious example being the misapplication of the failure to comply standard and the resulting suspension of the POCR process.

The HQCDU has provided comprehensive guidance and procedures for the 90-day and 180-day POCR decisions. It has also established a manual tracking system for the 180-day POCR decisions. However, there are weaknesses and potential vulnerabilities in the POCR process that cannot be easily addressed with ICE's current oversight efforts. These deficiencies will directly affect ICE's ability to manage the projected growth in its caseload caused by DHS' planned enhancements to secure the border as envisioned with the Secure Border Initiative, the end of "catch and release" practices, and an increase in interior enforcement programs.¹² Specifically, cases are not prioritized to ensure that aliens who are dangerous, or whose departure is in the national interest, such as war criminals and supporters of terrorist organizations, are removed or that their release within the United States is adequately supervised. In addition, there is no measurable standard for determining the likelihood that an alien can be removed to his or her country of origin. Moreover, procedures for managing post-180 day cases are inadequate, particularly when ICE has concluded that there is a significant likelihood of removing the alien in the foreseeable future, or that the alien is not cooperating.

¹² http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0794.xml

Majority of Detainees Are Removed Within 90 Days But More Oversight Is Needed

Previous reports and evaluations of the POOCR process focused on the ICE DRO's ability to track and manage cases, as the DACS database was not designed to perform this function. The HQCDU now obtains a monthly update from DACS of all aliens in detention who have a final order of removal, information that allows some analysis of the characteristics of the POOCR caseload. However, the DACS monthly update does not provide information on whether aliens no longer listed as detained have been removed to a country of origin or released within the United States.

Of the 8,690 aliens with a final order of removal who were in detention in March 2006, only 1,725 (20%) were still detained by June 2006 (see Table 1). However, detention rates vary widely by region and country of origin.

Table 1: Detentions Past 90 Days, By Region Of Origin¹³

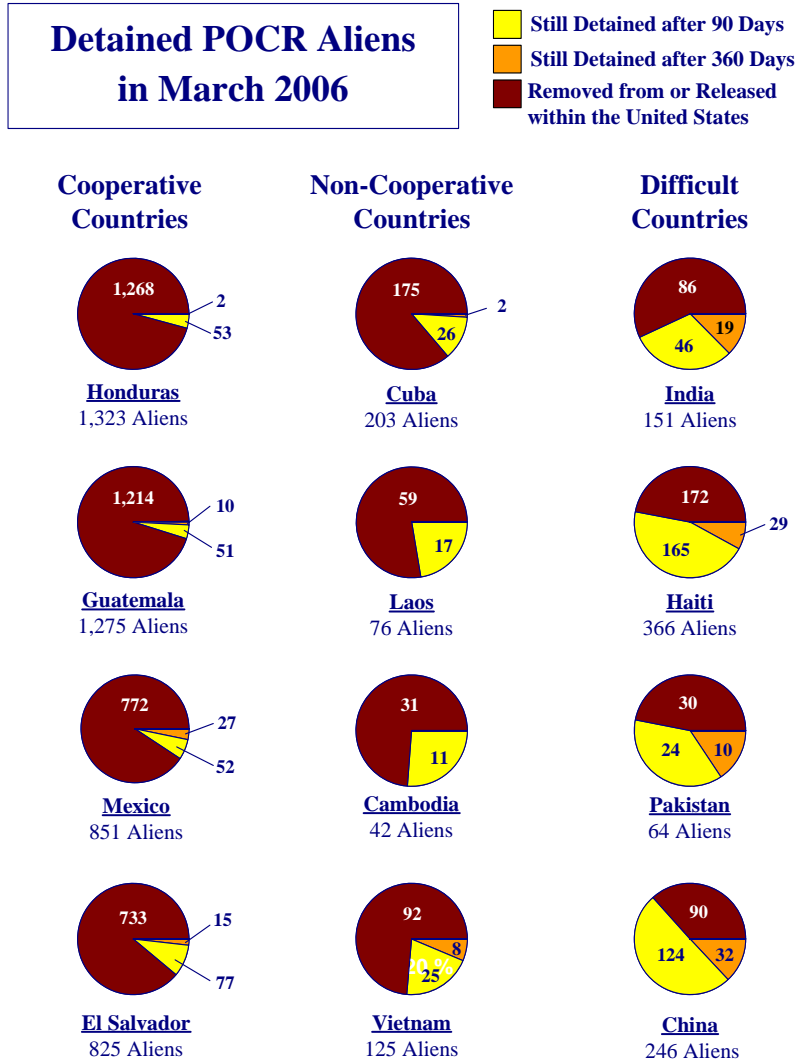
Region of Origin	Aliens In Detention March 2006	Aliens Still Detained June 2006	Percent Still Detained June 2006
Africa	643	304	47%
Oceania	34	15	44%
Asia	1,156	485	42%
Caribbean	1,220	396	32%
Europe	378	79	21%
North America	879	114	13%
South America	640	69	11%
Central America	3,740	263	7%
Total	8,690	1,725	20%

Long-term detention is directly related to the return policies of an alien's country of origin. For example, as depicted in Table 1 and Chart 1, the sharp decline in the number of detained North and Central Americans reflects high levels of cooperation from those governments in providing travel documents and accepting removals. ICE deportation officers informed us that the governments of Honduras, Guatemala, Mexico, and El Salvador routinely provide travel documents for their nationals, and that most are removed from the United States before 90 days. In Chart 1, of the 1,323 Hondurans in

¹³ See DHS statistical yearbooks for countries within each region of origin. (<http://www.uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf>).

detention in March 2006, only 55 (4%) were still detained in June 2006, and most had been returned to Honduras. Only 2 of 1,323 Hondurans had been in detention more than 360 days.

Chart 1: Detention Rates By Country Of Origin



Source: DACS, OIG Analysis

In contrast, as depicted in Chart 1, the sharp decline in the number of detained Cubans, Laotians, Cambodians, and Vietnamese, reflects ICE DRO's recognition that there is usually no significant likelihood that the governments of these countries will issue travel documents for their nationals. Therefore, most aliens from these countries must eventually be released within the United States unless the stringent regulatory standards for special circumstances can be met. ICE deportation officers said that most aliens from these countries are released within the United States after 90 days. If aliens from these countries are a violent threat to the community, but do not meet the stringent standard for special circumstances cases, most are released within the United States after 180 days. For example, in March 2006 there were 203 Cubans in detention, and by June 2006 all but 28 (14%) of this group were no longer in detention, most released within the United States. Only 2 of 203 Cubans had been in detention more than 360 days. These figures, based on DACS POCR reports, do not include Cubans paroled into the United States from the 1980 Mariel boatlift, as Mariel Cubans are tracked separately in DACS.

Finally, as depicted in Chart 1, the high detention rates among Indians, Haitians, Pakistanis, and Chinese, reflect that removals are possible, but difficult, for these nationalities. Deportation officers said that these countries either provide travel documents routinely after long delays, or provide them sporadically based on internal political circumstances or diplomatic pressure from the United States. For example, in March 2006 there were 246 Chinese in detention. By June 2006, 156 (63%) were still detained because China had agreed during negotiations with the United States to accept a charter flight of its nationals, but then delayed the charter several times. Of the 246 Chinese nationals detained in March 2006, 32 had been in detention more than 360 days. During our fieldwork, ICE deportation officers informed us that the United States government had reached agreements with the governments of China, India, and Haiti to authorize the return of a substantial number of nationals from these countries and that some detained aliens had already been removed.

As shown in Appendix E: Detentions Past 360 Days the correlation between countries that are slow to produce travel documents and the length of detention some aliens experience was most apparent when we examined detention rates for the group of 428 aliens who had been detained for more than 360 days as of June 2006. Reasons for the longer detention rates among the group of 428 vary, and might include the alien's failure to comply, or a court's grant of a stay of removal. The longer detention rates might also result from an expected removal that does not occur or a belief that travel documents

will be issued in a reasonable period of time. However, very few of the 428 aliens were formally certified as special circumstances cases, the four categories of cases for which continued detention is justified to protect the public or the national interest. For example, only 36 cases were held as “specially dangerous.” No cases, however, were certified under the remaining three categories, as having a highly contagious disease, or a potentially adverse affect on national security, or the national interest if released. See Appendix F: Special Circumstances Cases for more information on DHS’ certifications.

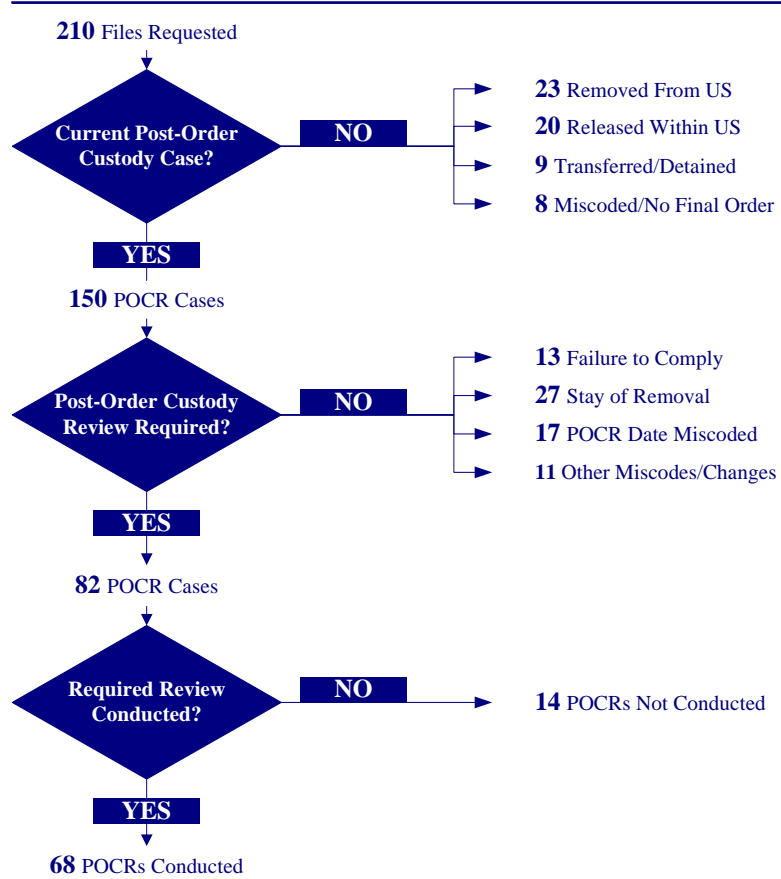
Inconsistent Use of Available Guidance and Resources by Field Offices Contributes to Compliance Issues

To determine whether the detention of aliens with a final order complies with Supreme Court decisions, regulations and ICE guidance, we reviewed a sample of alien files at each of the seven DRO offices where we conducted site visits. We determined that post-order custody reviews were not consistently conducted, and that required notifications and reviews were not consistently complete or timely. While the HQCDU has developed and posted on its website extensive guidance, not all field offices visited were using the materials. The most serious consequence was that some detainees were deemed to have failed to comply, and therefore removed from the POOCR process, without sufficient justification. For more information on field offices selected for site visits and our sample of alien files reviewed, see Appendix A.

Post-Order Custody Reviews Are Not Consistently Conducted

Of the 210 alien files we examined, 82 were eligible for a post-order custody review. We determined that 11 of these 82 aliens had not received a 90-day post-order custody review, and 3 had not received either a 90-day or 180-day review. Case completion rates varied widely by field office as depicted in Figure 1 and Table 2, which illustrate the disposition of the sample files.

