

October 2007

# IMMIGRATION ENFORCEMENT

## ICE Could Improve Controls to Help Guide Alien Removal Decision Making





Highlights of [GAO-08-67](#), a report to congressional requesters

## Why GAO Did This Study

Officers with U.S. Immigration and Customs Enforcement (ICE) within the Department of Homeland Security (DHS) investigate violations of immigration laws and identify aliens who are removable from the United States. ICE officers exercise discretion to achieve its operational goals of removing any aliens subject to removal while prioritizing those who pose a threat to national security or public safety and safeguarding aliens' rights in the removal process. GAO was asked to examine how ICE ensures that discretion is used in the most fair, reasoned, and efficient manner possible. GAO reviewed (1) when and how ICE officers and attorneys exercise discretion and what internal controls ICE has designed to (2) guide decision making and (3) oversee and monitor officers' decisions. To conduct this work, GAO reviewed ICE manuals, memorandums, and removal data, interviewed ICE officials, and visited 21 of 75 ICE field offices.

## What GAO Recommends

GAO recommends that ICE update guidance to include factors officers should consider when making apprehension and removal decisions and establish time frames for this task; ensure that officers are provided timely information on legal developments affecting their decisions; and evaluate the costs and alternatives for developing a mechanism to systematically analyze officer decision making. DHS agreed and identified actions ICE plans to take to implement GAO's recommendations.

To view the full product, including the scope and methodology, click on [GAO-08-67](#). For more information, contact Richard M. Stana at (202) 512-8777 or [StanaR@gao.gov](mailto:StanaR@gao.gov).

## IMMIGRATION ENFORCEMENT

### ICE Could Improve Controls to Help Guide Alien Removal Decision Making

#### What GAO Found

ICE officers exercise discretion throughout the alien apprehension and removal process, but primarily during the initial phases of the process when deciding to initiate removals, apprehend aliens, issue removal documents, and detain aliens. Officers GAO interviewed at ICE field offices said that ICE policies and procedures limit their discretion when encountering the targets of their investigations—typically criminal or fugitive aliens, but that they can exercise more discretion for other aliens they encounter. Officers also said that they consider humanitarian circumstances, such as sole caregiver responsibilities or medical reasons, when making these decisions. Attorneys, who generally enter later in the process, and officers told GAO that once removal proceedings have begun, discretion is limited to specific circumstances, such as if the alien is awaiting approval of lawful permanent resident status.

Consistent with internal control standards, ICE has begun to update and enhance training curricula to better support officer decision making. However, ICE has not taken steps to ensure that written guidance designed to promote the appropriate exercise of discretion during alien apprehension and removal is comprehensive and up to date and has not established time frames for updating guidance. For example, field operational manuals have not been updated to provide information about the appropriate exercise of discretion in light of a recent expansion of ICE worksite enforcement and fugitive operations, in which officers are more likely to encounter aliens with humanitarian issues or who are not targets of investigations. Also, ICE does not have a mechanism to ensure the timely dissemination of legal developments to help ensure that officers make decisions in line with the most recent interpretations of immigration law. As a result, ICE officers are at risk of taking actions that do not support operational objectives and making removal decisions that do not reflect the most recent legal developments.

Consistent with internal control standards, ICE relies on supervisory reviews to ensure that officers exercise appropriate discretion and has instituted an inspection program designed to ensure that field offices comply with established policies and procedures. However, ICE lacks other controls to help monitor performance across the 75 field offices responsible for making apprehension and removal decisions. A comprehensive mechanism for reviewing officers' decision making could provide ICE with meaningful information to analyze trends to identify areas that may need corrective action and to identify best practices. ICE officials acknowledged they do not collect the data necessary for such a mechanism and said doing so may be costly. Without assessing costs and alternatives, ICE is not in a position to select an approach that will help identify best practices and areas needing corrective action.

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## Abbreviations

DACS	Deportable Alien Control System
DHS	Department of Homeland Security
DRO	Office of Detention and Removal Operations
ICE	Immigration and Customs Enforcement
INA	Immigration and Nationality Act
NTA	notice to appear
OIG	Office of Inspector General
OI	Office of Investigations
OPLA	Office of the Principal Legal Advisor
TECS	Treasury Enforcement Communications System
USCIS	U.S. Citizenship and Immigration Services

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United States Government Accountability Office  
Washington, DC 20548

October 15, 2007

The Honorable Zoe Lofgren  
Chairwoman  
Subcommittee on Immigration, Citizenship, Refugees, Border  
Security, and International Law  
Committee on the Judiciary  
House of Representatives

The Honorable Sheila Jackson Lee  
House of Representatives

Responsibility for the enforcement of immigration laws within the interior of the United States rests with U.S. Immigration and Customs Enforcement (ICE), which plans and conducts investigations of persons and organizations subject to criminal and administrative provisions of the Immigration and Nationality Act (INA).<sup>1</sup> ICE officers investigate violations of immigration law and are responsible for identifying aliens—that is, persons who are not citizens or nationals of the United States—who are removable from the United States.<sup>2</sup> Aliens may be subject to removal for a wide variety of reasons, including entering the United States illegally, staying longer than their authorized period of admission, being convicted of certain crimes, or engaging in terrorist activities. Aliens who enter the United States illegally are subject to removal, as are aliens who violate immigration law after entering the country legally. According to its strategic plan, ICE focuses the greater part of its immigration enforcement efforts on aliens who pose a threat to national security and public safety, as well as on aliens who have ignored orders to leave the United States. According to ICE records, in fiscal year 2006, ICE removed about 182,000 aliens from the United States as part of its enforcement efforts.

In recent years, through targeted investigative operations, ICE components have increased their efforts to enforce immigration laws and apprehend and remove aliens subject to removal. The ICE Office of Investigations (OI), which has responsibility for investigating immigration

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<sup>1</sup>ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.)

<sup>2</sup>Aliens fall into two categories: (1) nonimmigrant aliens who enter the United States for leisure or temporary work and (2) immigrant aliens who may be able to obtain lawful permanent residence in the United States.

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and other crimes related to national security, has increased its emphasis on worksite enforcement operations. These operations are conducted to apprehend and remove aliens who are unlawfully employed and impose sanctions on employers who knowingly employ these aliens. According to ICE data, the number of worksite enforcement arrests increased from 510 in fiscal year 2002 to 4,383, in fiscal year 2006. Likewise, ICE's Office of Detention and Removal Operations (DRO), which has responsibility for ensuring that all removable aliens depart from the country, has increased its emphasis on fugitive operations, which are enforcement operations designed to locate, apprehend, and remove aliens from the country who have not complied with orders of removal issued by an immigration judge—known as fugitive aliens.<sup>3</sup> Over the last 2 fiscal years, the number of fugitive arrests conducted by DRO increased from 7,958 in fiscal year 2005 to 15,467 in fiscal year 2006. In carrying out these operations and processing aliens for removal, OI and DRO officers are to work with attorneys from ICE's Office of the Principal Legal Advisor (OPLA), which is responsible for providing legal advice, training, and services to support the ICE mission and for defending the interests of the United States in the administrative and federal courts. In fiscal year 2006, OPLA handled approximately 324,000 proceedings in immigration courts.

During the process of enforcing immigration law, there are a number of decisions that ICE officers and attorneys must make, taking into account all facts and circumstances of each case, about the apprehension and disposition of aliens who are subject to removal. Specifically, ICE officers exercise discretion when they decide whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure (whereby aliens agree to waive their rights to a hearing and are escorted out of the United States to their home countries by ICE officers);<sup>4</sup> and whether to

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<sup>3</sup>In addition, DRO has a Criminal Alien Program, which is designed to identify removable foreign nationals currently serving sentences in federal, state, or local prisons—as well as individuals not in custody who are on probation or parole—with the goal of removing them from the country at the end of their sentence, rather than releasing them back into the U.S. population where they might commit further crimes.

<sup>4</sup>Aliens who agree to voluntary departure can be legally admitted to the United States in the future without penalty. The authority for voluntary departure is outlined in section 240B(a) of the Immigration and Nationality Act (INA) (8 U.S.C. § 1229c(a)) and its implementing regulations (8 C.F.R. § 240.25). OI and DRO field operational manuals also include guidance on voluntary departure and ICE officers told us that they can grant voluntary departure. We noted that ICE manuals and field officers use the terms “voluntary departure” and “voluntary return” interchangeably. In this report, we use the term “voluntary departure,” rather than “voluntary return” when discussing this removal option.

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detain an alien in custody. For example, ICE officers might consider alternative ways to initiate removal proceedings—other than immediate apprehension and detention—when they encounter aliens who are sole caretakers for minor children or who are ill and are undergoing medical treatment. In other circumstances, officers might decide not to question and arrest some aliens they suspect are subject to removal in the interest of pursuing other law enforcement efforts that provide a greater value to the nation—such as those involving known criminals or threats to national security. Also, once an ICE officer has made a decision to pursue removal, ICE attorneys exercise discretion when they decide whether and how to settle or dismiss a removal proceeding or to appeal a decision rendered by an immigration judge.

All of these decisions are made within the context of the number of aliens subject to removal from the United States (estimated to be about 12 million in 2006); ICE resources available to investigate, apprehend, and remove aliens subject to removal; and the circumstances surrounding each case. One of ICE's operational objectives is to apprehend and remove aliens who are subject to removal—with a priority on those aliens who pose a threat to national security and public safety—while safeguarding aliens' rights in the removal process. Nonetheless, given the large number of aliens in the country who are subject to removal, it is virtually impossible for ICE officers to investigate and arrest every potentially removable alien encountered through the course of an enforcement effort. ICE headquarters officials told us that data are not collected about potentially removable aliens whom its officers may encounter and against whom officers do not take actions that may result in removal proceedings. For this reason, the data provided in this report focus primarily on aliens for whom removal proceedings have been initiated.

Because of the important role that discretion plays in the alien apprehension and removal process, you asked us to examine how ICE ensures that discretion is used in the most fair, reasoned, and efficient manner possible. Along these lines, we examined whether ICE has designed internal controls to guide and monitor officers' exercise of discretion when making alien apprehension and removal decisions,

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consistent with internal control standards for the federal government.<sup>5</sup> Specifically, this review addresses the following three questions:

1. When and how do ICE officers and attorneys exercise discretion during the alien apprehension and removal process?
2. What internal controls has ICE designed to guide officer decision making to enhance its assurance that the exercise of discretion supports its operational objectives?
3. What internal controls has ICE designed to oversee and monitor officer decision making during the alien apprehension and removal process to enhance ICE's assurance that the exercise of discretion supports its operational objectives?

To address these questions, we reviewed relevant laws and regulations as well as applicable policies, memorandums, field operational manuals, and training materials developed by OI, DRO, and OPLA headquarters offices. We also examined available data on alien apprehensions for worksite enforcement and fugitive operations to understand decision outcomes resulting from alien apprehension enforcement operations. We performed procedures to test the data's reliability and we concluded that the data were reliable for the purpose of our review. We also met with officials at OI, DRO, and OPLA in Washington, D.C.; and interviewed ICE officers, supervisors, and managers in 14 ICE field offices—seven OI and seven DRO field offices—located in seven cities throughout the United States: Chicago, Detroit, Los Angeles, New York, Philadelphia, Phoenix, and San Diego. In addition, we interviewed ICE attorneys, supervisors, and managers in seven Chief Counsel Offices (which serve as OPLA's field offices) at these same locations. We asked both officers and attorneys about when and how they have exercised and are expected to exercise discretion in the course of their duties related to alien removal.<sup>6</sup> We selected these locations considering field office size, ICE data on alien apprehensions, and geographic dispersion. As we did not select probability

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<sup>5</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999). Internal control is an integral component of an organization's management that provides reasonable assurance that the following objectives are being achieved: effectiveness and efficiency of operations, reliability of financial reporting, and compliance with applicable laws and regulations.

<sup>6</sup>Federal regulations do not authorize ICE attorneys to initiate formal removal proceedings (8 C.F.R § 239.1).



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samples of field offices to visit and ICE officers and attorneys to interview, the results of these interviews may not represent the views of ICE officers and attorneys nationwide.

We also reviewed field operational manuals, headquarters policy memorandums, locally developed field guidance, and training materials. We asked headquarters officials and officers and attorneys in the field about the guidance and information that would help to inform alien apprehension and removal decisions available to officers, attorneys, and their supervisors and managers. At headquarters and the various field locations, we also examined available documentation on internal controls in place to guide supervisory and managerial oversight and monitoring of alien apprehension and removal decisions, and inquired about procedures and practices for assessing the exercise of discretion and outcomes associated with alien apprehension and removal decisions. We compared the internal controls in place with the standards for internal control to determine whether ICE's internal controls are designed to provide assurance that its officers and attorneys are best equipped to consistently exercise discretion in support of its operational objectives.<sup>7</sup> Appendix I discusses the scope of our work and the methodology in greater detail.

We conducted our work for this report from August 2006 through September 2007 in accordance with generally accepted government auditing standards.

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## Results in Brief

At the 14 ICE OI and DRO field offices we visited, policies and procedures allow ICE officers to exercise discretion at multiple points throughout the alien removal process—encountering aliens, apprehending aliens, issuing removal charges, detaining removable aliens, pursuing removal proceedings in immigration court, and executing a final removal order. The initial phases of the alien removal process involve the most discretion—specifically, decisions about whether to initiate removal action, apprehend aliens, issue removal documents, and detain aliens. Officers typically encounter two categories of aliens who are subject to removal: (1) aliens who are the target of an investigation (e.g., the subject of a fugitive operation designed to locate and remove aliens who have ignored prior removal orders) and (2) aliens who are not the target of an investigation but whom officers encounter through the course of an

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<sup>7</sup>[GAO/AIMD-00-21.3.1](#).

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operation. Officers told us that when they encounter aliens who are fugitives, criminals, or other investigation targets, their ability to exercise discretion is limited by clearly prescribed policies<sup>8</sup> and procedures governing the handling of targeted aliens—with the exception of extenuating circumstances such as serious illnesses. However, officers at all seven DRO and seven OI field offices we visited told us that they do exercise discretion when determining how to process aliens who are not fugitives or criminals and are not investigation targets, based on humanitarian circumstances, such as medical issues or being the sole caregiver for minor children. In such circumstances, officers can, based on the circumstances of the case, decide to apprehend an alien and transport the alien to an ICE facility to initiate the removal process, or the officer could exercise an alternative method to initiate this process including issuing a notice to appear (NTA) by mail or scheduling an appointment for the alien to report at an ICE facility at a later date. Officers told us that they will, in limited circumstances, issue an NTA by mail or schedule an appointment as an accommodation to aliens who cannot be physically present at a facility due to humanitarian circumstances. Officers told us that once they decide how to initiate the removal process (e.g., apprehending an alien or scheduling an appointment for later processing), they have some discretion in determining which removal option to employ, including whether to initiate formal removal proceedings, which typically result in a hearing before an immigration judge, or to grant voluntary departure in lieu of initiating formal removal proceedings. Once a charge is issued, officers also have discretion, with the exception of certain mandatory detention requirements,<sup>9</sup> to decide whether to detain an alien, based on the circumstances of the case and taking account of both humanitarian and resource issues. As aliens move further along the apprehension and removal process, there are fewer circumstances that require officers and attorneys to exercise discretion, as discretionary options are limited by fixed policies and guidelines.<sup>10</sup> Chief Counsel Office attorneys have limited discretion to terminate removal proceedings and can do so if, for example, an alien is eligible for an immigration benefit, such as lawful permanent residence. DRO officers, who are responsible for

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<sup>8</sup>These policies refer to mandatory restrictions outlined in the INA and a Department of Homeland Security memorandum.

<sup>9</sup>These mandatory detention requirements are outlined in the INA and in an October 2004 Department of Homeland Security memorandum on detention priorities.

<sup>10</sup>These policies and guidelines are outlined in the DRO field operational manual and the INA and implementing regulations.

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executing final removal orders, can postpone an alien's removal date—by granting a stay or a deferred action—if circumstances merit such actions, but they rarely exercise these options.

ICE's OI and DRO officers are to rely on their field operational manuals, guidance provided by supervisors, and training to guide their decision making about alien apprehensions and removals. Consistent with internal control standards, which call for training to be aimed at developing and retaining employee skills to meet changes in organizational needs,<sup>11</sup> ICE has taken steps to review and update segments of its training curricula that may help support officer decision making for alien apprehension and removal. For example, ICE has instituted a specific worksite enforcement training module for OI agents and Spanish language training for newly hired DRO officers. Internal control standards also call for agencies to develop and document detailed policies, procedures and practices to ensure that they are an integral part of operations. ICE headquarters currently has three sources to document established policies, procedures, and practices that affect the exercise of discretion in the alien removal process: (1) OI and DRO field operational manuals; (2) DHS and ICE memorandums; and (3) an ICE worksite enforcement guidebook. However, the guidance on the exercise of discretion in the alien removal process is not comprehensive and up to date. Specifically, the guidance does not serve to fully support officer decision making in cases involving humanitarian issues and aliens who are not primary targets of ICE investigations. First, despite a sharp increase in ICE's worksite and fugitive operations in recent years, the OI and DRO operational manuals, which are largely unchanged from before the creation of the Department of Homeland Security (DHS) and ICE's placement in it, do not reflect ICE's expanded worksite and fugitive operations, nor do they clearly and comprehensively address humanitarian and other issues associated with these operations. ICE has begun efforts to update these manuals, but it does not have time frames for completing these updates and it is unclear whether the revisions would include guidance on the exercise of discretion. Second, although the various ICE organizational units with removal responsibilities have issued guidance in the form of their own memorandums to inform the exercise of discretion around humanitarian issues, these memorandums also do not comprehensively address the various circumstances the officers and attorneys may encounter. Moreover, even though some memorandums are potentially informative

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<sup>11</sup>[GAO/AIMD-00-21.3.1](#).

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for multiple ICE units, they do not clearly apply outside the unit that created them. Third, although ICE plans to regularly update its worksite enforcement guidebook based on lessons learned from past worksite operations, the current guidebook that ICE provided us in August 2007 does not instruct officers on how to identify and process aliens with humanitarian issues in large worksite operations or otherwise. The lack of comprehensive and up to date guidance puts ICE officers at risk of taking actions that do not support the agency's operational objectives. This risk is greatest in larger scale operations, including worksite enforcement and fugitive operations, where officers may encounter numerous aliens with humanitarian issues and aliens who are not investigation targets. In addition to the guidance outlined in field operational manuals, memorandums, and the guidebook, ICE officers also require timely information regarding legal developments—such as court decisions modifying existing interpretations of immigration laws—to guide officers' decision making. Regional ICE Chief Counsel Offices are responsible for disseminating this information. During our field visits, 3 of the 14 OI and DRO offices reported receiving the necessary legal information, while others said this has not happened. ICE does not have a formal mechanism to help ensure consistent dissemination of this information across field offices; rather, each Chief Counsel Office independently decides when and what information about legal developments is disseminated. These legal developments affect officers' decisions, and without current information, officers are at risk of making incorrect removal disposition decisions that could result in the termination of a removal case.

ICE has two control mechanisms in place to monitor its removal operations—established supervisory review practices and procedures and an inspection program. However, ICE does not have a mechanism to allow it to analyze information specific to the exercise of discretion across all units. Internal control standards advise agencies to design internal controls to ensure that ongoing monitoring occurs in the course of normal operations.<sup>12</sup> This monitoring includes regular management and supervisory activities, comparisons, reconciliations, and other actions people take in performing their duties. Consistent with internal control standards that call for agencies to ensure that supervision is performed continuously in agency operations, ICE relies on supervisory oversight as a key management control to oversee officer decision making and to ensure that discretion is exercised appropriately with regard to alien

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<sup>12</sup>[GAO/AIMD-00-21.3.1.](#)

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apprehensions and removals. Officials also told us that operations are typically conducted in team environments and that officers rely on the teams' collective judgment in determining how to exercise discretion for these aliens. Headquarters officials told us that supervisors at both DRO and OI field offices are required to sign removal dispositions, including NTAs, voluntary departures, and other removal dispositions.<sup>13</sup> In addition, officials at all 14 DRO and OI field offices we visited told us that supervisors are responsible for reviewing instances when officers exercise discretion, such as when encountering aliens with humanitarian factors. ICE has also recently instituted an inspection program for its OI field offices to help provide assurance that its operations are in line with its operational objectives, and plans to institute a similar program for DRO offices. However, ICE lacks other control elements to help it monitor program performance across the 75 OI, DRO, and Chief Counsel field offices. Specifically, internal control standards recommend that managers compare trends in actual performance to expected results throughout the organization in order to identify any areas that may require corrective action to help ensure that operations continually support operational objectives. Given that 75 field offices are involved in the alien apprehension and removal process and that oversight of these offices lies with three ICE units, a comprehensive mechanism for reviewing officers' decision making could provide ICE with meaningful information to promote the appropriate use of discretion, identify best practices, and analyze any significant differences across field offices in order to take appropriate action. ICE officials told us that modifying existing databases to collect the details of discretionary decisions made by officers needed to monitor performance across all offices could be costly. However, having information on the use of discretion could provide ICE senior managers enhanced assurance that officers and supervisors across field offices are making decisions that reflect the agency's operational objectives regarding alien apprehension and removals. Moreover, even though ICE has ongoing and planned updates to its information systems, it has not evaluated the costs and alternatives for creating a mechanism capable of providing ICE with usable information that it can analyze to identify trends in the exercise of discretion. Without assessing the costs and alternatives for creating such a mechanism, ICE is not in a good position to select and implement an approach that will provide ICE assurance that it can identify any best practices that should be reinforced or areas that might require

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<sup>13</sup>Supervisory special agents and supervisory detention and deportation officers are granted the authority to issue and cancel NTAs under federal regulations.