Figure 1: Disposition Of Requested POCR Case Files



Source: OIG File Review

Table 2: Sixty-Eight POCR Reviews Conducted

ICE Field Office	POCR Required	POCR Conducted	POCR Deficiency
Site I	23	14	9
Site II	17	14	3
Site III	15	14	1
Site IV	8	7	1
Site V	9	9	0
Site VI	8	8	0
Site VII	2	2	0
TOTAL	82	68	14

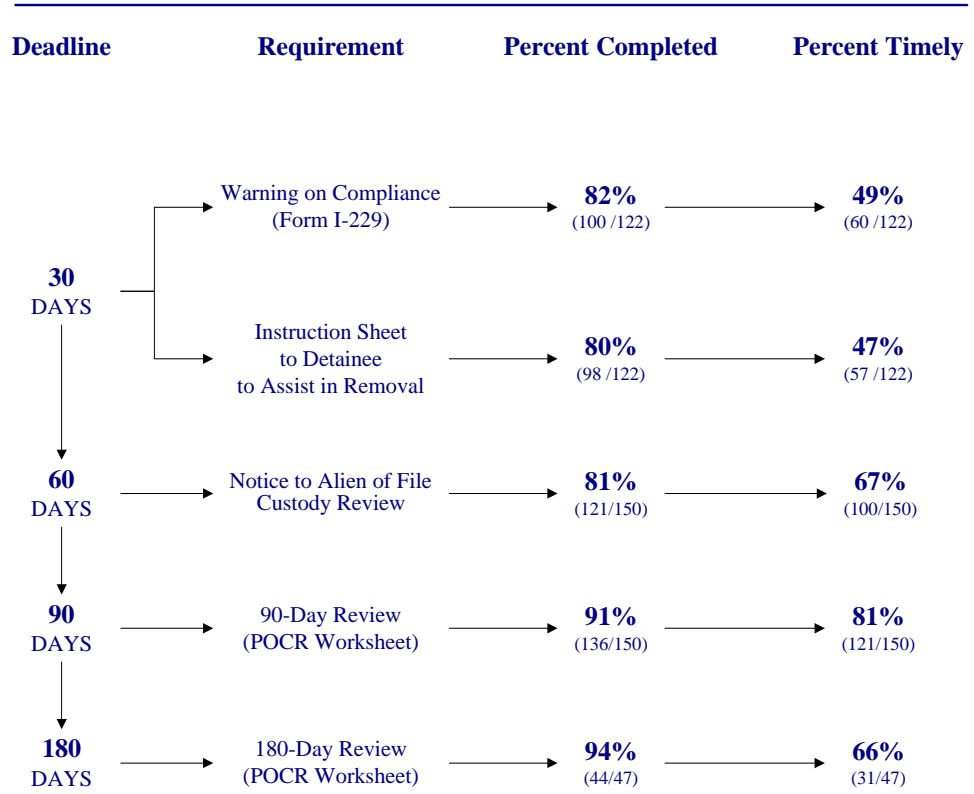
Notifications and Decisions Are Not Consistently Complete or Timely

In addition to conducting the 90- and 180-day reviews required by regulation, ICE guidance requires that an alien be notified within the first 30 days of detention of the consequences of failing to comply with requests to assist the federal government in obtaining travel documents, and of the specific information the alien should provide to assist with the custody determination. In addition, the regulations and ICE guidance require notification within the first 60 days that a PO CR will take place on or before 90 days of detention after a final order of removal.

As shown in Figure 2, field offices did not consistently serve the required notices, and the notifications and post-order custody reviews that DRO did serve were not consistently timely. For example, the 90-day review was timely in approximately 81% of the cases; however, the 180-day review was only timely in 66% of the cases. While notification documents were provided in more than 80% of all cases, only one document was provided on time in more than 50% of the cases. Deportation officers listed a variety of reasons for delayed or missing documents, including staffing shortages, competing priorities among duties, such as fugitive task force operations and escorting removals overseas, a preference for more training, difficulty tracking cases, and unforeseen delays in removal.

We counted cases that did not require a particular notification document, such as the 60-day notification of PO CR file review for an alien who was failing to comply or had a stay of removal, as complete and timely. We excluded one field office from the count of the 30-day notification forms: as it did not keep copies of the forms in the alien's file, timeliness is calculated from the 122 cases reviewed for the other six field offices. Interviews with local *pro bono* organizations and a review of the files at the detention center confirmed that the notifications were being served. To identify only cases that were seriously overdue, we counted the 30-day notifications as timely if they occurred within the first 45 days, the 60-day notification as timely if it occurred within the first 75 days, and the post-order custody review as timely if it occurred within 10 days of the deadline.

Figure 2: Timeliness of POCR Notifications and Decisions



Source: OIG File Review

Guidance Not Fully Implemented

DRO field offices have not fully incorporated headquarters guidance into their operating procedures. At several sites we visited, deportation officers were either unaware of the HQCDU website where PO CR guidance is available, or were aware the site existed but had not used it. As a result, several field offices were using outdated or inaccurate forms. One of the field offices issued its 90-day denial letter with a misleading statement that, “[w]e will conduct another review of your custody status within six months of the date of this notice,” while the regulations require a second review 90 days after an

initial denial. Four field offices were using a version of the Notice to Alien of File Custody Review that used the standard—“clear and convincing evidence that [the alien] will not pose a danger to the community and will not be a significant flight risk”—drawn from pre-Zadvydas regulations. The ICE Office of the Principal Legal Advisor confirmed that the older “clear and convincing” language in these Notices was more stringent than the language in the Notice posted on the website. While the website Notice predates the transfer of detention authority from the Attorney General of the Department of Justice to the DHS Secretary, the legal standard—that evidence must be “to the satisfaction of the Attorney General” that the detainee “will not pose a danger to the community and will not present a flight risk”—is accurate.

In addition, the HQCDU provides clear guidance on the elements that must be included in the 90-day denial letter provided to aliens; the case history; a criminal history, if convicted; an evaluation of the release criteria; and a decision specific to the alien’s circumstances. However, of the 150 POCR case files we reviewed, 44 (29%) did not address all of these elements. In addition, of the 68 cases for which there was a POCR required and completed, 32 (47%) had at least one substantive deficiency. As a result, field offices had provided detainees notifications with outdated and inappropriate language and standards. See Appendix G: Substantive Deficiencies in POCR Worksheets for additional details.

Material Deficiencies
A Pakistani alien was told that, “ICE is in possession of a travel document to effect your removal.” In a series of emails eight days later, the deportation officer told ICE headquarters that the office was still working on the travel document request.

Failure to Comply Standard Needs to be Properly Applied

ICE defines failure to comply with efforts to secure removal as refusing to comply with a request for a concrete action, such as signing a travel request document or talking to a consular officer. According to HQCDU guidance, “[t]he removal period shall be extended and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to facilitate the alien’s departure or conspires or acts to prevent the alien’s removal. This includes any failure or refusal on the part of the alien to provide information or to take any other action necessary to obtain a travel document [See INA 241(a)(1)(C) of the Act]. Prior to the government suspending the removal period, the alien must have (1) Been served with a notice of what he/she is

required to do; (2) Been given the opportunity to comply; and (3) Subsequently failed to comply.”¹⁴ An alien who challenges a final order of removal through court processes, including appeals, stays of removal, and motions to reopen denial decisions, is not considered failing to comply with the removal order. The Office of Principal Legal Advisor told us that the misapplication of failure to cooperate standards is one deficiency that makes continued detention decisions difficult to defend once an alien files a petition of *habeas corpus*. As depicted in Figure 1: Disposition of Requested PO CR Case Files, in addition to the 82 cases for which a PO CR was required, there were 68 cases for which a review was not required. Of the 68 cases, the field office had identified 13 as failing to comply with requests to assist the government in obtaining travel documents. However, we observed that in only 8 of the 13 cases did the deportation officer provide evidence that the alien was actively impeding the process of obtaining travel documents, for instance by refusing to sign a travel document request or misrepresenting nationality. The evidence in the remaining five files did not support the basis for determining that these aliens were failing to comply. In addition, although ICE headquarters guidance requires that aliens who fail to comply must receive notification monthly, and the 13 failure to comply cases had been detained with a final order for more than 90 days, only 4 of the 13 cases had the required notifications in the alien’s file.

Failure To Comply
The Nigerian consulate refused to supply a travel document for one citizen until DHS addressed an untreated injury sustained a year earlier in DHS custody and provided a settlement for belongings stolen by a DHS officer. (The officer was convicted of theft.) The detainee was denied review as failure to comply.

Resource Allocation and Management Constrains the PO CR Process

According to a 2004 GAO report, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, and our 2006 audit report, *Detention and Removal of Illegal Aliens: Immigration and Customs Enforcement*, ICE DRO does not have adequate resources to provide management and oversight for the PO CR

¹⁴ The INA refers to the *Immigration and Nationality Act*.

caseload.¹⁵ The GAO recommended that ICE DRO assess staffing needs and use its estimates to support funding and personnel requests.¹⁶ Both the GAO report and our audit report observe that the DACS database failed to meet GAO’s information technology standards, which at a minimum should enable the agency to determine whether it is “achieving its compliance requirements under various laws and regulations.”¹⁷ In our audit report we requested that ICE provide us with bi-annual updates on its progress in replacing DACS.

Because the recommendations made in those reports are still outstanding, this report will outline some of the consequences of ICE’s resource limitations, but we will not make duplicate recommendations. We do point out, however, that ICE could implement more immediate changes to improve the POOCR process. Closing these gaps should shorten detention time for aliens who could be removed. It could also provide the HQCDU with earlier notice to make provisions for aliens whose release within the United States would be most problematic.

POOCR Compliance Oversight Is Limited

POOCR Program Is Understaffed

Budget constraints during the first years after DHS was created contributed to a hiring freeze within ICE, and the ranks of deportation officers were depleted by attrition. For most field offices we visited, deportation officers managing the POOCR caseload had been assigned this responsibility within the last year and had not received formal training. These officers were either hired or promoted after the budget constraints were resolved. Despite limited resources, ICE DRO drafted excellent guidance to field officers on the 90-day post-order custody review, adapted the program to comply with the Supreme Court’s Martinez decision on inadmissible aliens, and introduced close oversight of the 180-day review. ICE DRO reports that it intends to introduce additional measures when more staff and resources become available. While ICE has not provided a staffing model in response to the GAO recommendation, most field offices suggested that a ratio of 75 to 100 detainees to each deportation officer would be a manageable caseload. At

¹⁵ *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*,” GAO-04-434, May 2004. DHS OIG “*Detention and Removal of Illegal Aliens: Immigration and Customs Enforcement*,” OIG-06-33, April 2006, page 21.

¹⁶ GAO-04-434, May 2004, p. 25.

¹⁷ DHS OIG-06-33, April 2006, page 21.

present, most offices are operating with detainee to officer ratios over 100 and some as high as 150 cases per officer. Because the GAO recommendation is still outstanding, we are not making a recommendation on developing a staffing methodology or on increasing staffing positions for the POOCR process. However, full implementation of several recommendations in our report requires additional ICE deportation officers, and additional support staff, contract resources, or a more effective database.

When discussing HQCDU staffing levels, officials at ICE DRO offices in headquarters and in the field, as well as other entities that work closely with ICE DRO, such as the Office of Principal Legal Advisor and the Department of Health and Human Services' Public Health Service, considered the HQCDU to be understaffed. The HQCDU currently relies on four full-time staff and a few deportation officers who have been detailed to manage the POOCR caseload, which averaged 1,098 post-180 day cases during the period of our review, from March 2006 to June 2006. In addition to adjudicating the 180-day cases forwarded from 22 ICE DRO field offices, HQCDU officers are responsible for special circumstances cases and *habeas corpus* claims, as well as for developing guidance and training and conducting oversight and training site visits.

Attorneys from the Office of Principal Legal Advisor who work closely with the HQCDU officers assigned to manage national security and terrorism cases, and cases involving war criminals and human rights abusers, estimated that the HQCDU should have at least one officer working full time on each of these caseloads, whereas there is currently one officer working on both in addition to that officer's other duties. One attorney told us that because it has insufficient staff, the HQCDU is reactive, focusing on cases nearing the 180-day deadline. The attorney said that with adequate staffing, the HQCDU could take a more proactive approach to monitoring and prioritizing the whole caseload, which might secure faster returns and fewer releases.

In addition to the national security and national interest cases, one HQCDU officer works almost exclusively on obtaining closely supervised release or certification for mentally ill aliens who are violent. Another HQCDU officer manages *habeas corpus* petitions as a collateral duty. The HQCDU conducted six field office trainings in FY 2006, which is also a collateral duty. HQCDU staff estimated that the unit has been authorized to hire a few more officers, but would require a total of about ten officers and a corresponding level of administrative staff to provide adequate oversight and support. We were not

able to determine how many support staff or contract resources would be required to support additional headquarters and field deportation officers.