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corrective actions—by, for example, modifying policies, procedures, or training.

To enhance ICE’s ability to inform and monitor its officers’ use of discretion in alien apprehensions and removals, we are recommending that the Secretary of Homeland Security direct the Assistant Secretary of ICE to take the following three actions: (1) develop time frames for updating existing policies, guidelines, and procedures for alien apprehension and removals and include factors that should be considered when officers make apprehension, charging, and detention determinations for aliens with humanitarian issues; (2) develop a mechanism to help ensure that officers are consistently provided with updates regarding legal developments; and (3) evaluate the costs and alternatives for developing a reporting mechanism by which ICE senior managers can analyze trends in the use of discretion across ICE’s field offices to help identify areas that may require management actions—such as changes to guidance, procedures, and training—to address problems or support development of best practices.

DHS agreed with our recommendations and outlined actions planned to address them. These plans entail reevaluating and republishing all existing policies, guidelines, and procedures pertaining to the exercise of discretion during calendar year 2008; developing best practices to ensure the latest legal updates are disseminated to agents and officers through each Chief Counsel’s Office; and, by December 1, 2007, initiating an evaluation of the costs and alternatives for developing a mechanism by which to analyze trends in the use of discretion.

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## Background

Estimates of the size of the alien population subject to removal vary. A report from the Pew Research Center estimated the population of unauthorized aliens in the United States to be approximately 12 million as of March 2006.<sup>14</sup> According to DHS, the population of aliens subject to removal from the United States has grown in recent years. DHS’s Office of Immigration Statistics estimated that the population of aliens subject to removal has increased by half a million from January 2005 to January 2006. Additionally, DHS has estimated that the removable alien population grew

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<sup>14</sup>Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Washington D.C.) March 7, 2006.

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by 24 percent from 8.5 million in January of 2000 to 10.5 million in January of 2005.

Aliens who are in violation of immigration laws are subject to removal from the United States. Over 100 violations of immigration law can serve as the basis for removal from the United States, including, among other things, criminal activity, health reasons (such as having a communicable disease), previous removal from the United States, and lack of proper documentation. ICE investigations resulted in 102,034 apprehensions, or about 8 percent of the approximately 1.3 million DHS apprehensions in 2005. Four main categories constituted the basis for aliens removed by DHS in 2005: (1) aliens entering without inspection, by, for example, illegally crossing the border where there is no formal U.S. port of entry; (2) aliens attempting to enter the United States without proper documents or through fraud, at U.S. ports of entry; (3) aliens with criminal convictions or believed to have engaged in certain criminal activities, such as terrorist activities or drug trafficking; and (4) aliens who are in violation of their terms of entry (e.g., expired visa).

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## ICE Officers Exercise Discretion, Particularly for Aliens with Humanitarian Issues or Who Are Not Investigation Targets

Our review of ICE policies and procedures, along with interviews at ICE field offices, showed that officers exercise discretion throughout various phases of the alien apprehension and removal process, but the initial phases of the process—initiating removals, apprehending aliens, issuing removal documents and detaining aliens—involve the most discretion. Officers in OI and DRO field offices told us that they exercise discretion for aliens with humanitarian issues and aliens who are not investigation targets on a case-by-case basis with guidance and approval from supervisors. Officers told us they typically encounter (1) aliens who are the target of an investigation and (2) aliens who are not the target of an investigation but who are encountered through the course of an operation and are subject to removal. While officers told us that discretion with regard to aliens who are fugitives, criminals, and other investigation targets is limited by clearly prescribed policies and procedures, they told us that they have more latitude to exercise discretion when they encounter aliens who are not fugitives or criminals and are not targets of ICE investigations, particularly when encountering aliens with humanitarian issues.

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## Most Discretion Is Exercised in the Initial Phases of the Apprehension and Removal Process

The alien apprehension and removal process encompasses six phases: (1) initial encounter, (2) apprehension, (3) charging, (4) detention, (5) removal proceedings, and (6) final removal. Our review of federal regulations, ICE policies, guidance, and interviews showed the parts of the removal process from the time officers encounter aliens as part of an operation to the time they determine whether to detain an alien involve the most discretion. During removal proceedings and final removal, ICE attorneys and DRO officers can exercise discretion only in clearly delineated situations prescribed by ICE policies and statutory and regulatory requirements.

Officers told us that during the initial phases of the apprehension and removal process, they encounter situations that require them to pursue alternate ways to initiate removals, in lieu of apprehending aliens. During encounters with aliens, officers told us that they decide how to exercise discretion for aliens on a case-by-case basis with input from supervisors or experienced officers. Specifically, officers told us that they exercise discretion when they encounter aliens who (1) present humanitarian concerns such as medical issues or being the sole caregiver for minor children or (2) are not the primary target of their investigations.

### Initial Encounter Phase

DRO and OI officers told us that their primary goal is to initiate removal proceedings for any alien they encounter who is subject to removal. However, officers told us that in some instances, they might decide not to pursue any action against an alien who they suspect to be removable. Officers at two OI and one DRO field office told us that, in some instances, they are unable to initiate removal action against every alien they encounter during the course of an operation. Officers noted that several factors—such as the availability of detention space, travel time to an alien’s location, and competing enforcement priorities—affect their decisions to initiate removal action against an alien. Officers at one of the seven OI field offices we visited also told us that because of limited resources they have to make trade-offs between dedicating resources to aliens who pose a threat to public safety and those who do not—that is, noncriminal aliens—which in some instances result in decisions to not initiate removal action against noncriminal aliens.

### Apprehension Phase

Our review of DHS and ICE guidance showed that officers’ ability to exercise discretion is limited for aliens who are investigation targets, such as criminal aliens and fugitive aliens who have ignored a final removal order. Discretion for apprehending these aliens is limited due to clearly prescribed policies, and procedures—such as requirements under the INA to detain terrorists or certain criminals—governing the handling of these



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aliens.<sup>15</sup> By contrast, officers at all seven DRO and seven OI field offices we visited told us that they have discretion to process and apprehend aliens who are not investigation targets or aliens who present humanitarian circumstances. In such circumstances, officers told us that they can exercise discretion by deciding to (1) apprehend an alien and transport the alien to an ICE facility for processing, (2) issue the alien an NTA by mail, or (3) schedule an appointment for the alien to be processed at an ICE facility at a later date.

For example, in looking for a criminal alien who is the target of an investigation, a fugitive operations team may encounter a friend or relative of the targeted alien—who is also removable—but not the primary target of an ICE investigation. If the friend or relative has a humanitarian circumstance, like being the primary caregiver for small children, the officers can decide to not apprehend the friend or relative and opt for processing at a later time after reviewing the circumstances of the case and determining that no other child care option is available at the time. In such instances, ICE headquarters officials told us that officers are to confirm child welfare claims made by an alien and determine whether other child care arrangements can be made. Headquarters officials also told us that aliens do not always divulge that they are the sole caretakers of children but explained that if ICE agents became aware of an alien's child welfare responsibility, agents must take steps to ensure that the child or children are not left unattended.

In addition, officers at two OI offices and one DRO office told us that in some instances, such as when aliens are sole caretakers for minor children or are ill, they will schedule appointments for aliens who are not investigation targets to process them at a later date. Officers at five of the seven OI field offices and two of the seven DRO offices we visited also told us that they will mail an NTA—as an alternative to apprehension—to aliens who present humanitarian issues such as medical conditions or child welfare issues. At another OI field office, officers told us that when determining whether to apprehend aliens or use an alternative to

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<sup>15</sup>Requirements for detaining aliens are outlined in the INA and DHS memorandums. For example, the INA stipulates that aggravated felons, aliens who are threats to national security, and categories of fugitive aliens must be detained by ICE officers if apprehended. In limited circumstances, such as when necessary to protect aliens who are cooperating with a major criminal investigation, the INA authorizes the release from custody of certain criminal aliens who do not pose a threat to public safety and are likely to appear for proceedings.

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apprehension—for aliens who are not investigation targets—they also consider manpower availability.

## Charging Phase

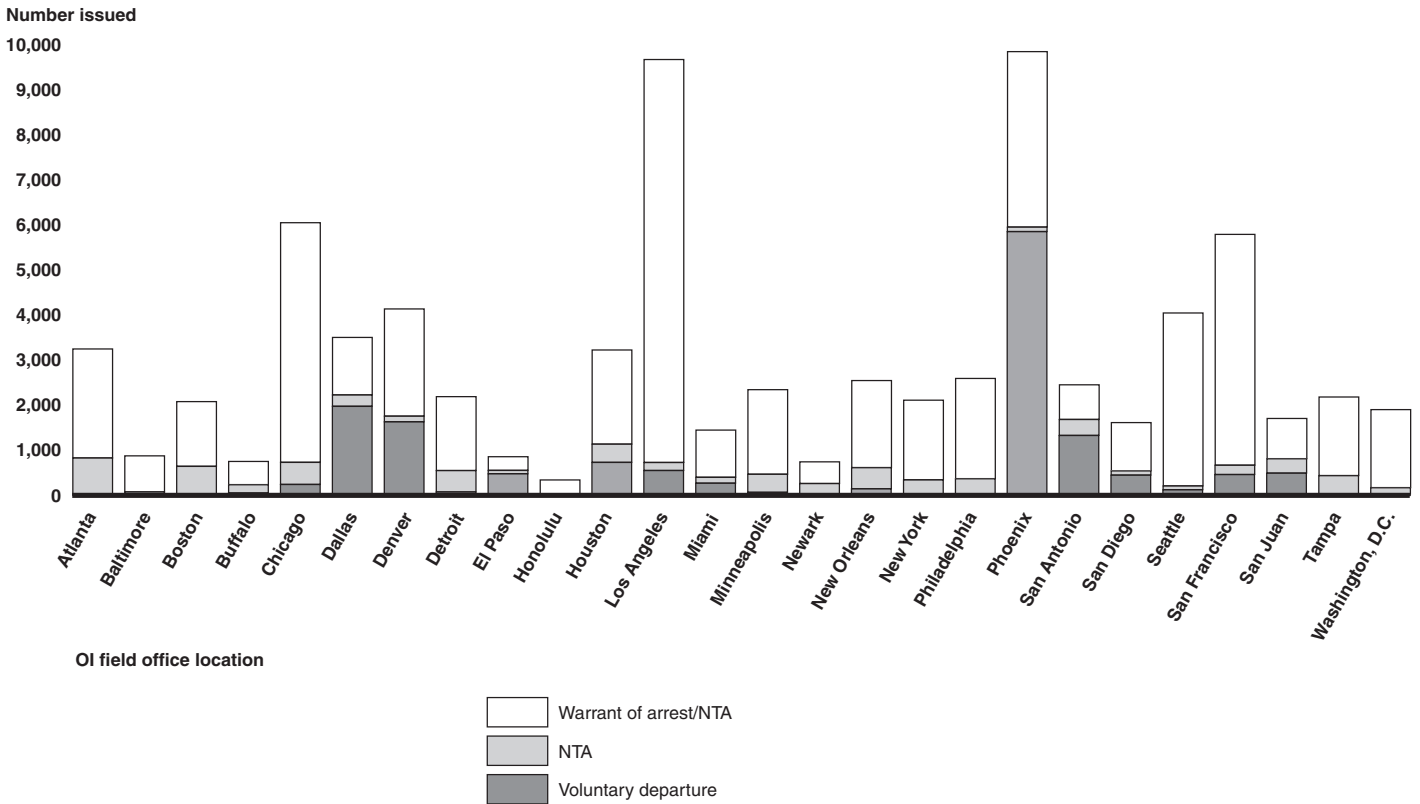
Our review of ICE guidance and procedures showed that most of an officer's discretion in the charging phase relates to the decision to grant voluntary departure. Officers told us that when not statutorily prohibited from granting voluntary departure, they have some discretion in determining whether to issue an NTA and thus initiate formal removal proceedings or grant voluntary departure in lieu of initiating formal removal proceedings, which typically results in a hearing before an immigration judge. Officers told us that they may consider factors like humanitarian concerns and ICE priorities when exercising discretion to grant voluntary departure.

On the basis of our review of ICE data, we noted significant variation in the use of voluntary departure across field offices.<sup>16</sup> Our review of OI apprehension data also showed that three OI field offices near the U.S. southwestern border initiated a relatively higher number of voluntary departures (equal or greater than the number of NTAs issued). ICE headquarters officials noted that officers at field offices near the U.S. southwestern border employ voluntary departure generally because of their proximity to the U.S.-Mexico border, which enables them to easily transport Mexican nationals to Mexico. Figure 1 illustrates the number of NTAs and voluntary departure issued by OI field offices.

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<sup>16</sup>The INA prohibits officers from granting voluntary departure to aggravated felons and aliens engaged or likely to engage in terrorist activities.

**Figure 1: Fiscal Year 2006 Removal Dispositions Issued by OI Field Offices**



Source: GAO analysis of OI data.

Note: ICE officers employ other removal dispositions, such as those employed to remove criminal aliens or fugitive aliens who have failed to depart the United States. These removal dispositions and others are not shown in this graphic because NTAs and voluntary departures constitute the largest number of removal options employed by ICE officers.

**Detention Phase**

Our review of procedures also showed that if detention is not mandated by the INA,<sup>17</sup> officers have discretion to determine if an alien will be detained or released pending the alien’s immigration court hearing. When making this determination, ICE guidance instructs officers to consider a number of factors, such as humanitarian issues, flight risk, availability of detention space, and whether the alien is a threat to the community. Officers at two DRO field offices we visited told us that they exercise discretion to release aliens from custody if appropriate facilities are not available or if

<sup>17</sup>Examples of mandated detention cases include aliens who are aggravated felons and terrorists.

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detention space is needed for aliens who pose a greater threat to public safety. At one OI field office, officers provided an example of an operation where they released two women and two children on their own recognizance because of the lack of appropriate detention space to house women and children. Officers at another DRO field office also noted that detaining women and juveniles can be challenging because of limited space to accommodate them. Detention determinations made by officers can be reexamined by immigration judges upon an alien's request.

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### Officers and Attorneys Have Less Discretion Once Removal Proceedings Have Been Initiated

Our review of ICE policy and DRO's field operational manual showed that ICE attorneys—who generally enter the process once proceedings have begun—and officers have less discretion in the later phases of the apprehension and removal process. Once an alien's case arrives at the removal proceedings phase and is being reviewed by ICE attorneys, we found that the use of discretion at this stage is limited by clear policy and guidelines. Our review of ICE policy and interviews with attorneys at 5 of 7 Chief Counsel Offices showed that most aliens have few alternatives to appearing before immigration court after entering the removal proceeding phase. Circumstances in which ICE might not pursue proceedings include a legally insufficient NTA; an alien's eligibility for an immigration benefit, such as lawful permanent residency; and an alien's serving as a witness in a criminal investigation or prosecution. In these specific cases, ICE attorneys can exercise discretion not to pursue proceedings by asking the immigration court to terminate removal proceedings if the NTA has been filed with the court. ICE OPLA guidance also permits ICE attorneys to take steps to resolve a case in immigration court for purposes of judicial economy, efficiency of process, or to promote justice. Examples in the guidance include cases involving sympathetic humanitarian circumstances like an alien with a U.S. citizen child with a serious medical condition or disability, or an alien or close family member who is undergoing treatment for a potentially life-threatening disease.

ICE policy states that DRO may exercise discretion and grant some form of relief to the alien, such as a stay of removal and deferred action at the final phase of the process. A stay of removal is specifically authorized by statute and constitutes a decision that removal of an alien should not immediately proceed. Deferred action gives a case a lower removal priority, but is not an entitlement for the alien to remain in the United States. While some aliens could be granted a stay or deferred action by DRO field office managers, DRO officers told us that DRO seeks to execute removal orders in the vast majority of cases. DRO officers in field offices told us that they could recall only a handful of cases when DRO

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officers did not execute a removal order after it was issued by an immigration judge. Supervisors in one DRO field office recalled a case in which a stay was granted to an aggravated felon who had a serious medical condition.

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## ICE Has Strengthened Training Programs, but Lacks Comprehensive Guidance and Consistent Legal Updates to Inform Decision Making

Officers at DRO and OI field offices who are responsible for apprehending, charging, and detaining removable aliens are to rely on formal and on-the-job training, guidance provided by supervisors, and guidance provided in field operational manuals to inform their decision making regarding alien apprehensions and removals. Consistent with internal control standards, which call for training to be aimed at developing and retaining employee skill levels to achieve changing organizational needs, ICE has updated some of the training it offers to officers responsible for making alien apprehension and removal decisions.<sup>18</sup> Some of the updated training includes, among other things, implementing worksite enforcement training, supervisory training for OI supervisors, and Spanish language training for newly hired DRO officers. These updates have the potential to provide critical information to officers and supervisors to better support their decision making. However, ICE guidance, including ICE's field operational manuals and ICE memorandums, on the exercise of discretion during the alien apprehension and removal process does not serve to fully support officer decision making in cases involving humanitarian issues and aliens who are not primary targets of ICE investigations. For example, ICE has not completed efforts to provide officers with complete and up to date guidance to reflect expanded worksite and fugitive operations enforcement efforts. ICE headquarters officials told us that they do not have a time frame for completing efforts to update available guidance in field operational manuals. In addition, although Chief Counsel Offices provide information regarding legal developments to DRO and OI officers to guide their decision making, ICE does not have a mechanism to ensure that such information is disseminated consistently to officers across field offices. The lack of comprehensive guidance and a mechanism by which to help ensure that officers receive consistent information regarding legal developments puts ICE officers at risk of taking actions that are not appropriate exercises of discretion and do not support the agency's operational objectives.

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<sup>18</sup> [GAO/AIMD-00-21.3.1](#).

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## ICE Has Instituted Training for Supervisors and Specialized Operations and Has Other Training Initiatives in Early Phases of Development

Internal control standards state that training should be aimed at developing and retaining employee skill levels to meet changing organizational needs. Officers at DRO and OI field offices who are responsible for apprehending, charging, and detaining removable aliens rely on formal and on-the-job training and guidance provided by supervisors to inform their decision making regarding alien apprehensions and removals. ICE has recently begun undertaking reviews and revisions of training that are consistent with these internal controls by updating and revising existing training curricula and implementing new training curricula for OI and DRO officers to provide critical information to officers and supervisors to better inform their decision making. These actions are important steps for providing officers with relevant information to inform their decision making. In early 2007, OI instituted a 2-week worksite enforcement training course geared toward informing ICE officers regarding criminal investigation techniques and procedures, which also provides information on the exercise of discretion regarding aliens who present humanitarian issues. OI headquarters officials identified worksite enforcement as a training need, since these operations are expanding, and an OI headquarters official told us that most OI officers had not participated in major worksite enforcement operations since 1998 and that many of the officers who participate are temporarily assigned to the operation from other duties or locations. Because of expanded worksite enforcement operations, officials told us that OI instituted worksite enforcement training, which will be offered to 100 OI officers per year. Headquarters officials told us that resource constraints preclude ICE from offering worksite enforcement training to all officers.

In addition to worksite enforcement training, OI officials told us that they are also in the process of instituting additional changes to training curricula that could better support officer decision making:

- OI officials told us that they developed a 3-week training course for first-line supervisors, with 1 week of the course designed to provide information on legal issues pertaining to removal dispositions, such as instances when to issue an NTA or grant voluntary departure.
- An OI official told us that OI is developing a 3-week refresher training course for experienced OI officers, to reinforce these officers' knowledge of alien apprehension and removal operations. According to OI's chief of training, this course should be implemented by the second quarter of fiscal year 2008.

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- OI officials have revised an “On the Job” training manual that tracks tasks that new officers must complete in their first 18 months on the job. According to an OI training official, by completing the tasks outlined in the manual, officers should have a full understanding of the requirements for processing aliens, which include exercising discretion throughout the apprehension and removal process (e.g., whether to immediately apprehend the alien or to mail an NTA).