Better Tracking Systems Required for Program Management

Enhancing staffing levels alone will not address the deficiencies we identified in the POOCR process. With the case disposition from our file review, as previously discussed and shown in Figure 1, we illustrate key deficiencies with DACS for managing the POOCR process. For example, the monthly caseload report that the HQCDU obtains is quickly outdated as aliens are removed, released, or transferred. DACS cannot distinguish POOCR cases that are due for a 180-day review from cases where the alien is failing to comply, has a stay of removal or is otherwise ineligible for review. Moreover, while the monthly DACS report identifies aliens convicted of an aggravated felony, DACS cannot identify for HQCDU the most critical cases, such as sexual predators, national security risk and national interest cases, and aliens with mental health problems that require certification or intensely supervised release. As reported in our previous audit report, DRO's DACS database is outdated and cannot meet field office and headquarters case tracking and program management needs.¹⁸

The quality of information entered into DACS is also problematic. Alerts for approaching deadlines must be manually calculated, entered, and checked; therefore, many field officers do not use them. DACS can only track a portion of the regulatory POOCR requirements, and some data fields are so difficult to update that they are often left blank. The completeness of information that is easier to update also varies by officer and field office.

Because of the deficiencies with DACS, both headquarters and field offices have developed several parallel tracking systems that require duplicate data entry. Each month the HQCDU obtains a report from DACS identifying cases that appear to have a final order. The HQCDU sends the list of cases that appear to have passed 180 days to each field office, as well as POOCR cases in earlier stages. The field offices submit a POOCR worksheet for the HQCDU to adjudicate or provide information on why the case is not eligible for the 180-day post-order custody review. The HQCDU reviews the information provided by the field, and alerts the Field Office Director regarding potential case management errors. All of the officials from the field offices we visited said that, in addition to DACS and monthly updates for the HQCDU, the field

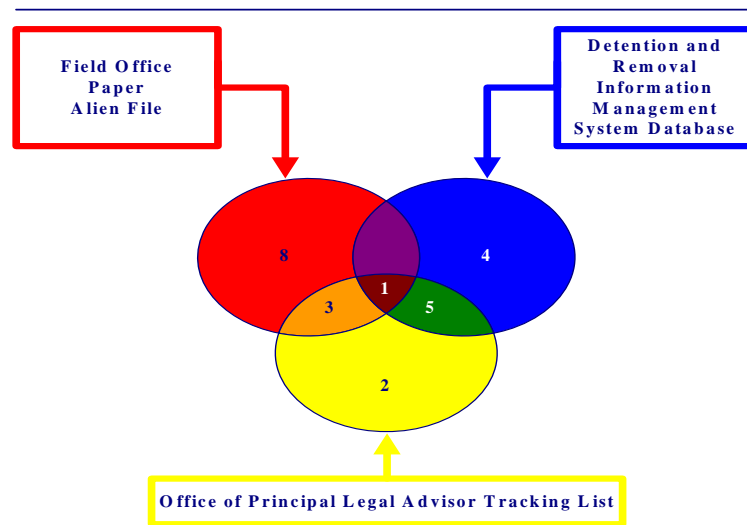
¹⁸ DHS OIG-06-33, April 2006, page 21.

offices track POCR cases through other locally developed systems, ranging from handwritten logs to other databases.

In addition to the monthly updates from the field offices, the HQCDU enters some information on the 180-day cases into the Detention and Removal Information Management System, a database developed to provide ICE DRO headquarters with case tracking and documentation capabilities that are not available in DACS. The HQCDU and Office of Principal Legal Advisor also maintain an informal tracking system for *habeas corpus* cases referred to headquarters, and Office of Principal Legal Advisor attorneys involved with special circumstances cases might also track the cases in a case management system used by DHS attorneys, the General Counsel Electronic Management System.¹⁹

The result of having multiple tracking systems is that no one source of information at either ICE headquarters or ICE field offices can be relied upon as complete. For example, as demonstrated in Figure 3, out of 150 POCR files we reviewed, 23 cases involved *habeas corpus* petitions, but relatively few were captured by more than one tracking system.

Figure 3: Habeas Corpus Petitions



Sources: File review and headquarters tracking systems

¹⁹ Chief, Knowledge Management Division, Office of the Principal Legal Advisor, *Assessment for the Immigration and Customs Enforcement (ICE) General Counsel Electronic Management System*, April 25, 2005.

There are two scheduled upgrades to DACS that should improve the quality of information available to the HQCDU and the field offices. The first was slated for field-testing in October 2006, and is intended to integrate existing DACS functions into ICE's Enforcement Case Tracking System (ENFORCE). ENFORCE is the primary administrative case management system for ICE. It provides access to biometric data, information on investigations and on national security and intelligence activities. The initial upgrade is primarily designed to eliminate the need to enter information into both ENFORCE and DACS, and to eliminate the parallel tracking systems that field offices use to supplement DACS.

The second upgrade, the ENFORCE Removals Module, is projected to be operational between April 2007 and January 2008. According to GAO, the ENFORCE Removals Module "will eventually be able to automatically identify which aliens are due for a post order custody review and generate key information such as when aliens should be notified of the review and when the review is to be done."²⁰

Field Offices Are Not Consistently Monitoring Compliance

Due to staffing constraints, the HQCDU must limit its oversight efforts to the 180-day post-order custody review, *habeas corpus* cases for which headquarters assistance has been requested, special circumstances cases, and field training site visits during which trainers review 90-day POOCR cases and failure to comply cases. Headquarters staff advised us that its monthly deficiencies reports on the 180-day cases demonstrate that the quality of the 180-day submissions is improving. However, headquarters staff also said that the quality of information received still varies by field office, and obtaining additional information from the field can be a major part of the decision-making process for 180-day cases.

In a February 2006 memorandum to the field, ICE DRO stressed that the Field Office Director or Deputy must "thoroughly review POOCR worksheets and written decisions prior to signing. All POOCR case reviews must be completed within the timeframes specified in regulations. Information contained in the POOCR worksheet must be accurate and complete, and all written decisions must be legally sufficient and in compliance with current regulations and

²⁰ GAO-04-434, May 2004, page 14.

policy.”²¹ Our file review indicated that Field Office Directors are not consistently reviewing the quality and timeliness of field notifications and decisions. Of the 68 PO CR worksheets we reviewed, only 4 had not been signed by the Field Office Director, Deputy, or Acting Director. However, almost half of the PO CR worksheets had material deficiencies, which we depict in Appendix G. In addition, as demonstrated in Figure 2, notifications and decisions were not consistently completed or timely. Until ENFORCE has the capability to track regulatory compliance automatically, increased monitoring and case-specific reporting by Field Office Directors represents the most practical interim option for verifying compliance.

TDU Support for the PO CR Process Is Not Adequate

The TDU is responsible for assisting field offices when post-order custody cases have passed 75 days without receiving a travel document, and for assisting with all cases from countries for which obtaining travel documents is particularly difficult. In July 2006, DACS indicated that there were 3,157 PO CR cases over 75 days old, and an additional 1,282 cases from countries for which the field must request immediate TDU assistance. The TDU is also responsible for non-detained post-order custody cases, which was reported to be 749,695 active alien cases in July 2006. In addition to requesting individual travel documents for field offices, the TDU is responsible for supporting ICE field offices abroad, and for negotiating with foreign governments to obtain cooperation on travel document issuance. The TDU’s staffing has fluctuated between three and six permanent deportation officers, with a few other staff detailed to provide additional support. The TDU has been recently authorized to hire 12 full time deportation officers.

The TDU Chief told us that inadequate staffing and funding meant that the TDU has not provided field offices with adequate training and guidance on obtaining travel documents. In discussing successful strategies for obtaining travel documents, the TDU Chief said that each country has its own citizenship laws and procedural requirements and if deportation officers do not follow these requirements, the chances of obtaining a travel document decrease. During our site visits, we observed that while three of the field offices routinely obtained and used some of the travel document applications required by the alien’s country of origin, four other field offices were

²¹ Memorandum from the Acting Director, ICE DRO, to Field Office Directors, “*Delegation of Authority for Post-Order Custody Review Decisions*,” February 22, 2006.

routinely sending foreign consulates nothing more than passport photographs and a DHS Form I-217, Information for Travel Document or Passport. The DHS Form I-217 is completed at apprehension or detention with information on the alien's biography and on available identity or travel documents. The four offices generally completed travel document request forms required by the alien's country of origin only when asked to do so by the foreign consulate. The TDU Chief observed that a website with links to nationality laws and a checklist of required forms for each country of origin would enhance the quality of travel requests that officers in the field submit to consulates on receiving the final order. The TDU Chief said that the TDU would need additional staff and funding to conduct or contract out the necessary research and website updates.

The TDU Chief also said that the unit's ability to assist field offices is limited by the quality of travel document requests it receives. Despite issuing detailed guidance to field offices on requirements for forwarding travel document requests to the TDU, the TDU receives many requests that consist of only a partially completed Form I-217 and passport photographs.²² For example, we observed the TDU Chief reviewing several travel document requests; the majority of which had only passport photographs and an incomplete Form I-217, and a few of which had only the passport photographs and a letter requesting assistance.

TDU Assistance
A British subject with a non-violent criminal record apprehended on the Canadian border spent more than six months in detention without a post-order custody review. His protracted correspondence with the British consulate eventually resulted in a travel document.

The TDU Chief explained that current staffing levels mean that the TDU cannot obtain information from the field in order to complete each Form I-217 before sending it to the consulate, so the TDU must decide whether to send the incomplete information to the consulate, or return the package to the field office for completion. Moreover, because there is no mechanism in place for tracking and prioritizing travel document requests, the TDU cannot easily provide field offices with feedback on deficiencies and cannot identify and prioritize cases for which release within the United States could have the most serious consequences.

²² Memorandum for Field Office Directors, from the Director, Office of Detention and Removal, Subject: "Requests for Assistance in Obtaining Travel Documents," August 21, 2003.

More complete travel document requests submitted by field offices, when they assume custody of an alien with a final order of removal, will not address all of the issues that cause countries of origin to deny or delay the issuance of travel documents. However, providing more complete field office requests is prudent and could reduce detention time for some POOCR cases. Further, additional training, guidance, and oversight on obtaining travel documents by the TDU will be more feasible once the TDU receives additional staffing. This assistance could also shorten detention time for some POOCR cases.

Recommendations

We recommend that the Assistant Secretary for Immigration and Customs Enforcement:

1. Direct that each Field Office Director report case-specific compliance with POOCR regulations and guidance to the HQCDU on a quarterly basis, and that the HQCDU report these results to the Assistant Secretary on a semi-annual basis until such information can be obtained through ENFORCE.
2. Ensure that existing vacancies in the TDU are filled and, as staff or funding becomes available, ensure the TDU upgrades its intranet to provide country-specific guidance on obtaining travel documents, including information on nationality laws and checklists of required information, to field deportation officers.

Making Removals a Priority Requires Additional Resources, Support, and Oversight

We identified weaknesses in the POOCR process that cannot be easily resolved with current staffing and technological resources. ICE must develop capacity building measures that address these weaknesses if it is to manage increasing detention numbers. Both the HQCDU and TDU have relied on staff detailed from field offices to fill short-term staffing needs. Detailing field officers is not just a means of addressing staffing shortages; it offers an opportunity to introduce practical and innovative responses to these challenges. During our fieldwork, we observed locally developed best practices that improved the timeliness, efficiency, and quality of post-order custody reviews. For example, one office used a combination of check sheets and weekly file

reviews to ensure that all POCR notifications and decisions were timely and complete. (See Appendix H: Procedural Challenges and Best Practices for additional examples).

Removals of National Interest Cases and Dangerous Aliens Should Be Prioritized

The Supreme Court decisions in Zadvydas and Martinez require that those aliens who cannot be removed be released within the United States, with a few stringent exceptions for “special circumstances cases,” which are further limited by some federal courts. While the Supreme Court decision and the regulations require that the alien demonstrate that removal cannot be effected, in practice HQCDU initiates the 180-day review and determines whether there is a significant likelihood of removal, and following this review, field deportation officers assume responsibility for initiating subsequent reviews. Yet ICE had little evidence that it is prioritizing the removal of aliens who are violent criminals, have suspected terrorist ties, or have been ordered removed as war criminals, and consequently they may be released within the United States.

For example, aliens with a violent criminal history—including those with mental health problems or convictions for domestic violence or sexual assault—were no more likely to have received a timely review, been served required notices, have accurate language in the denial letter, have complete travel document information, or have been flagged at an early stage to obtain HQCDU assistance with removal or supervised release. Because many halfway houses and other institutions refuse aliens with mental health problems and a history of

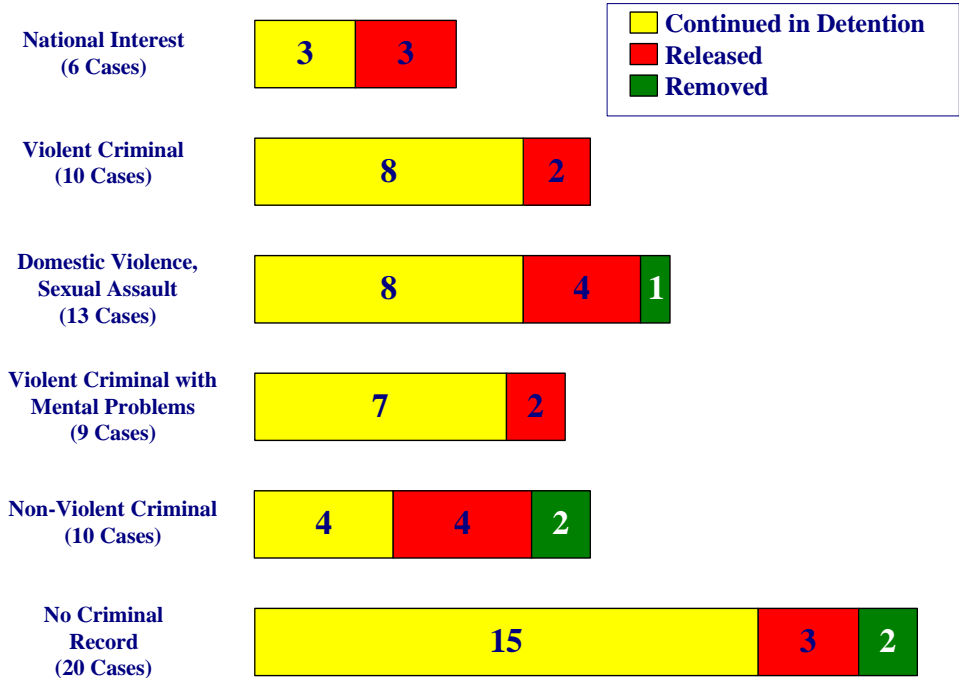
violence or criminal activity, making such arrangements can be a difficult and lengthy process. Additionally, ICE does not advise the TDU that these cases require expedited processing to hasten the removal of aliens who pose a threat to public safety, national security, or the national interest. Figure 4 illustrates a range of criminals versus non-criminals among the cases we reviewed, and numbers released, detained, or deported. Of the 68 cases we reviewed, 38

Prioritization

One Mariel Cuban who had been convicted of assault and battery on a child, and whose release criteria specified placement in a halfway house with supervision, was instead released to a first-come-first-served homeless shelter.

involved aliens who were violent or posed a potential threat to the national interest. Of the 38 cases, 11 aliens were released and only 1 was removed.

Figure 4: File Review of 68 POCR Case Dispositions



Source: OIG File Review

Even violent criminal aliens who require treatment for mental illness are entitled to release after 180 days, unless the federal government demonstrates that the violent behavior is due to a mental condition, the alien is likely to engage in acts of violence in the future, and no condition of release can ensure the safety of the public. Of the cases we reviewed, ten aliens had both mental health problems and convictions for violent behavior, but only one had been formally certified as “specially dangerous”—a requirement to justify continued detention. ICE was not able to obtain travel documents for the remaining nine, four of whom were from countries that rarely take back their nationals. The remaining five were from countries that issue documents sporadically or

have procedural requirements that an alien with mental health problems could not easily meet. Deportation officers were therefore responsible for arranging suitable release conditions. Five of the nine cases, still unresolved at 180 days, were referred to ICE headquarters, which then referred them to the Public Health Service for placement. One HQCDU official told us that this process could take three to six months, even after the Public Health Service receives the case. A Public Health Service official commented that ICE field officers have neither the social work training nor the contacts with mental health facilities to assist in the placement of these aliens. The Public Health Service official said that without professional assistance, the placement process can be time-consuming and may result in inappropriate placement or in the failure to secure any placement. The Public Health Service is generally not involved in field level placements and when the cases are referred to ICE headquarters at 180 days, the Public Health Service feels pressure from ICE to resolve the cases quickly.

National security and national interest cases do not receive more intensive monitoring as they move through the PO CR process. These cases are typically considered for continued detention as “special circumstances” cases. ICE had identified six aliens in our review as potential national security risks or human rights violators, all from countries to which removal is difficult. For three of the six, several federal agencies, including ICE Fugitive Operations, had put considerable effort into apprehending the aliens and securing a final order of removal. Again, field office files were not prioritized nor were there any heightened efforts to monitor or remove these aliens. The HQCDU kept a file on only one of those detained after a final order for more than 90 days but less than 180. Only two of the six national security and national interest aliens were flagged in DACS to ensure that ICE headquarters was consulted before any action was taken. ICE’s Human Rights Law Division provided assistance on one of the human rights violator cases, and the HQCDU had cleared the denial letter of one national security risk case, but the alien files for four of these six cases were among the 32 files we present in Appendix G as having material deficiencies.

National Interest
A denaturalized Nazi war criminal did not receive any of the required review notices, his post-order custody review was late, no alert placed on his record in DACS, and he was entered into the Detention and Removal Information Management System only as a travel document request case, not as a PO CR case.

Recommendation

We recommend that the Assistant Secretary for Immigration and Customs Enforcement:

3. Develop and staff a program to identify and prioritize cases involving aliens who represent a violent threat to the public or are national security or national interest cases, so that efforts to secure travel documents are expedited, and placement procedures are initiated early for those who might require eventual release within the United States.

Likelihood of Removal Standard Needs to be Documented and Transparent

In the Zadvydas decision, the Supreme Court said, “for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.”²³ While ICE regulations provide a list of factors for determining whether there is a significant likelihood of removal, they do not refer to, or provide guidance on, how to apply the Supreme Court’s requirement that the decision to detain be subject to greater scrutiny over time.²⁴ Moreover, because ICE regulations require that the significant likelihood decision be made at headquarters, the HQCDU has not developed written guidance for the field beyond the language in the Supreme Court decision and the regulations.

When we asked the TDU how it defined the significant likelihood of return, the TDU said it takes into account five factors: (1) actions by the country of origin; (2) the country’s level of interest in cooperating; (3) whether travel documents are issued consistently even if documents are issued well after the 180-day milestone; (4) whether repatriation requirements can be met; and, (5) feedback the TDU receives from the consulates. The TDU said that its deportation officers rely on their knowledge of documentary requirements, and general experience on return rates, when assessing whether there is a significant likelihood of removal. However, because ICE does not track actual removal rates, it is not developing statistics on the likelihood of removal by nationality, or assessing the accuracy of its predictions based on these five factors.

²³ Zadvydas v. Davis 533 U.S. 678 (2001), at 701.

²⁴ 8 CFR § 241.13(f).

After reviewing denial letters, POCR worksheets, other documentation in alien files, entries in DACS and the headquarters Detention And Removal Information Management System, headquarters files on 180-day cases, and declarations prepared by TDU officers defending continued detention following a *habeas corpus* decision, we conclude that ICE DRO rarely provides specific evidence to explain its significant likelihood determinations. Further, ICE rarely provides specific estimates of the time required to obtain travel documents, and rarely identifies additional measures it would need to take to secure the documents.

While headquarters ICE DRO staff might not need extensive documentation to explain 180-day post-order custody reviews, field officers responsible for managing the cases after the 180-day denial, the United States Attorney's Offices, and federal judges who respond to petitions of *habeas corpus* must make decisions based on the information provided by ICE DRO headquarters. Most of the detention decisions reviewed, including both the 180-day denials and TDU *habeas corpus* declarations, provided only limited statements that return was possible in the alien's case, that ICE could effect returns to the alien's country of origin, or that there are no permanent barriers to return.

Likelihood Of Removal

A non-criminal alien has been detained with a final order since April 2005. The HQCDU denied release, as recommended by the Field Office Director, because the "government of Ethiopia regularly issues travel documents to effect the repatriation of its nationals." Although Ethiopia subsequently denied the request, the alien remains detained pending a removal request to Eritrea.

According to the ICE DRO Field Manual, "For All Cases Over 180 Days (90 Days Beyond the 90-Day Removal Period) HQ[CDU] will hold jurisdiction for custody decisions pursuant to 8 CFR § 241.4, § 241.13, and § 241.14. The field officer will retain responsibility for docket control, case management, completion of future reviews, and will continue appropriate follow up efforts to remove the alien. Once HQ[CDU] issues a decision to continue detention and the alien has not been removed within a reasonable time frame, the local field office is to inform HQ[CDU] by way of a memorandum (which is also to include any updates to the POCR package) so that a new custody decision under 8 CFR § 241.13 may be made."²⁵ While headquarters guidance requires field officers to notify headquarters when an alien is not removed "within a reasonable time frame," HQCDU 180-day decisions to detain do not provide

²⁵ ICE DRO Field Manual Chapter 17, Section 17.11 (b).

field officers with an estimate of what is reasonable for a given country of origin and an alien's circumstances. These decisions also provide little basis for United States Attorney's Offices and federal judges to assess *habeas corpus* petitions. The Chief of the TDU told us that when the country of origin is accepting some removals, ICE will generally contest the *habeas corpus* petition, but that some detention decisions cannot be defended when a petition has been filed.

There is great value in tracking travel document issuance rates and compiling comprehensive statistics. For example, one successful TDU declaration to defend continued detention following a *habeas corpus* petition cited statistics compiled by the British government. An objective metric, such as the time required to remove 80%, or 90%, of aliens to a given country of origin, could assist field deportation officers in making release decisions, support ICE in conducting negotiations with countries of origin, and assist ICE and the United States Attorney's Offices in determining whether to defend continued detention when a *habeas corpus* petition is filed. Additional country-specific or case-specific information would allow ICE the flexibility to make release decisions early in the POOCR process, or to continue detention beyond the typical travel document issuance date. However, the TDU's need for additional staff and the necessary technological infrastructure extends to its inability to track and analyze return rates by country of origin.

Recommendation

We recommend that the Assistant Secretary for Immigration and Customs Enforcement:

4. Develop an objective and transparent methodology for determining whether there is a significant likelihood of removal for all cases, which considers: (1) the Supreme Court's requirement for increasing scrutiny over time; (2) the factors outlined in ICE regulations; and, (3) comprehensive statistics on actual removal rates for all POOCR cases forwarded to the TDU.

Oversight of Aliens Held Longer Than 180 Days Is Insufficient

Although the burden on the federal government increases the longer an alien is held in detention, ICE regulations and procedures provide less oversight and

review after an alien has been held 180 days. Citing the Supreme Court’s decision in Zadvydas, ICE guidance acknowledges, “the longer an alien remains in ICE custody with a final order, the higher the government’s burden to establish that the alien’s removal will occur in the reasonably foreseeable future.”²⁶ Yet some aliens are held for reasons that appear to weaken with time. In addition, others cases appear to be at an impasse, with neither the alien nor ICE taking steps to resolve the situation. Such cases would benefit from a broader range of strategies to ensure regulatory compliance and the most effective use of existing resources, such as detention space.

ICE procedures require field deportation officers to monitor the status of aliens who have received a 180-day “significant likelihood of removal” decision, give non-compliant aliens an opportunity to comply every 30 days, and update the case in DACS at a minimum of every 30 days. Beyond these requirements, the guidance requires a file review 90 days after the 180-day decision, and the resubmission of the POCR worksheet 180 days after the initial 180-day decision. Yet neither review requires additional actions that could facilitate an alien’s removal or release. For example, the review does not require a request for a written decision from a consulate on travel document requests, an interview with the alien to obtain more current information on the alien’s efforts to secure travel documents, or a discussion with the alien on possible release options. Nor is there evidence in the files that post-180 day reviews are consistently conducted. Of the 150 POCR cases we reviewed, 64 (43%) had been in detention with a final order for more than 180 days and had not received a post-order custody review in the last 90 days, and 36 (24%) had not received a review in the last 180 days. These figures include cases where the detainee had a stay of removal, was removed from the POCR process timeline for failure to comply, or had already received a 180-day review, as well as those who should have received a 180-day review and did not.