Like OI officials, DRO officials have also taken steps to strengthen training for DRO officers. In April 2007, DRO added a Spanish language course to its basic training curriculum. According to DRO headquarters training officials, this training will better equip officers to communicate with aliens and thus help ensure that officers make appropriate decisions about how to exercise discretion for aliens. In addition, DRO is developing a 3-week refresher training for experienced DRO officers designed to provide officers with skills, tactics and legal updates pertaining to alien apprehension and removal operations and plans to implement this course in October 2008. DRO headquarters officials also told us that they will institute a 2-year “On the Job” training program in September 2007. According to officials, this program is to provide newly appointed officers with additional training on immigration laws, competencies, and tasks related to their jobs. While the recent changes to the OI and DRO training curricula are positive steps in better aligning ICE training with operations, it is too soon for us to assess the effectiveness of these efforts.

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### Operational Guidance Lacks Comprehensive Information to Inform Decision Making and Has Not Been Updated to Fully Reflect Current Operations

According to internal control standards, management is responsible for developing and documenting the detailed policies, procedures, and practices to ensure that they are an integral part of operations. DRO and OI officers generally rely on (1) OI and DRO field operational manuals; (2) DHS and ICE memorandums; and (3) an OI-developed worksite enforcement operational guidebook for guidance and policies to perform their duties, including making decisions regarding alien apprehensions and removals. However, ICE guidance to instruct officer decision making in cases involving humanitarian issues and aliens who are not primary targets of ICE investigations during the alien apprehension and removal process is not comprehensive and has not been updated by headquarters officials to reflect ICE’s expanded worksite and fugitive operations. In addition, although officers exercise discretion when deciding whether or not to take action to initiate the removal process, ICE does not have guidance on officers’ exercise of discretion on who to stop, question, and arrest when initiating the removal process. Without comprehensive policies, procedures, and practices, ICE lacks assurance that management

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directives will be conducted as intended and that ICE officers have the appropriate tools to fully inform their exercise of discretion.

ICE's OI and DRO field operational manuals were created by ICE's legacy agency—Immigration and Naturalization Service (INS), which was reorganized under the newly formed Department of Homeland Security in March of 2003. Both of these manuals, which are largely unchanged from the guidance developed and employed by INS, are currently undergoing revisions. Our review of these manuals shows that they do not offer comprehensive and updated guidance to instruct officers on the exercise of discretion in cases involving aliens with humanitarian issues and aliens who are not targets of ICE investigations. For example, OI's field operational manual offers some guidance on options for addressing aliens with caregiver issues who are encountered during worksite operations, such as ensuring that an alien's dependents receive timely and appropriate care. However, the guidance does not include, for example, provisions for aliens with medical conditions. OI headquarters officials told us that they are in the process of revising OI's field operational manual but have not yet updated the sections corresponding to alien apprehensions and removals.

With respect to DRO's field operational manual, some guidance is available to help officers decide whether to detain aliens pending their immigration hearings, but it does not clarify how officers should exercise discretion to determine detention for nonmandatory detention cases, especially for aliens with humanitarian issues or aliens who are not targets of ICE investigations. DRO headquarters officials told us that they are revising a chapter in the manual on fugitive operations but the revisions are not yet available to DRO officers in the field. For both the OI manual and the fugitive operations chapter in the DRO manual, headquarters officials told us that they did not yet know if the revisions would include guidance on the use of discretion for aliens with humanitarian issues or aliens who are not the targets of ICE investigations. Moreover, OI and DRO officials could not provide a time frame for when the revisions will be completed.

The various ICE organizational units with removal responsibilities have issued some guidance to help guide their own officers' and attorneys' exercise of discretion for aliens with humanitarian issues, but the guidance either is not comprehensive with regard to the various circumstances the officers and attorneys may encounter or does not apply to officers who have the authority to initiate removal proceedings. A memo issued in 2006 by DRO to its field offices, outlines severe medical



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illnesses<sup>19</sup> as a basis for exercising discretion when deciding whether to detain aliens who are not subject to mandatory detention.<sup>20</sup> While this memo provides important guidance for exercising discretion during the detention phase for aliens with medical issues, it does not address child welfare and primary caretaker issues.<sup>21</sup> In addition, a 2005 memo issued by OPLA permits ICE attorneys to take steps not to pursue proceedings by asking the immigration court to terminate removal proceedings if the NTA has been filed with the court. Examples in the guidance include cases involving sympathetic humanitarian circumstances like an alien with a U.S. citizen child with a serious medical condition or disability, or an alien or close family member who is undergoing treatment for a potentially life-threatening disease. However, this memo is directed at Chief Counsel attorneys, who do not have the authority to initiate removal proceedings. Instead, only supervisory DRO and OI officers can initiate removals, and as a result the memo is not clearly applicable to them.

In addition, DHS, OI, DRO, and OPLA have also issued their own separate memorandums that guide officers' actions at different points of the apprehension and removal process. Each memorandum is generally directed to officers and attorneys under the respective ICE unit that issues it, resulting in a number of memos distributed via a number of different mechanisms within each ICE unit. These memorandums do not offer comprehensive guidance on exercising discretion for aliens with humanitarian circumstances or aliens who are not the primary targets of ICE investigations. For example, OI issued a memo in May 2006, which instructs officers to schedule appointments as a last resort for juvenile aliens, elderly aliens, or aliens with health conditions to be processed at a later date, rather than apprehend these aliens at the time of the encounter or mail them an NTA. This guidance addresses important humanitarian issues, but it is only directed to ICE officers who are responding to calls from local law enforcement agencies. Furthermore, it does not define or

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<sup>19</sup>Examples of severe medical illnesses listed in memo include kidney failure, cancer, HIV/AIDS, or significant pregnancy complications.

<sup>20</sup>The INA mandates detention for certain categories of aliens, such as most criminal aliens.

<sup>21</sup>In August 2007, a DRO official also told us that ICE operational plans include guidance on processing juveniles encountered during fugitive operations. According to this official, the guidance is designed to help officers determine whether juveniles should be placed with families or in the custody of child care agencies in the jurisdiction where the operation occurred. The official did not provide copies of operational plans containing this guidance and the plans provided to us before August 2007 did not include guidance on processing juveniles encountered during fugitive operations.

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fully delineate circumstances that might constitute “last resort.” Another memo issued by DHS in October 2004 provides officers and supervisors with flexibility on detaining aliens (who are not subject to mandatory detention) depending on the circumstances of the case, such as available bed space. However, this memo does not offer specific guidance on determining detention for aliens with humanitarian circumstances or aliens who are not primary targets of ICE investigations.

In addition to ICE field operational manuals and various memorandums, an OI headquarters official told us that ICE has recently instituted a worksite enforcement operational guidebook to assist in the proper planning, execution, and reporting of worksite enforcement operations. Our review of this guidebook showed that it discusses, among other things, operational planning and coordination, including instructions on reporting requirements at the arrest site and working with other ICE units, like DRO. However, although ICE plans to regularly update its worksite enforcement operational guidebook based on lessons learned from past worksite operations, the current guidebook that ICE provided us in August 2007 does not include any guidance about how officers should factor humanitarian issues into their decision making during the apprehension and removal process. Finally, in our review of the worksite enforcement operational guidebook, we did not find guidance to inform officers’ exercise of discretion on whom to stop, question, and arrest when initiating the removal process—guidance that was also lacking in the various operational manuals and memorandums.

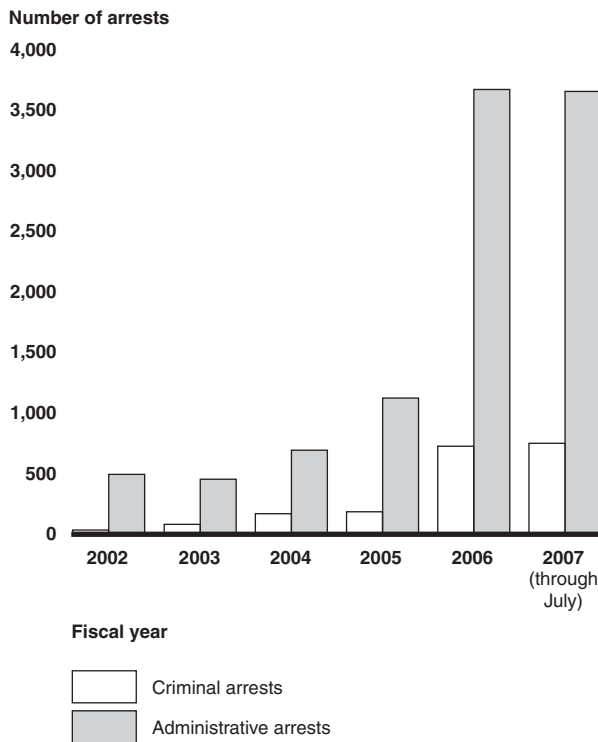
In our review of documents from 26 OI field offices, we also noted that only 3 of these field offices have developed local guidance to guide officers’ discretion in the initial phases of the apprehension and removal process. However, the local guidance we reviewed is not comprehensive because the 3 offices do not have guidance that covers the use of discretion throughout the phases of the alien apprehension and removal process when officers can exercise discretion. For example, 1 of the 3 offices has guidance on scheduling appointments for future processing for aliens with humanitarian concerns. Another office has guidance that covers factors to consider when exercising discretion for cases involving humanitarian issues as well as guidance on deciding whether to detain aliens who are not investigation targets.

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**Current ICE Operations  
Present a Need for  
Guidance on Humanitarian  
Issues and Aliens Who Are  
Not ICE Targets**

ICE has recently expanded its worksite enforcement and fugitive operations, increasing the probability that officers in the field will have to exercise discretion in their encounters with aliens who present humanitarian issues or aliens who were not the targets of their investigations—particularly noncriminal aliens. With these expanded operations, the need for up to date and comprehensive guidance to reduce the risk of improper decision making becomes increasingly important. According to ICE data, in fiscal year 2006, ICE made, through its worksite enforcement operations, 716 criminal arrests, which include aliens subject to removal who are charged with criminal violations, and 3,667 administrative arrests, which refer to alien workers who are unlawfully present in the United States but have not been charged with criminal violations. These data show a sharp increase from fiscal year 2005, as noted in figure 2. Through July 2007 of fiscal year 2007, ICE made 742 criminal arrests and 3,651 administrative arrests in its worksite operations; these arrests surpassed the combined arrests for worksite enforcement operations from fiscal year 2002 to fiscal year 2005. According to a senior ICE headquarters official, from fiscal year 2003 through the third quarter of fiscal year 2007, ICE has also experienced over a six-fold increase in the number of new officers dedicated to worksite enforcement operations, many of whom are temporarily assigned to worksite operations.