Post 180-Day Oversight
One detained Indian’s travel document request was submitted in October 2004. The last documented review of the likelihood of issuance of a travel document in the reasonably foreseeable future took place in April 2005.

Continued detention of these aliens is not closely monitored, and the basis for headquarters’ decision on the likelihood of securing travel documents may not be fully articulated or might not remain relevant. For instance, negotiations on returns underway during the 180-day post-order custody review might have

²⁶ ICE DRO Field Manual, Chapter 17, Removal Process: Post Order Custody Reviews (POCR) Section 17.3(b).

stalled. For aliens detained after a 180-day review, field deportation officers continue to manage the case, but in many instances do not have information to determine whether a significant likelihood of removal still exists, unless they receive an explicit denial from the consulate. Further, aliens do not appear to be providing sufficient information to field deportation officers: of the 68 aliens who received PO CR decisions, only 25 (37%) had submitted information relevant to the release criteria, either in a prior immigration hearing or during the PO CR process.

For those aliens who fail to comply with removal efforts, continued detention might not be based on the criteria specified in the regulations and guidance. For example, failure to comply decisions do not consistently follow guidance, and are not consistently documented in required monthly warnings. In addition, deportation officers currently have few options when aliens fail to comply. For instance, at least five of the removal cases held for more than 180 days involved aliens who were obscuring their nationality. However, deportation officers did not have access to linguistic or cultural experts who could have provided assistance in determining the alien's country of origin. While there have been successful prosecutions for failure to comply, most United States Attorney's Offices do not consider such cases a priority.

TDU Assistance
A Federal Bureau of Investigation translator and two Iranian consuls questioned an alien's claim that he was Iranian, based on his dialect and poor knowledge of the country. Years later he was still detained as an Iranian failure to comply case.

Moreover, while some field offices have integrated *pro bono* organizations into the PO CR process, field offices that do not might be limiting options for resolving impasses and avoiding some *habeas corpus* releases. Before DHS was created, the role of *pro bono* organizations was more institutionalized in immigration processes. These organizations had access to detainees through free telephone service and "know your rights" presentations at detention facilities. In addition, most field office directors met periodically with *pro bono* organizations to discuss systemic issues. Such coordination was prudent as it established a conduit for issue resolution. Issues that could not be resolved at the field office level could then be challenged in court.

When DHS was created, field offices were separated into benefits administration and enforcement functions. Some *pro bono* organization representatives we interviewed said that there was no longer a routine mechanism for addressing post-order custody review issues with ICE Field

Office Directors. The field offices that work closely with *pro bono* organizations cited examples of how DHS benefits from such cooperation. They said that the *pro bono* organizations could provide: (1) assistance with release of aliens with mental health problems; (2) independent advice to aliens who mistakenly believed they are entitled to release at six months even when the alien failed to cooperate or filed successive stays of removal; and, (3) notification when aliens and their consulates have difficulty communicating. For example, we were told by *pro bono* organizations that the telephones in many detention facilities do not allow detainees free access to their consulates and *pro bono* organizations, as required by detention facility standards. We confirmed that in only one of the seven facilities we visited were all telephones correctly programmed to allow free calls. Communication with consulates was further constrained when consulates had not taken measures to enable detainee calls to be answered by automated systems.

When avenues for direct communication with ICE officials do not exist, *pro bono* organizations appear to rely on the courts to review compliance with post-order custody review regulations. Three *pro bono* organizations reported that they consider the *habeas corpus* petition the most effective way to obtain review after 180 days. Field deportation officers and an Office of Principal Legal Advisor said that, while many decisions to detain can be supported against a *habeas corpus* petition, in some cases the United States Attorney's Office is unwilling to defend the decision due to workload priorities. In other *habeas corpus* cases, aliens have been released due to insufficient documentation in the file to support continued detention. While not all *habeas corpus* petitions filed are recorded in the Detention and Removal Information Management System, the database does document that, between January 2005 and April 2006, in 78 of the 185 (42%) *habeas corpus* petitions on file, the alien was released. The database does not provide the reason for many of the decisions, does not document whether ICE had already made a decision to release at the time the *habeas corpus* petition was filed, and does not document whether the individual was released before a federal judge heard the case. The total number of *habeas corpus* petitions tracked in Detention and Removal Information Management System since 2001 is 2,152, of which 958 (45%) aliens were released.

Recommendation

We recommend that the Assistant Secretary for Immigration and Customs Enforcement:

5. Develop and staff a program to improve oversight of all aliens who have been in detention longer than 180 days after a final order of removal. Oversight should include periodic field office meetings with local *pro bono* organizations.

Management Comments and OIG Analysis

We evaluated ICE DRO's written comments and have made changes to the report where we deemed appropriate. Below is a summary of ICE DRO's written response to the report's recommendations and our analysis of the response. A copy of ICE DRO's response, in its entirety, is recorded in Appendix B.

Recommendation 1: Direct that each Field Office Director report case-specific compliance with Post-Order Custody Review regulations and guidance to the Custody Determination Unit (HQCDU) on a quarterly basis and that the HQCDU report these results to the Assistant Secretary on a semi-annual basis until such information can be obtained through Enforcement Case Tracking System (ENFORCE).

ICE DRO Response: ICE DRO responded this recommendation has been satisfied through its current procedures and recommends it be closed. ICE DRO said it has an established case-specific compliance program, where a monthly report is generated, which makes establishing quarterly reporting redundant. Each month all Field Office Directors provide case-specific updates on all final order aliens detained post-180 days. DRO's HQCDU oversees the reports from field offices and reports back to the Field Office Directors for action on cases in which deficiencies are noted. Also, the HQCDU uses the monthly report, in conjunction with its site visits to field offices, to monitor and maintain quality control of the POCR process. After each site visit, a detailed report is provided by the HQCDU to the DRO Director.

Moreover, headquarters DRO proposes to begin reporting the monthly 180-day case review results to the DRO Director, who reports directly to the

Assistant Secretary. For the review of 90-day POOCR cases, headquarters DRO will establish, within the next 90 days, an enhanced review process to ensure better compliance with regulations and policies, such as random sampling of pre-180 day cases. Also, additional review initiatives will be introduced through the case management system that will replace DACS.

OIG Evaluation: We consider these actions not responsive to the intent of the recommendation. The recommendation is unresolved and open. ICE DRO proposes short-term quality assurance measures that would not address the concerns our report raises. Although the HQCDU site visits can provide valuable feedback on substantive issues, ICE needs to verify compliance with its regulations and guidance on the service of all: notification documents; failure to comply warnings; and conduct of 90-day, 180-day, and post-180 day reviews. We recommended each Field Office Director report to the HQCDU case-specific compliance with POOCR regulations and guidance on a quarterly basis and that these results be reported to the Assistant Secretary on a semi-annual basis until such information can be obtained through the Enforcement Case Tracking System (ENFORCE). We made this recommendation because our file review indicated that Field Office Directors are not consistently reviewing the quality and timeliness of field notifications and decisions. Of the 68 POOCR worksheets we reviewed, only 4 had not been signed by the Field Office Director, Deputy, or Acting Director. However, almost half of the POOCR worksheets had material deficiencies, which we depict in Appendix G of the report. In addition, as demonstrated in the report's Figure 2, notifications and decisions were not consistently completed or timely. As Field Office Directors or their delegates sign most POOCR documents, they are uniquely positioned to track, monitor, and report compliance. Some field offices have already introduced tracking systems and checklists that would meet this requirement.

Further, the Assistant Secretary should have a familiarity with the quality and timeliness of decisions Field Office Directors are signing to determine whether existing programs and resources for training, monitoring, and oversight are sufficient. Reporting requirements are temporary measures until ENFORCE can provide such information.

Recommendation 2: Ensure that existing vacancies in the Travel Document Unit (TDU) are filled and, as staff or funding becomes available, ensure that TDU upgrades its intranet to provide country-specific guidance on obtaining

travel documents, including information on nationality laws and checklists of required information to field deportation officers.

ICE DRO Response: ICE DRO concurred with this recommendation. It said that vacancy announcements have been posted and that as the seven vacancies are filled, TDU staff will obtain updates on the travel document process in specific countries. TDU will update its intranet site with field advisories and other information deemed necessary and useful to field offices.

OIG Evaluation: We consider these actions responsive to the intent of the recommendation. This recommendation is resolved, but remains open pending receipt of additional action items and documentation. For example, we want notification when the vacancies have been filled and when a program is in place to introduce and update the intranet to assist field offices with country of origin information.

Recommendation 3: Develop and staff a program to identify and prioritize cases involving aliens who represent a violent threat to the public or are national security or national interest cases, so that efforts to secure travel documents are expedited, and placement procedures are initiated early for those who might require eventual release within the United States.

ICE DRO Response: ICE DRO responded the HQCDU has staff dedicated to the case management of aliens deemed to be a national security interest, as well as the placement of aliens for whom release is warranted but whose mental condition and prior violent tendencies may pose a threat to the community. DRO works with other ICE components, as well as other law enforcement agencies, to identify cases of special interest and to ensure that appropriate action is taken before release or removal. In addition, DRO has established a working group with the Department of State to assist in the removal of these aliens. As more staff is added, the HQCDU and TDU will ensure that additional resources are assigned to the oversight of these cases, as their proper handling is a priority for DRO.

OIG Evaluation: We consider these actions responsive to the intent of the recommendation. This recommendation is resolved, but remains open pending receipt of additional action items and documentation. For example we want notification when vacancies have been filled and when a program is in place to identify and prioritize cases.

Recommendation 4: Develop an objective and transparent methodology for determining whether there is a significant likelihood of removal for all cases, which considers: (1) the Supreme Court’s requirement for increasing scrutiny over time; (2) the factors outlined in ICE regulations; and (3) comprehensive statistics on actual removal rates for all PO CR cases forwarded to the TDU.

ICE DRO Response: ICE DRO responded it does not concur with this recommendation and recommends it be closed. ICE DRO said any methodology must be subject to case-specific circumstances, changes in country conditions, and diplomatic relationships. Requiring such a methodology is comparable to requiring a methodology that defines “beyond a reasonable doubt” in the criminal proceedings context. ICE DRO said it believes sufficient guidance is already provided and that it is difficult to develop a transparent methodology appropriate to the circumstances of all cases. Further, the HQCDU issues all significant likelihood of removal decisions. ICE DRO also provided examples of cases in which judicial requirements, congressional private bills, consular standards, and diplomatic relations could affect the likelihood of removal.

OIG Evaluation: We consider these actions not responsive to the intent of the recommendation. The recommendation is unresolved and open. The issues ICE DRO raises do not interfere with its ability to develop an objective and transparent methodology, and are not in conflict with its need to establish one.

ICE DRO’s methodology for 90-day decisions, provided through regulations and field guidance, demonstrate that an objective and transparent methodology is consistent with making decisions based on the facts of each case, and can serve as a model for developing written criteria for 180-day and post-180 day decisions.

ICE DRO makes thousands of decisions on PO CR cases each year, and many should be analyzed to identify the effect on removals for such factors as country of origin, consular office and officer, ongoing negotiations or sanctions, available documentation, the presence or absence of criminal and mental health factors, and the need to identify a third country to accept aliens who cannot be removed to a country of origin. Therefore, the overall accuracy of HQCDU’s predictions could and ought to be tracked and analyzed to inform future decisions on detention, and the equally important negotiations with countries of origin.

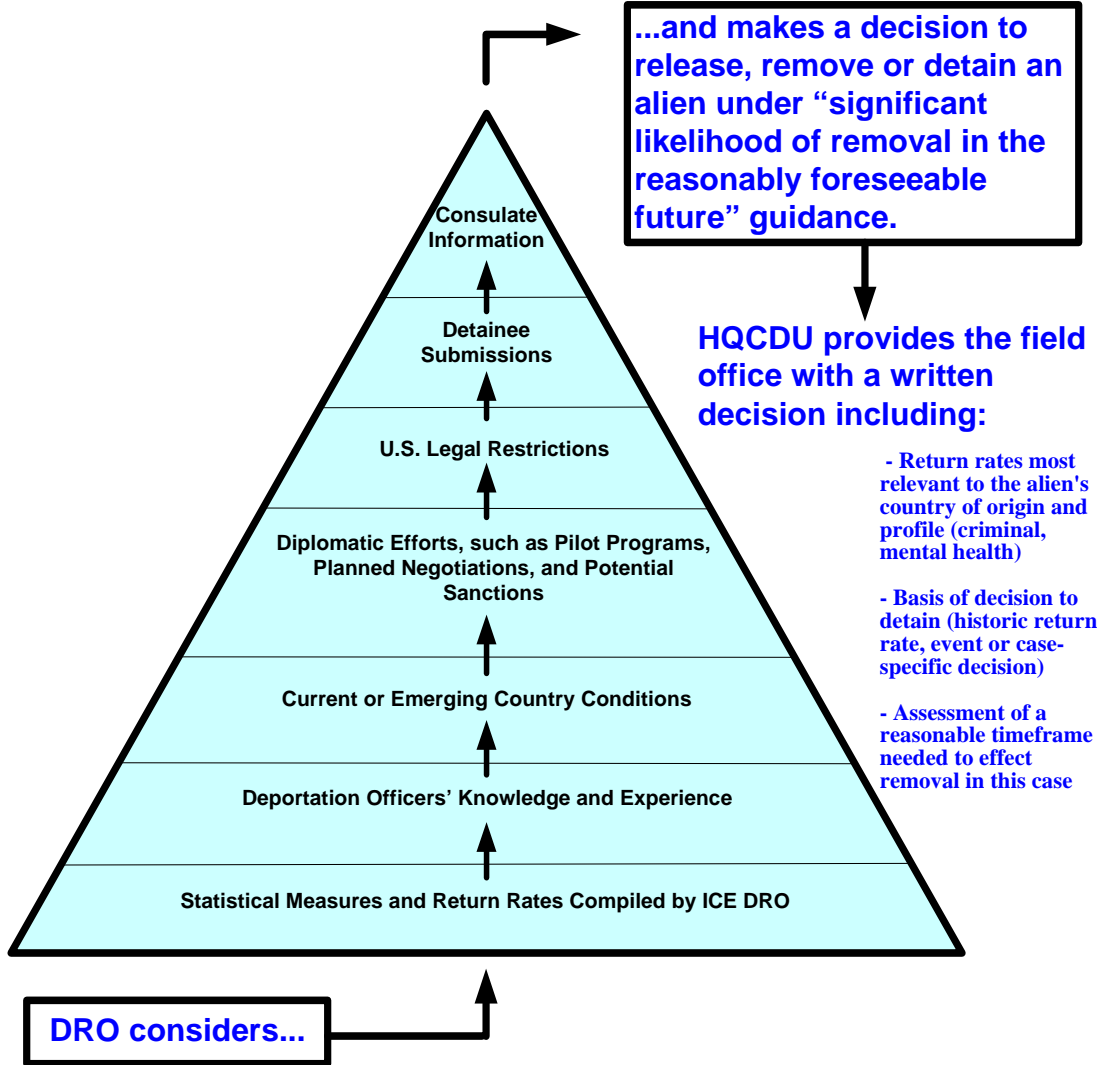
Although HQCDU makes all 180-day and post-180-day POCR decisions, once the 180-day decision has been made, responsibility for monitoring cases and initiating subsequent reviews shifts to deportation officers in the field. HQCDU has cited only two circumstances in which field officers would have information to initiate a post-180 day review: (1) when the consulate issues the field office a formal denial, which ICE officials reported is uncommon, and (2) when six months after the 180-day review have elapsed. Relying on one of those two events to trigger a post-180 day review is not sufficient to meet the Supreme Court's requirement that scrutiny of a decision to detain be increased over time. Absent a written decision from the HQCDU, that provides the basis for the 180-day decision and a written projection on when necessary actions by the alien, the alien's government, the United States government, or other responsible parties, will have occurred, deportation officers do not have necessary information to determine when to initiate a review of post-180 day detention. Also, initiation of a review at this stage does not automatically compel the HQCDU to release the alien.

Moreover, the decisions made by the HQCDU could be, and are, challenged in court through writ of *habeas corpus* petitions. While the HQCDU does not track all aliens released in response to a *habeas corpus* challenge, available statistics from the HQCDU database suggest that approximately 40% of POCR aliens are released after a *habeas corpus* petition is filed. This release rate implies government entities, including the HQCDU, the Office of the Principal Legal Advisor, United States Attorney's Office, and federal court judges, are finding the decisions made under the existing system can not be supported when challenged. Below we provide an explanation of one possible model for developing a methodology, which incorporates specific country, event, and case criteria.

OIG Sample Methodology:

ICE DRO 180-Day Decision Triangle

In this model, ICE DRO considers information from the following sources, from bottom to top, when making 180-day and “significant likelihood of removal in the reasonably foreseeable future” decisions. Each level modifies information from the one below. Levels also progress from providing regularly available information for all cases, such as our recommended analysis of return rates for all aliens, to country- and case- specific information, such as pilot programs or a consulate’s decision on a particular detainee.



Source: OIG Analysis

Recommendation 5: Develop and staff a program to improve oversight of all aliens who have been in detention longer than 180 days after a final order of removal. Oversight should include periodic field office meetings with local *pro bono* organizations.

ICE DRO Response: ICE DRO responded the HQCDU has a program in place to monitor aliens who have been in detention longer than 180 days after a final order of removal. ICE said the program has succeeded in decreasing deficiencies in case management. However, due to limited staffing, the HQCDU has prioritized and concentrated its effort on overseeing post-order aliens in detention for more than 180 days. Additional funding will allow ICE DRO to increase the HQCDU staffing levels and enable the unit to more proactively implement the program. Also, ICE DRO plans to conduct annual site visits to all field offices, closely monitor post-order detained cases, and continue to provide training. ICE DRO concurred that field offices meet with *pro bono* organizations periodically, but does not agree that these meetings should be tied to the “oversight” function, because this function is operational in nature.

OIG Evaluation: We consider these actions responsive to the intent of the recommendation. This recommendation is resolved, but remains open pending receipt of additional action items and documentation. For example, we want notification when vacancies have been filled, and when a program is in place to improve oversight of aliens who have been in detention longer than 180 days. For clarification, we are not suggesting *pro bono* organizations would conduct oversight of the program, only that such organizations are a source of information on potential compliance issues, can assist in resolving post-180 day cases, and can—and do—raise compliance issues in court if they are not resolved at the local field office level. Guidance to field offices on periodic meetings with *pro bono* organizations ought to emphasize this distinction to avoid confusion.

Purpose, Scope, and Methodology

We reviewed ICE's compliance with detention time limits for aliens with a final order of removal, including the reasons for exceptions or non-compliance. During our review, we focused on three areas:

- Compliance with the Supreme Court rulings in Zadvydas v. Davis 533 U.S. 678 (2001) and Clark v. Martinez 543 U.S. 371 (2005), and implementing regulations.
- The quality of guidance provided by the HQCDU.
- ICE's management practices, including its ability to track and prioritize cases and conduct nationwide quality assurance.

The review included interviews with ICE headquarters and field staff, analysis of monthly reports from the DACS database, site visits to 7 of ICE DRO's 53 docket control offices, two each in ICE's western and central regions, and three in its eastern region, and a review of selected alien files. ICE DRO is divided into 3 regions, 22 field offices (formerly districts), and 53 docket control offices. Two of the sites we visited were in the same field office, but under different docket control offices. The review did not address the sufficiency of release decisions, the success of alternatives to detention, or ongoing negotiations with foreign governments.

Two of the field sites were chosen because either ICE or *pro bono* organizations recommended them as best practices sites. Five were selected because ICE, *pro bono* organizations, or an analysis of data in DACS indicated there might be program deficiencies. The review also included telephone interviews with supervisors at three ICE field offices identified by ICE and *pro bono* organizations as having best practices. Because site selection was not random, the results of our review cannot be considered representative of the performance of ICE field offices nationwide.

Our work at each site consisted of three elements: staff interviews, a tour of a local detention center, and POCR case file reviews. We interviewed officials throughout DRO as well as attorneys from the Office of Principal Legal Advisor. We also spoke with Public Health Service officials who help place detainees with mental health problems. Our headquarters and field visits included meetings with *pro bono* organizations that represent detained aliens. Our tours of detention facility focused on detainees' ability to communicate with their consulates and legal representatives, their access to legal materials, and visitation policies and other services.

Our file review covered 210 POOCR cases requested from DRO field offices. We selected those cases from the following categories:

- 1) Mexicans and Central Americans – these countries have historically placed a high priority on facilitating return of their nationals as quickly as possible, so detentions beyond 90 days required explanation.
- 2) Countries refusing or delaying repatriation of nationals – these countries historically have either refused to accept their nationals, are slow in processing requests, or have unusually stringent standards of proof of citizenship (Cambodia, China, Cuba, Eritrea, Ethiopia, Haiti, India, Iran, Iraq, Jamaica, Laos, Pakistan, and Vietnam).
- 3) Countries whose nationals appear less frequently in the POOCR caseload, making travel document requests less common – these include countries in Africa and Europe.
- 4) Detainees with DACS entries that indicated long detention time – irrespective of nationality, those aliens who have been detained past the 180 days, in some cases for several years.

Case information was extracted from DACS and from ICE headquarters' monthly 180-day report. We also reviewed a balance of criminal versus non-criminal detainees and removable versus inadmissible aliens. Because males were disproportionately represented in all but one site, we generally reviewed all female detainee cases. Our file review results cannot be generalized to the POOCR program as a whole, since the review focused on cases where the DACS monthly report suggested anomalies and countries for which deportation officers have less experience obtaining travel documents.

Fieldwork began in April 2006 and was completed in July 2006. This review was conducted under the authority of the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspections*, issued by the President's Council of Integrity and Efficiency.

We would like to offer our appreciation for the cooperation and courtesies extended by ICE to our staff during this review.


Management Response to Draft Report

Office of the Assistant Secretary
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

MEMORANDUM FOR: Richard L. Skinner
Inspector General
Department of Homeland Security

FROM: Julie L. Myers 
Assistant Secretary

SUBJECT: Response to the OIG Draft Report: ICE's Compliance with Detention
Limit for Aliens With a Final Order of Removal From the
United States

Recommendation 1:

Direct that each Field Office Director report case-specific compliance with Post Order Custody Review (POCR) regulations and guidance to the Custody Determination Unit (HQCDU) on a quarterly basis, and that the HQCDU report these results to the Assistant Secretary on a semi-annual basis until such information can be obtained through Enforcement Case Tracking System (ENFORCE).

Response:

U.S. Immigration and Customs Enforcement believes this recommendation is already satisfied through current Office of Detention and Removal Operations (DRO) procedures, and therefore recommends that it be closed. DRO has an established case-specific compliance program that generates a monthly report, thus the establishment of a quarterly report would be redundant. Each month, all Field Office Directors provide case-specific updates on all final order aliens detained post-180 days. Headquarters personnel in DRO's HQCDU oversee the reports from the field office and report back to the Field Office Director for action on any case in which deficiencies are noted.

HQCDU uses the monthly 180-day POCR report in conjunction with site visits to field offices to monitor and maintain quality control of the POCR program. HQCDU also provides the DRO Director with a thorough report of each field office's post-order case management operations following each field visit. HQCDU will begin reporting the results of the monthly 180-day case reviews to the DRO Director, who reports directly to the Assistant Secretary on this particular issue.

With regard to the specific review of the 90-day POCR cases, HQDRO will establish an enhanced review process to better ensure compliance with regulations and policies. HQDRO is currently exploring options to enhance the review process, such as a random sampling of cases in

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Subject: Response to the OIG Draft Report: *ICE's Compliance with Detention Limits for Aliens With a Final Order of Removal From the United States*

Page 2

the pre-180-day period. HQDRO anticipates the implementation of an enhanced review process within the next 90 days. Furthermore, additional review initiatives through the establishment of a proposed case management system to replace the Deportable Alien Control System (DACS) will also ensure compliance with all PO CR regulations and guidance.