**Figure 2: Worksite Enforcement Arrests, Fiscal Year 2002 through Fiscal Year 2007**



Source: ICE data.

ICE reported that it has also expanded fugitive operations and plans to increase the number of fugitive operation teams from 18 in 2006 to 75 by the end of fiscal year 2007. Annual performance goals for each of these teams call for 1,000 apprehensions per team. As of April 27, 2007, ICE officers had arrested 17,321 aliens through its fugitive operation teams in fiscal year 2007, a 118 percent increase in arrests since fiscal year 2005.

ICE's expanding worksite enforcement and fugitive operations both present officers with circumstances that could require the use of discretion, specifically cases that involve aliens with humanitarian issues or aliens who are not ICE targets. Expanded fugitive operations may increase the number of encounters that officers have with removable aliens who are not the primary targets or priorities of ICE investigations. For cases involving these aliens, additional guidance could provide ICE with better assurance that its officers are equipped to exercise discretion and prioritize enforcement activities appropriately.

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In large-scale worksite enforcement operations, officers have encountered numerous aliens who have presented humanitarian issues. For this type of case, comprehensive guidance on how to weigh relevant aspects of aliens' circumstances or humanitarian factors would provide ICE with enhanced assurance that officers are best equipped to appropriately determine whether aliens should be apprehended, how they should be charged, and whether they should be detained.

A recent large-scale worksite enforcement operation in Massachusetts highlights the importance of having comprehensive and up to date guidance to help inform officers' decision making when they encounter aliens with humanitarian issues. In this operation, ICE officers encountered aliens who had humanitarian issues, including aliens who were primary caretakers of children and had to assess the totality of the circumstances in numerous cases, in real time, to decide how to handle each case in coordination with other entities, such as social service agencies, state government, and local law enforcement. ICE issued a fact sheet about this operation on its external Web site that discussed difficulties in coordinating and communicating with these entities on issues of operational plans, detention space, access to detainees, and information about arrestees. The fact sheet noted that ICE arrested 362 removable aliens and transported over 200 of these aliens to detention facilities in Texas due to a lack of bed space in Massachusetts. In addition, 60 aliens were initially released during administrative processing at the time of the operation for child welfare or family health reasons, and additional aliens were released later for these reasons. According to ICE officials, another concern ICE officers face as they attempt to exercise discretion is that these officers encounter aliens who sometimes do not divulge their status as sole caregivers for children. Complex environments like the one described here demonstrate the need for up to date and comprehensive guidance that supports ICE's operational objectives and use government resources in the most effective and efficient manner.

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**No Mechanism Is in Place to Help Ensure Officers Consistently Have Necessary Information Regarding Legal Developments**

Internal control standards state that effective communications should occur in a broad sense with information flowing down, across, and up the organization. This includes communicating information in a form and within a time frame that enables officials in carrying out their duties. In carrying out their duties, ICE officers require information on relevant legal developments—such as court decisions modifying existing interpretations of immigration laws—to help inform their decision making regarding removal dispositions (e.g., NTA or voluntary departure). However, ICE has not instituted a mechanism to ensure that legal developments are

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consistently disseminated to ICE officers across all field offices. For example, officers at only two DRO field offices and one OI field office we visited received current information on legal developments from their Chief Counsel Office, which is responsible for disseminating this information, while others did not receive such information at all or did not receive it when they needed it for case processing. In addition, officers at two of the seven OI field offices we visited expressed a need for more information regarding legal developments to better inform their decision making regarding removal dispositions. Officers at one OI field office told us that there are occasions when they do not receive the necessary legal guidance until they have already processed a case. Chief Counsel offices independently decide when and what information to disseminate regarding legal developments. Officers at seven DRO and six OI field offices we visited told us that they can consult Chief Counsel attorneys to seek guidance on legal issues. Although relying on Chief Counsel field offices to disseminate information and advise officers on legal issues can help officers when making decisions, without a formalized mechanism to consistently disseminate information that officers can use when they process cases, officers might not receive information necessary to make sound removal decisions that comply with the most recent legal developments.

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## ICE Has Supervisory Review and an Inspection Program to Monitor Removal Operations but Lacks a Means to Analyze Information Specific to the Exercise of Discretion across All Field Offices

ICE has two control mechanisms in place to monitor its removal operations—established supervisory review practices and procedures and an inspection program. However, ICE does not have a mechanism to allow it to analyze information specific to the exercise of discretion. Internal control standards advise agencies to design internal controls to ensure that ongoing monitoring occurs in the course of normal operations. This monitoring includes regular management and supervisory activities, comparisons, reconciliations, and other actions people take in performing their duties. ICE relies primarily on the judgment of experienced field officers and supervisory reviews to provide assurance that officers' decision making complies with established policies and procedures. In addition to supervisory reviews, ICE has recently taken steps to institute an inspection program designed to oversee field offices' compliance with established policies and procedures. However, neither supervisory reviews nor ICE's newly instituted inspection program offers a mechanism for management to collect and analyze information specific to officers' exercise of discretion in alien apprehension and removal decisions across all field offices. The ability to collect and analyze data about the exercise of discretion across field offices could provide ICE with additional assurance that it can identify and respond to areas that may require some

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type of corrective action. Moreover, without these data and analyses, ICE is not positioned to compile and communicate lessons learned to help support officers' decision making capacity.

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### Supervisory Reviews Serve as Primary Control over Officer Decision Making

One way for agencies to help ensure that ongoing monitoring occurs in the course of normal operations is to design appropriate supervision to help provide oversight of internal controls. Consistent with this activity, ICE policy requires supervisory review of officer decisions on a case-by-case basis to ensure that officers' decisions comply with established policies and procedures for alien apprehension and removal decisions.

ICE officers are to document the specific immigration charges lodged against an alien, as well as the custody decision made by officers, on a standardized form. Throughout the alien apprehension and removal process, supervisors are responsible for reviewing and authorizing decisions made by officers. For example, when officers are determining whether to detain or release an alien from custody, ICE memorandums state that supervisors must approve an officer's decision.<sup>22</sup> In addition, according to ICE headquarters officials, supervisors at both DRO and OI field offices are to review officers' apprehension and removal decisions to ensure that officers use the most appropriate removal disposition and to ensure that officers' decisions comply with legal requirements, policies, and procedures. Headquarters officials also told us that supervisors are responsible for approving and signing off on decisions to grant voluntary departure and issue NTAs and other removal dispositions issued by officers.

Officials at all seven DRO and seven OI field offices we visited also told us that supervisors are responsible for reviewing instances when officers have exercised discretion, such as when encountering aliens with humanitarian issues. Officers at field offices we visited also noted that they consult with experienced officers or supervisors when making these decisions and that operations are typically conducted by teams where officers' collective knowledge is used to make discretionary decisions. Table 1 outlines the types of reviews conducted by experienced officers, supervisors, and managers at DRO and OI field offices.

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<sup>22</sup>In addition, ICE supervisors are authorized to issue NTAs and grant voluntary departure under federal regulations: 8 CFR § 239.1 (NTAs) and 8 CFR § 240.25 (voluntary departure).

**Table 1: Decisions Reviewed by Experienced Officers, Supervisors, and Managers**

<b>Phase</b>	<b>Type of decision</b>	<b>Reviewing/approving official</b>	<b>Review instituted as a result of</b>
Apprehension	Decision not to apprehend an alien based on humanitarian or other factors <sup>a</sup>	<ul style="list-style-type: none"> <li>• Senior officer/agent or lead officer/agent</li> <li>• Supervisory special agent</li> <li>• Supervisory detention and deportation officer</li> </ul>	ICE policy
Charging	Decision to issue an NTA	<ul style="list-style-type: none"> <li>• Supervisory special agent</li> <li>• Supervisory detention and deportation officer</li> </ul>	8 CFR, Section 239.1
Charging	Decision to grant voluntary departure	<ul style="list-style-type: none"> <li>• Supervisory special agent</li> <li>• Supervisory detention and deportation officer</li> </ul>	8 CFR, Section 240.25 ICE policy
Detention	Decision to detain or release alien on own recognizance or under order of supervision	<ul style="list-style-type: none"> <li>• Supervisory detention and deportation officer</li> </ul>	ICE policy
Removal proceedings	Decision to grant stay or deferred action	<ul style="list-style-type: none"> <li>• Supervisory detention and deportation officer</li> <li>• DRO assistant field office director</li> <li>• DRO field office director<sup>b</sup></li> </ul>	ICE policy

Source: GAO analysis of ICE policies and practices.

<sup>a</sup>Decisions not to apprehend aliens involve scheduling an appointment for processing at a later time and mailing a notice to appear to an alien's home. In addition to humanitarian factors, other factors that officers consider when making these decisions include manpower availability, detention availability, and competing enforcement priorities.

<sup>b</sup>According to DRO field officers we interviewed, DRO field office directors are required to approve stays and deferred action.



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## ICE Has Instituted an Inspection Program to Help Monitor Operations, Including Alien Apprehensions and Removals for its OI Field Offices, and Plans a Similar Program for DRO Field Offices

ICE's Office of Professional Responsibility instituted an inspection program for OI field offices in July 2007, consistent with internal control standards for monitoring operations by designing mechanisms for identifying and communicating deficiencies to managers.<sup>23</sup> According to the headquarters official responsible for overseeing the inspection program, ICE plans to implement a similar inspection program for DRO field offices in the fall of 2007. According to this official, the inspection program is designed to determine whether field offices are complying with the established policies and procedures selected for review. The inspection program consists of two areas: (1) an annual self-inspection process under which all field offices must respond to a Web-based questionnaire covering operational activities and (2) a field inspection program under which all OI and DRO field offices are to be inspected by headquarters officials at least once during a 4-year cycle. In instances where field offices are not compliant, field officials must develop a plan of action to address discrepancies that are identified. For OI offices, examples of areas that are to be reviewed include procedures for processing aliens, as well as methods for ensuring that operational plans are prepared and approved before arrests are conducted. For DRO field offices, areas that are to be reviewed, among other things, include compliance with procedures to ensure that aliens are served with a copy of an NTA, as well as procedures for completing and obtaining approval for operational plans in advance of fugitive operations. Our review of the self-inspection questionnaires and our discussion with the program manager showed that the inspection program is not designed to analyze information on officer decision making regarding alien apprehensions and removals.