Recommendation 2:

Ensure that existing vacancies in the Travel Document Unit (TDU) are filled and, as staff or funding becomes available, ensure the TDU upgrades its intranet to provide country-specific guidance on obtaining travel documents, including information on nationality laws and checklists of required information to field deportation officers.

Response:

ICE concurs with this recommendation. A hiring announcement for the seven vacant Detention and Deportation Officer positions in the TDU closed on November 15, 2006. As these positions are filled, TDU staff will obtain updates on the travel document process in specific countries. Within 90 days, TDU will update the Intranet site with field advisories and other information deemed necessary and useful to field offices.

Recommendation 3:

Develop and staff a program to identify and prioritize cases involving aliens who represent a violent threat to the public or are national security or national interest cases, so that efforts to secure travel documents are expedited, and placement procedures are initiated early for those who might require eventual release within the United States.

Response:

ICE concurs in part with this recommendation. HQCDU has staff dedicated to the case management of aliens deemed to be of national security interest, as well as the placement of aliens for whom release is warranted but whose mental condition and prior violent tendencies may pose a threat to the community. DRO works closely with other ICE components, including OI and OPLA, as well as other law enforcement agencies, including the JTTF and DOJ, to identify cases of special interest and to ensure that appropriate action is taken before release or removal. Furthermore, DRO has established a working group with the Department of State to assist in the removal of these aliens. As additional staff is added, HQCDU and TDU will ensure that additional resources are assigned to the oversight of these cases, as their proper handling is a priority for DRO.

In addition to routinely coordinating on cases of national security interest, DRO's HQCDU and OPLA's National Security Law Division (NSLD) create a monthly report that highlights developments in significant national security cases. The NSLD and HQCDU also include the monthly "Hot List" in their briefing to the Assistant Secretary. The "Hot List" provides an integrated consolidated mechanism for the programs to track and monitor significant cases.

Recommendation 4:

Develop an objective and transparent methodology for determining whether there is a significant likelihood of removal for all cases, which considers: (1) the Supreme Court's requirement for increasing scrutiny over time; (2) the factors outlined in ICE regulations; and (3) comprehensive statistics on actual removal rates for all PO CR cases forwarded to the TDU.

Subject: Response to the OIG Draft Report: *ICE's Compliance with Detention Limits for Aliens With a Final Order of Removal From the United States*

Page 3

Response:

ICE does not concur with this recommendation and recommends that it be closed. HQCDU can make educated predictions about the "significant likelihood of removal" to many countries, but creating a "transparent methodology" for all cases is difficult. Whatever methodology is employed is subject to individual case-specific circumstances, changes in country conditions, and diplomatic relationships.

Requiring such a methodology is comparable to requiring a methodology that defines "beyond a reasonable doubt" in the criminal proceedings context. Furthermore, foreign relations evolve on a regular basis. In addition, inconsistent intra-country decision-making in the issuance of travel documents precludes reliable predictions on an individualized basis. For example, foreign government consular officials in the U.S. may provide varied decisions on travel document issuance for similarly situated aliens of the same nationality. DRO believes that sufficient guidance is already provided on this matter and that it is not possible to develop a transparent methodology appropriate to the circumstances of all cases. Furthermore, all decisions regarding the significant likelihood of removal are issued only by HQCDU.

Each individual case is weighed on its own merits. Many factors are taken into account when determining the likelihood of obtaining a travel document. For example, an immigration judge may issue a final order of removal with many conditions, such as a grant of withholding of removal to a specific country while also issuing Convention Against Torture protection from multiple countries within the same order. Other factors which are case-specific to the individual may be taken into account by the receiving country. These factors include the criminality of the individual, whether the individual is a known subversive, or whether the individual is known to participate in actions counter to the government from which ICE is seeking a travel document. These considerations may result in a negative decision that is not rooted in nationality laws.

Consulates also have an important role in document issuance and maintain their own standards which may not coincide with ICE's methodology. Furthermore, diplomatic relations are fluid and negotiations with countries over accepting their nationals are unpredictable. For instance, the Government of Ethiopia (GOE) historically did not cooperate in the repatriation process but recently responded positively to a joint effort by ICE and the Department of State to increase the issuance of travel documents for Ethiopian nationals. Haiti offers another example. After a year-long hiatus in the repatriation of Haitian nationals, imposed by the government of Haiti, ICE succeeded in arranging these aliens' removal to Port-au-Prince via Justice Prisoner and Alien Transportation System flights in July and August 2006.

Another factor that affects the likelihood of removal is the introduction of a private bill, which will preclude ICE from removing an individual even if a document is readily available.

Recommendation 5:

Develop and staff a program to improve oversight of all aliens who have been in detention longer than 180 days after a final order of removal. Oversight should include periodic field office meetings with local pro bono organizations.

Response:

ICE concurs in part with this recommendation. HQCDU has a program in place to monitor the population referenced in this recommendation. Since its inception, the program has succeeded in greatly decreasing deficiencies in case management. However, due to limited staffing, HQCDU

Subject: Response to the OIG Draft Report: *ICE's Compliance with Detention Limits for Aliens With a Final Order of Removal From the United States*

Page 4

has prioritized and concentrated its efforts on overseeing post-order aliens in detention for more than 180 days. Additional funding in the Fiscal Year 2007 budget, however, will allow DRO to increase HQCDU staffing levels and enable the unit to more proactively implement the program. It also will allow ICE to expand its oversight of aliens detained post-180 days and those in custody pre-180 days.

HQCDU also plans to conduct site visits to all field offices annually, closely monitor post-order detained cases, and continue to provide training to both supervisory and non-supervisory personnel. These site visits will continue to ensure that field offices adhere to established POCR regulations and policies. The additional staff will enable HQCDU to ensure efficient case management at all post-order levels and potentially reduce the number of cases in detention over 180 days after a final order of removal.

DRO concurs with the recommendation that field offices should meet with pro bono organizations periodically, but does not agree that these meetings should be tied to the "oversight" function, as this function is operational in nature. Nonetheless, established ICE procedures direct pro bono organizations to address detention inquiries, in the first instance, to the local DRO FOD Office. In addition, ICE Headquarters holds quarterly meetings with pro bono organizations to address areas of concern to include detention and removal issues. In addition to CDU site visits, ICE DRO will be dedicating resources to the ICE Office of Professional Responsibility to conduct management inspection of DRO activities to include the Post Order Custody Review Program.

Office of the Assistant Secretary
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

MAR 1 2007

MEMORANDUM FOR: Richard L. Skinner
Inspector General
Department of Homeland Security

FROM: Julie L. Myers *JM*
Assistant Secretary

SUBJECT: OIG Final Report: ICE's Compliance with Detention Limits for
Aliens With a Final Order of Removal From the United States

Thank you for providing U.S. Immigration and Customs Enforcement (ICE) the opportunity to clarify points regarding the subject report. I appreciate Assistant Inspector General Carlton Mann, Chief Inspector Marcia Hodges, and Senior Inspector Lorraine Eide of your office taking the time to meet with members of my staff on February 27, 2007. The meeting was very productive and helped us gain a greater understanding as to what is needed to conclude the audit.

I also appreciate the recognition by the Office of Inspector General (OIG) meeting participants that ICE's Office of Detention and Removal Operations (DRO) consistently cooperated during the course of the OIG review, as well as the participants' recognition of the profound commitment toward their work displayed by members of the DRO Custody Determination Unit in implementing the Post-Order Custody Review Process (POCR).

I understand that the OIG meeting participants and my staff were able to clarify that the phrase "not responsive" in the report's "Management Comments and OIG Analysis" section is a technical term specific to auditing, which is not meant to suggest that ICE failed to cooperate with the OIG's review, or that ICE attempted to evade a particular recommendation made in the report. Based upon the Assistant Inspector General's explanation, ICE understands that this term denotes a situation where an agency's proffered solution to an identified difficulty does not fully meet the implied expectations of the auditor's recommendations, or that the solution did not directly remedy the auditor's perceived concern, rather than that the agency has displayed flat refusal, noncompliance, or uncooperativeness with the audit. Because "not responsive" might be construed differently outside the auditing context, particularly in a legal setting, I propose that the phrase be modified to more effectively convey OIG's intent to outside readers.

In addition to clarifying the intent of OIG's use of the term "not responsive," I understand that the OIG meeting participants clarified the intent of Recommendation 4 of the report, enhancing ICE's understanding of how compliance with that recommendation might be achieved.

In Recommendation 4 of the report, OIG recommended that ICE "[d]evelop an objective and transparent methodology for determining whether there is a significant likelihood of removal for all cases . . ." As I expressed in the formal response to the draft version of the report, this recommendation appeared to urge ICE to establish a mechanical, "one-size-fits-all" approach to custody determinations for aliens held in custody 180 days or more following a final order

SUBJECT: OIG Final Report: ICE's Compliance with Detention Limits for Aliens With a
 Final Order of Removal From the United States

Page 2

of removal. ICE's concern with the recommendation was that such an approach would fail to fully account for the myriad and ever-evolving factors ICE officials already take into account when making post 180-day custody determinations. ICE was also concerned that such a rigid, restrictive approach was contrary to the U.S. Supreme Court's use of extremely subjective standards (e.g., "significant," "reasonable") in its decisions explaining the legal limitations on the duration of post-order detention.

ICE now understands, as clarified by the OIG meeting participants, that Recommendation 4 did not intend to constrain ICE's decision making, or to omit key factors from consideration by requiring a "checklist" or rigid decisionmaking model presupposing an artificial timetable for release, as previously feared. Instead, as explained in the meeting, OIG's primary intent behind this recommendation was to urge ICE to more fully document the post-order custody review decisionmaking process as it progresses, to do so in a more uniform manner, and to summarize as fully as possible in its formal written decision, the full range of considerations underlying a DRO determination to either release or to continue to hold an alien more than 180 days following a final order of removal. In advancing this recommendation, the OIG hopes that the decision-making process will be improved, that more detailed guidance will be available to DRO Field Office staff, that problematic cases might be identified sooner, and that aggregate data would become available describing the extent of foreign governments' cooperation with the repatriation of their citizens. With an improved understanding of Recommendation 4, ICE is now carefully studying how the clarified recommendation might be implemented consistent with the OIG's intent.