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## ICE Lacks a Mechanism to Collect and Analyze Data Specific to the Exercise of Discretion across All Field Offices

An important purpose of internal control monitoring is to allow agencies to assess the quality of performance over time.<sup>24</sup> Specifically, internal control standards recommend that managers compare trends in actual performance to expected results throughout the organization in order to identify any areas that may require corrective action to help ensure operations support operational objectives. Although, ICE has some controls in place to monitor operations related to alien apprehensions and

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<sup>23</sup>The Office of Professional Responsibility, among other things, inspects and reviews ICE offices, operations, and processes so as to provide executive management with independent reviews of the agency's organizational health.

<sup>24</sup>[GAO/AIMD-00-21.3.1](#).

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removals, neither supervisory review nor its inspection program offer managers information to specifically analyze officer decision making for trends across the 75 OI, DRO and Chief Counsel field offices that might indicate the need for a corrective action, such as additional training or clarification of procedures, or that might reveal best practices for achieving desired outcomes. ICE does not have a mechanism for collecting and analyzing data on officers' exercise of discretion in determining what removal processing option to employ, such as officers' basis for scheduling an appointment to process an alien at a later date for aliens who present humanitarian circumstances or the frequency of such actions. Additionally, ICE does not collect and analyze the actions taken by officers (e.g., scheduling an appointment, or mailing an NTA) in addressing aliens presenting humanitarian issues. Such information could be used by managers to identify trends in actions taken by officers to address aliens with humanitarian issues that could in turn be used to make any necessary modifications to guidance, policies or training.

ICE policy outlines a mechanism to capture and analyze information regarding officers' discretionary decisions made as part of worksite enforcement operations, but this inspection mechanism has not been used consistently. ICE officials told us that, as part of worksite enforcement operations, its officers make decisions in the field on a case-by-case basis in a time-constrained environment. In recent worksite operations, officers have apprehended thousands of aliens in operations conducted in various cities across the nation. Our review of ICE's worksite enforcement training curriculum and OI's field operational manual showed that ICE policy outlines a key internal control—after-action reports—which are to capture, among other things, information on significant or unusual incidents or circumstances that may have occurred during an operation; a listing of the number of aliens arrested, reasons for the release of detained or arrested aliens, and any allegations of civil rights violations or other complaints.<sup>25</sup> However, a senior headquarters official responsible for overseeing OI's worksite enforcement division told us that although after-action reports are still outlined as requirements in OI's training curriculum (dated April 2007) and in the OI field operational manual, ICE has eliminated this requirement. According to OI headquarters officials, prior to the reporting requirement change, after-action reports had only been prepared for one worksite enforcement operation, which was conducted

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<sup>25</sup>According to OI's field operations manual and training materials, after-action reports must be completed within 1 business day of an operation.

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in 2006, since ICE was created. The senior headquarters official told us that, in lieu of after action reports, OI intends to collect information on lessons learned as part of its worksite enforcement guidebook. Our review of the guidebook provided to us by ICE showed that the guidebook did not yet reflect lessons learned.

The scale and complexity of recent ICE worksite operations, such as an operation in Massachusetts involving difficulties coordinating and communicating with social service agencies, state government, and local law enforcement on issues of operational plans, detention space, access to detainees, and information about aliens who were apprehended, highlight the need for ICE to be able to learn from past experiences, thereby providing ICE officers with a richer knowledge base to inform their decision making under difficult circumstances. Moreover, since ICE has experienced a more than six-fold increase (between fiscal year 2003 and the third quarter of fiscal year 2007) in the number of new officers participating in worksite enforcement operations, more officers are making decisions and exercising discretion in these complex environments. Having a mechanism that provides ICE with information regarding its enforcement operations across all field offices would help identify areas needing corrective action regarding officer decision making. For example, having comprehensive information on factors considered by officers and actions taken by them (e.g., scheduling an appointment for later processing, or mailing an NTA) to address aliens with humanitarian issues could lead to revised policies and procedures. In addition, such a mechanism could help ICE protect its credibility and integrity against allegations of alien mistreatment by having readily available information to ensure that officer decision making complies with established policies and procedures. Without a mechanism to catalog and collect information—agencywide—on the exercise of discretion, ICE managers cannot analyze trends to provide additional assurance that officer decision making complies with established ICE policies and operational objectives, nor is ICE positioned to refine operational approaches based on a review of best practices across field offices.

ICE relies on two databases to document officers' decisions regarding alien apprehensions: (1) the Enforcement Case Tracking System (ENFORCE), which is primarily used to collect alien biographical information and removal option employed, such as voluntary departure or an NTA, and (2) the Deportable Alien Control System (DACS), which is used to track the location of detained aliens, as well as the status of aliens' immigration court hearings. However, headquarters officials told us that the details of discretionary decisions (e.g., factors considered in deciding

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whether to apprehend an alien or detain an alien, based on humanitarian reasons) are not recorded in ENFORCE and DACS. Officials explained that officers may record information explaining their decisions in each of these systems' narrative sections. However, according to officials, inputting this information is not a requirement, and information recorded by officers in the narrative sections of these databases is not analyzed by field managers or headquarters officials.

Headquarters officials responsible for overseeing ENFORCE and DACS told us that ICE plans to update these systems to provide other capabilities. A headquarters official responsible for overseeing ENFORCE told us that ICE plans to integrate aspects of ENFORCE with another system—the Treasury Enforcement Communications System (TECS)—used by officers to track criminal investigations. According to this official, the proposed changes will allow officers to more easily access information pertaining to apprehended aliens and associated criminal investigations. In addition, a headquarters official responsible for overseeing the DACS system told us that ICE is piloting a program to merge DACS with ENFORCE, with the goal of creating one case management system for collecting information on alien apprehensions and for tracking the progress of alien removal proceedings. However, it is unclear whether these plans and the resulting systems would provide information ICE managers need to monitor and analyze officer decision making across all field offices.

The DHS Office of Inspector General (OIG) has recognized the need to upgrade ICE data systems so that management has reliable data to make programmatic decisions and assess performance with regard to detention and removal programs, including identifying trends associated with underlying decisions made during the alien removal process. In April 2006, the OIG reported that DACS lacks the ability to readily provide DRO management with the data analysis capabilities to manage the detention and removal program in an efficient and effective manner because (1) the information stored in DACS was not always accurate or up to date and (2) DRO could not readily query DACS to obtain statistical reports on detentions and removals.<sup>26</sup> The OIG stated that the lack of reliable program analysis capabilities could detrimentally affect DRO's ability to identify emerging trends and identify resource needs. According to the OIG, this

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<sup>26</sup>DHS, Office of Inspector General, Office of Audits, *Detention and Removal of Illegal Aliens*, OIG-06-33 (Washington, D.C.: April 2006).

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data system should, at a minimum, be able to provide quality immigration-related data on various factors including, among other things, the rationale underlying DRO's decision to release an alien from detention or not to detain individual aliens. OIG recommended that ICE expedite efforts to develop and implement a system capable of meeting data collection and analysis needs relating to detention and removal, including a plan showing milestone dates, funding requirements, and progress toward completing the project. DHS and ICE concurred with the OIG's recommendation and said that it would prepare a project plan for developing and deploying the system in an expedited manner. Although DHS and ICE said that the new system is to allow users to capture, search, and review information in specific areas, including information on detention and removal case details, the response was not specific about whether it would contain information on the rationale for making these decisions. Having information on officers' exercise of discretion, including their rationale for making decisions, would provide ICE managers a basis for identifying potential problems, analyzing trends, and compiling best practices.

ICE headquarters officials told us that collecting and managing data that detail decisions made by officers could be costly. However, ICE has not evaluated the costs or alternatives for creating a mechanism capable of providing ICE with usable information that it can analyze to identify trends in the exercise of discretion. For example, ICE has not considered the costs and benefits of such a mechanism in connection with planned or ongoing information system updates. Until ICE assesses costs and alternatives for collecting these data, it will not be in a good position to select and implement an approach that will provide ICE assurance that it can identify any best practices that should be reinforced or areas that might require corrective actions—by, for example, modifying policies, procedures, or training. Given that 75 field offices are involved in the alien apprehension and removal process and that oversight of these offices lies with three ICE units, a comprehensive mechanism for reviewing officers' decision making could provide ICE with meaningful information to promote the appropriate use of discretion, identify best practices, and analyze any significant differences across field offices in order to take appropriate action.

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## Conclusions

Appropriate exercise of discretion during the alien removal process is an essential part of ICE's law enforcement efforts as it conducts operations in complex environments and with finite resources to identify, locate, and remove many of the estimated 12 million aliens subject to removal from the United States. Internal controls, like training, guidance, and monitoring

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that are designed to help ICE ensure that its officers are well equipped to consistently make decisions that support its operational objectives, are crucial for ICE to help provide assurance that its officers exercise discretion in a manner that protects the agency's integrity, advances its mission, and provides the greatest value to the nation. Although ICE has taken steps in the area of training to develop and retain officer skills, ICE's guidance does not comprehensively address key aspects of the alien apprehension and removal process, such as dealing with humanitarian issues and aliens who are not investigation targets. In light of the increased number of circumstances that might call for the exercise of discretion in ICE's expanded enforcement efforts, comprehensive guidance—including factors that should be considered when officers make apprehension, charging, and detention determinations for aliens with humanitarian issues—to better support officers' decision making to provide ICE with enhanced assurance that discretion is exercised appropriately. Without established time frames for updating guidance, ICE lacks a means to track progress and ensure accountability for accomplishing the updates. Moreover, developing a mechanism for consistently disseminating legal information would help to ensure that officers have the most recent information on legal developments that may affect the decisions they make. Finally, collecting information on officers' exercise of discretion could provide ICE with enhanced assurance that officers and supervisors across field offices are making decisions that reflect the agency's operational objectives regarding alien apprehensions and removals and could also help managers identify best practices or areas that may require management action. Although ICE officials have noted that collecting and managing data about the exercise of discretion could be costly, ICE has not evaluated the costs of and alternatives for collecting such information. For instance, as ICE updates the systems it uses to manage other operational data, it could consider the costs and benefits of integrating this data collection function as part of other planned system redesigns. However, without an assessment of the costs and alternatives for collecting data on officer decision making, whether in association with planned system updates or not, ICE is not in the best position to select and implement an approach that provides ICE assurance that it can identify best practices to support decision making capacity or, more importantly, recurrent or systematic issues that could jeopardize its mission.