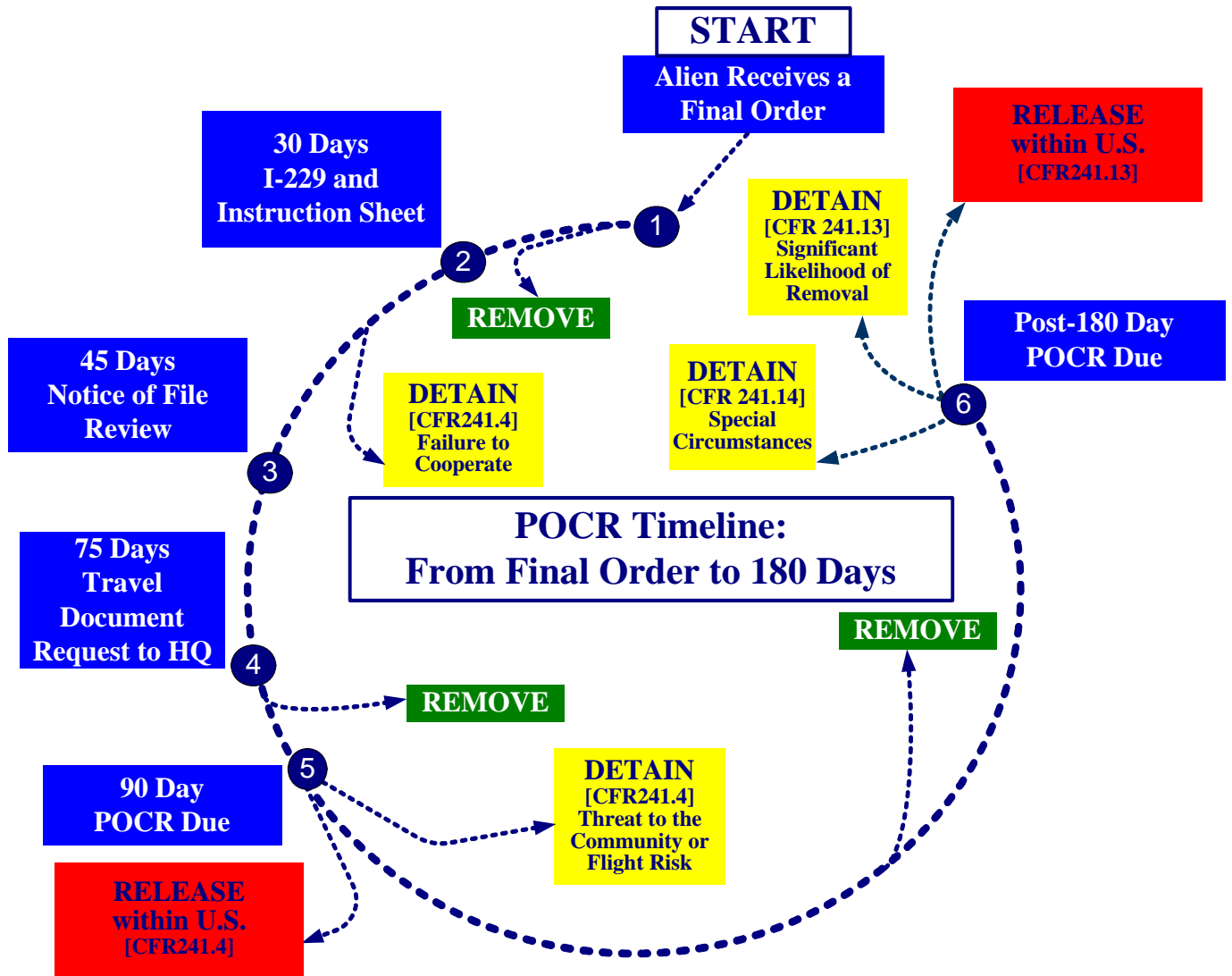
Additionally, for the sake of accuracy, as indicated by my staff at the meeting, one minor factual inaccuracy presented in the "Management Comments and OIG Analysis" section of the report discussing Recommendation 1 involves DRO Field Office Directors' chain-of-command. As my staff explained, Field Office Directors do not report directly to the ICE Assistant Secretary. Instead, they report to headquarters management within DRO. I understand that this does not change the tenor of OIG's recommendation or its underlying analysis, but simply wished to assist your office in ensuring that the report is fully accurate.

Finally, one issue which my staff did not raise at the meeting, but which I feel bears emphasizing, involves a point I made in ICE's previous response to Recommendation 3. Specifically, the OIG evaluation of this response in the report's "Management Comments and OIG Analysis" section does not appear to acknowledge the current process ICE has in place to identify and prioritize national security cases. As explained both in our response and to OIG's auditors during the course of the review, ICE has established a formalized "Hot List" process by which the Office of the Principal Legal Advisor's National Security Law Division regularly coordinates with DRO to identify, track, monitor and process cases deemed to be of national security interest. This process is a tangible way to prioritize cases involving aliens of special interest or who pose a threat to national security. As a routine supplement to the "Hot List" process, the National Security Law Division also alerts DRO of any significant case developments through a Significant Case Report. This provides an additional mechanism for the timely exchange of relevant information which furthers efforts to process these cases expeditiously.

Again, thank you for your assistance in providing ICE the opportunity to move toward resolution of the report's recommendations. I look forward to updating you on the progress we are making in this area.

I ask that this memorandum be appended to the report and presented as part of your update to the Secretary of Homeland Security and Congress.

POCR Timeline



Detentions Past 360 Days, By Region of Origin, as of June 13, 2006

Region of Origin	Aliens In Detention June 2006	Aliens Detained Past 360 Days	Percent Detained Past 360 Days
Africa	643	87	14%
Oceania	34	8	24%
Asia	1,156	116	10%
Caribbean	1,220	90	7%
Europe	378	31	8%
North America	879	29	3%
South America	640	28	4%
Central America	3,740	39	1%
Total	8,690	428	5%

Special Circumstances Cases

ICE regulations outline four categories of special circumstances that permit detention beyond 180 days even if there is no significant likelihood that travel documents can be obtained in the reasonably foreseeable future: (1) aliens with a highly contagious disease that poses a threat to public safety; (2) aliens detained on account of serious adverse foreign policy consequences of release; (3) aliens detained on account of security or terrorism concerns; and, (4) aliens determined to be specially dangerous, i.e., criminals whose violent behavior is due to a mental condition, who are likely to engage in acts of violence in the future, and for whom no condition of release can ensure the safety of the public.²⁷ Certifying that an alien meets one of these criteria requires substantial factual support and the concurrence of senior government officials or, for “specially dangerous” aliens, an immigration judge.

With the exception of certifying aliens who are specially dangerous, special circumstances certifications are rare. Certification that a release would have adverse foreign policy consequences has been used twice on high-profile persecutors, both of whom were subsequently removed. No alien has yet been certified as a national security or terrorist risk, but a small number of cases are being monitored for this eventuality. It is unlikely that the fourth certification, for highly contagious diseases, will ever be used.

Highly Contagious Disease

ICE can continue to detain an alien indefinitely if it obtains certification that the alien meets one of the four “special circumstances” listed above. For certification that an alien has a highly contagious disease, or is specially dangerous due to a psychological condition that cannot be treated, ICE coordinates with the Public Health Service, a division of the Department of Health and Human Services. Among the evidence required to support the certification, the regulations require a medical examination and the recommendation of the Public Health Service. To date there have been no certifications for highly contagious diseases, and ICE officers said that it is unlikely there will be one in the future, as most conditions can be treated during the first 180 days of detention.

Specially Dangerous

At the time of our review, there were 36 aliens in detention who have been referred to Public Health Service as specially dangerous. Among the evidence

²⁷ 8 CFR § 241.14.

required to support the certification, a physician employed or designated by the Public Health Service must conduct a full medical and psychiatric examination of the alien, and must include recommendations on whether the alien is likely to engage in acts of violence based on a mental condition or personality disorder. A Public Health Service official told us that while aliens who qualify as specially dangerous are rare, the number of aliens with violent criminal convictions related to mental health problems, most commonly schizophrenia, is much larger. The Public Health Service provides assistance in locating alternatives to detention for these aliens if the local field offices have not found a suitable program. Public Health Service usually assumes responsibility for such cases at 180 days but in some cases they are referred earlier in the process.

Adverse Foreign Policy Consequences

For certification that a release would have adverse foreign policy consequences, the HQCDU coordinates with the ICE Human Rights Law Division. Among the evidence required to support the certification, the Secretary of State must provide evidence of reasonable grounds to believe that there would be adverse foreign policy consequences, and must notify Congress of the identity of the alien and the reason for the determination. The certification for adverse foreign policy consequences has been used twice, in each case for an alien who had committed numerous persecutory acts in an official capacity in his country of origin. Both have subsequently been successfully removed with assistance from the Department of State. At the time of our review, the Human Rights Law Division estimated that it was assisting the HQCDU to obtain travel document for about five aliens, and would, if necessary, enlist the help of the Department of State to locate a third country willing to take the alien. There is no formal tracking mechanism for these cases, although some are flagged in DACS to alert deportation officers in the field not to release or remove without consulting with ICE headquarters.

Security or Terrorism Concerns

ICE's National Security Law Division assists the HQCDU in cases where an alien is certified as a terrorist or security risk. Among the evidence required to support the certification, the government must provide the alien with a written description of the factual basis of the claim and respond to the alien's rebuttal. To date, the formal certification process has not been used, but the National Security Law Division estimated that they are monitoring about 15 cases in the POOCR caseload. There is also no formal tracking mechanism for these cases, although some are flagged in DACS.

**Substantive Deficiencies in POCR Worksheets for the 68 Review Cases
(Cases might be deficient for more than one reason)**

Material inaccuracies in the POCR worksheet
(28 cases)

Reason for denial decision not clearly articulated
(17 cases)

Discrepancies between POCR worksheet and alien submissions
(13 cases)

Overstatement of travel document availability
(10 cases)

Standard for failure to comply does not follow CDU guidance
(7 cases)

Release criteria misapplied
(5 cases)

Special circumstances cases without the relevant special
circumstances worksheet page
(3 cases)

Interpretation of POCR timeline stops and starts unclear
(3 cases)

Flight risk tied to likelihood of removal
(2 cases)

Legal standards misapplied
(2 cases)

CDU or OPLA identified serious procedural errors
(2 cases)

Source: OIG File Review

Operational Challenges and Best Practices

ICE's inability to hire staff, attrition, and turnover, coupled with regulatory requirements, inadequate database resources, varying levels of cooperation from countries of origin, and difficult alien case histories, make it difficult to manage the POCR caseload. During our review, we observed practices developed in field offices that could improve the timeliness, efficiency, and quality of the POCR process. Each of the sites visited or interviewed by telephone contributed at least two of the best practices we cite.

Division of POCR Cases Among More Staff

In 2001, when POCR processing under the Zadvydas decision began, many field offices assigned only one or two deportation officers to the POCR process. Each site now assigns POCR cases to all deportation officers working on detained cases or to a team of deportation officers to ensure case coverage. This expands the field office's knowledge base, ensures continuity during staff turnover, and eliminates the burden on one officer to conduct timely and thorough reviews.

Procedures to Ensure Complete, Timely, and Clear Records

All offices we visited have created tracking systems to lessen the chances that cases will be overlooked or reviews delayed due to DACS' deficiencies. A few field offices had developed sophisticated databases, while others relied on more basic checklists, calendars, and file cover sheets.

Several offices had developed checklists for stages in the POCR process, including:

- A timeline for document service and case review deadlines.
- Check sheets to verify completion of steps in the POCR process.
- A cover sheet to verify completion of necessary checks before removal.

Several offices served all required notices for all aliens detained with a final order, eliminating the need to coordinate notification service with monitoring travel document requests.

Two sites had a hand-written Record of Action sheet in each file, enabling quick supervisory review of the case status.

One office had files that were consistently in chronological order with each required PO CR document tabbed.

Nongovernmental Organization Coordination for Placement of Mental Health Cases

Three field offices we visited worked closely with local *pro bono* organizations and know-your-rights groups to find placements for aliens who could not be removed but who had mental health problems and no community ties. This practice enabled the offices to place individuals before they reached 180 days and the Public Health Service could assist in this process.

Communication Between Deportation Officers and Aliens

Regular contact with detainees helps DRO field offices obtain information for travel document requests and post-order custody reviews. It may also help address some detainees' misconception that they will eventually be released if they conceal, or obstruct procurement of, travel documents. Unless deportation officers are stationed at a detention facility, regular communication with aliens in the PO CR process can be difficult. The deportation officers in one field office conducted telephone interviews with the PO CR aliens to obtain information on the release criteria. The officers also counseled the aliens on behavior and compliance. Another facility, where the deportation officers were not stationed at a detention facility, arranged for the ICE officers who supervise the physical custody of detained aliens to work through a questionnaire with the detainees that included all information required for the release decision. One of the field offices interviewed by telephone reported that it prepares a roster each week with the status of each case, and a deportation officer visits each facility to provide updates to detainees.

Communication Between Aliens, Consulates, and *Pro Bono* Organizations

The detention standards require that all detainees have free telephone access to their consulates and local *pro bono* organizations. This practice enables detainees to actively participate in resolving their cases, whether by securing travel documents or obtaining evidence for release or judicial review of their immigration status. At only one site we visited were all of the telephones programmed as required. One site was in the process of fixing its telephones. However, for the sites interviewed by telephone as best practices sites, deportation officers reported that they are aware that the existing telephone system frequently drops numbers, and consulates change their numbers

without notifying ICE. They have addressed the problem by going into the aliens' cells periodically to test the telephones.

Communication Between Field Offices and Consulates

The TDU identified personal relationships with consular officers as a key factor in obtaining travel documents. Some field offices located in cities with consulates reported that they have better results when they arrange regular face-to-face meetings with consular officers. However, many DHS field offices operate in areas of the United States where there are no consulates nearby, and, therefore, must operate primarily by telephone. One of the deportation officers we interviewed by telephone, who worked in a field office where there were no consulates nearby, reported that when an alien is dropped off for a charter flight in a larger city, the deportation officers make appointments to visit several consulates to follow up in person on pending travel documents.

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