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## Recommendations for Executive Action

To enhance ICE's ability to inform and monitor its officers' use of discretion in alien apprehensions and removals, we recommend the Secretary of Homeland Security direct the Assistant Secretary of ICE to take the following three actions:

- develop time frames for updating existing policies, guidelines, and procedures for alien apprehension and removals and include in the updates factors that should be considered when officers make apprehension, charging, and detention determinations for aliens with humanitarian issues;
- develop a mechanism to help ensure that officers are consistently provided with updates regarding legal developments necessary for making alien apprehension and removal decisions;
- evaluate the costs and alternatives of developing a reporting mechanism by which ICE senior managers can analyze trends in the use of discretion to help identify areas that may require management actions—such as changes to guidance, procedures, and training.

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## Agency Comments and Our Evaluation

We requested comments on a draft of this report from the Secretary of Homeland Security. In an October 4, 2007 letter, DHS agreed with our three recommendations and discussed the actions ICE plans to take to address them, which are summarized below and included in their entirety in appendix II.

With regard to our recommendation that ICE develop time frames for updating existing policies, including factors that should be considered when making apprehension, charging, and detention decisions, DHS said that ICE would reevaluate and republish all existing policies, guidelines, and procedures pertaining to the exercise of discretion during calendar year 2008. With regard to our recommendation that ICE evaluate the costs and alternatives of developing a mechanism by which to analyze trends in the use of discretion, DHS said that ICE anticipates initiating this evaluation by December 1, 2007.

With regard to our recommendation to develop a mechanism to help ensure that officers are consistently provided with updates regarding legal developments, DHS explained that ICE believes that policies are in place to address the needs of the operational components for up to date legal guidance, and that officers rely primarily on local Chief Counsel Offices for information on legal developments. DHS said that this localized

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approach reflects the fact that significant developments in case law often result from decisions of the 12 United States Courts of Appeal and that such decisions are often inconsistent and only have application within the geographic boundaries where they arise. Nonetheless, DHS commented that ICE recognizes that consistency in the dissemination of legal updates is of great importance to agents and officers and said that ICE will look to develop best practices to ensure the latest legal updates are disseminated to agents and officers through each Chief Counsel's office. We believe ICE identification and implementation of best practices would be important in helping ensure that updates on legal developments are consistently provided to officers.

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We are sending copies of this report to selected congressional committees, the Secretary of Homeland Security, the Assistant Secretary of U.S. Immigration and Customs Enforcement, the Director of the Office of Management and Budget, and other interested parties. We will also make copies available to others on request. In addition, the report will be available on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report or wish to discuss them matter further, please contact me at (202) 512-8777 or [stanar@gao.gov](mailto:stanar@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Major contributors are listed in appendix III.



Richard M. Stana  
Director, Homeland Security and Justice Issues



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# Appendix I: Objectives, Scope, and Methodology

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This review examined how Immigration and Customs Enforcement (ICE) ensures that discretion is used in the most fair, reasoned, and efficient manner. Along these lines, we examined whether ICE has designed internal controls to guide and monitor officers' exercise of discretion when making alien apprehension and removal decisions, consistent with internal control standards for the federal government.<sup>1</sup> Specifically, this review addresses the following three questions:

1. When and how do ICE officers and attorneys exercise discretion during the alien apprehension and removal process?
2. What internal controls has ICE designed to guide officer decision making to enhance its assurance that the exercise of discretion supports its operational objectives?
3. What internal controls has ICE designed to oversee and monitor officer decision making during the alien apprehension and removal process to enhance ICE's assurance that the exercise of discretion supports its operational objectives?

To address these objectives, we obtained and analyzed information at ICE's Office of Investigations (OI), Office of Detention and Removal Operations (DRO), and the Office of the Principal Legal Advisor (OPLA) within the Department of Homeland Security (DHS) in Washington, D.C. We also carried out work at 14 ICE field offices—seven OI and seven DRO field offices—located in seven cities throughout the United States: Chicago, Detroit, Los Angeles, New York, Philadelphia, Phoenix, and San Diego and seven ICE Chief Counsel Offices (which serve as OPLA's field offices) at these same locations. We selected these locations considering field office size, ICE data on alien apprehensions, and geographic dispersion. Regarding alien apprehensions, about 40 percent of all ICE Office of Investigations apprehensions during fiscal year 2006 were made by the seven OI offices selected for our review. As we did not select a

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<sup>1</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999). We used the criteria in GAO's *Standards for Internal Control in the Federal Government*, [GAO/AIMD 00-21.3.1](#), dated November 1999. These standards, issued pursuant to the requirements of the Federal Managers' Financial Integrity Act of 1982 (FMFIA), provide the overall framework for establishing and maintaining internal control in the federal government. Also pursuant to FMFIA, the Office of Management and Budget issued Circular A-123, revised December 21, 2004, to provide the specific requirements for assessing the reporting on internal controls. Internal control standards and the definition of internal control in Circular A-123 are based on the GAO *Standards for Internal Control in the Federal Government*.

probability sample of field offices or Chief Counsels' offices to review, the results of our work at these locations cannot be projected to field offices nationwide.

To identify when and how officers and attorneys exercise discretion during the alien apprehension and removal process, we reviewed relevant laws and regulations as well as applicable policies, memorandums, operational manuals, and training materials developed by OI, DRO, and OPLA headquarters offices. We also spoke with headquarters officials in the OI, DRO, and OPLA operational divisions regarding the exercise of discretion in the alien apprehension and removal process. At each of the field locations we visited, we collected and reviewed available locally developed field guidance, memorandums, and training materials applicable to the exercise of discretion during the apprehension and removal process. We also conducted small group interviews with officers, supervisors, and managers at the 14 OI and DRO field offices we selected as part of our nonprobability sample to determine when and how officers at those locations exercise discretion, and when and how officers are expected to exercise discretion, during the alien apprehension and removal process. In addition, we conducted small group interviews with attorneys, supervisors, and managers at the 7 Chief Counsel offices we visited to determine when and how attorneys exercise discretion, and when and how they are expected to exercise discretion, once formal removal proceedings have been initiated by OI and DRO officers.<sup>2</sup> As we did not select probability samples of ICE officers and attorneys, supervisors, and managers to interview at the field offices we selected, the results of these interviews may not represent the views of ICE officers and attorneys and their supervisors and managers nationwide.

To address internal controls ICE has designed to guide officer decision making, we reviewed field operational manuals, policy memorandums, and training materials developed by OI, DRO, and OPLA headquarters offices. We also requested locally developed written guidance and policies and procedures regarding alien apprehension and removal procedures from all DRO, OI and Chief Counsel field offices. We received and reviewed locally

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<sup>2</sup>Federal regulations do not authorize ICE attorneys to initiate formal removal proceedings (8 C.F.R § 239.1). However, ICE attorneys can advise officers, supervisors, and managers when they apprehend aliens and initiate removal proceedings, and these attorneys have the authority to recommend that ICE supervisors cancel a notice to appear (NTA), or if the NTA has been filed with immigration court, ask the court to terminate removal proceedings.

developed guidance from 13 of OI's 26 field offices and 12 of Chief Counsel's 26 field offices. The purpose of this review was to identify the range of policies and guidance developed by field units that we did not capture as part of our nonprobability sample of ICE field offices. We did not receive locally developed guidance from DRO's 23 field offices, as DRO headquarters officials told us that DRO field offices do not rely on locally developed guidance and instead rely on national policies and memorandums. As part of our work at the ICE field offices we visited, we also discussed and identified guidance and training provided to officers and attorneys with regard to the guidance and information available to them when exercising discretion during the apprehension and removal process, including guidance about nontargeted aliens, humanitarian issues, and updates on legal developments. We then compared the national and local guidance, memorandums, and training materials in place with internal control standards to determine whether these controls were consistent with the standards.<sup>3</sup> In addition, we met with headquarters officials responsible for the development of policy and training of field unit operations for OI and DRO and we interviewed OPLA officials responsible for developing policy and training for Chief Counsel Offices to discern their role in developing and providing guidance and information to ICE officers, attorneys, supervisors, and managers involved in the alien apprehension and removal process.

To address what internal controls ICE has designed to oversee and monitor officer decision making during the alien apprehension and removal process, we reviewed relevant laws, regulations, and field operational manuals. We also interviewed OI, DRO and OPLA headquarters officials, field officers, and field attorneys to identify the types of oversight that are in place. We examined what controls were in place to provide assurance that removal decisions are consistent with established policies, procedures, and guidelines across field offices, and examined whether these controls were designed to be consistent with the internal control standards. We did not test ICE controls in place as part of our review. We also interviewed headquarters officials responsible for overseeing ICE's enforcement operations to examine controls in place to monitor enforcement activities. We met with ICE headquarters officials responsible for overseeing ICE databases containing information pertinent to alien apprehension and removal outcomes, and we inquired about information collected in these databases regarding officer decision

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<sup>3</sup>[GAO/AIMD-00-21.3.1](#).

making, including cases involving humanitarian issues and cases involving aliens who are not targets of ICE investigations. We also interviewed ICE officers, supervisors, and management personnel at the ICE field offices we visited to identify the types of supervisory reviews and approvals required for decisions made by ICE officers and attorneys and the documentation to be reviewed and approved by supervisors in regard to these decisions. We reviewed data on alien apprehensions for worksite enforcement operations, for fiscal year 2002 through fiscal year 2007, to identify trends in ICE's expanded enforcement efforts. We also reviewed data on alien apprehensions resulting from fugitive operations. To determine the reliability of the data, we interviewed headquarters officials responsible for overseeing and verifying the data, reviewed existing documentation regarding the data, and interviewed headquarters officials responsible for tracking statistics pertaining to the data.

We conducted our work between August 2006 and September 2007 in accordance with generally accepted government auditing standards.

# Appendix II: Comments from the Department of Homeland Security

U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

October 4, 2007

Mr. Richard M. Stana  
Director, Homeland Security and Justice  
U.S. Government Accountability Office  
Washington, DC 20548

Dear Mr. Stana:

Thank you for the opportunity to review and comment on the report titled "Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making," GAO-08-67SU.

The following is our response to the recommendations.

**Recommendation 1:** Develop timeframes for updating existing policies, guidelines, and procedures for alien apprehension and removals and include in the updates factors that should be considered when officers make apprehensive, charging, and detention determinations for aliens with humanitarian issues.

**Response:** Concur. During calendar year 2008, ICE's Office of Detention and Removal Operations (DRO) will reevaluate and republish all existing policies, guidelines, and procedures pertaining to discretion.

**Recommendation 2:** Develop a mechanism to help ensure that officers are consistently provided with updates regarding legal developments necessary for making alien apprehension and removal decisions.

**Response:** Concur. ICE believes that policies are currently in place to address the needs of the operational components for up-to-date legal guidance. As the draft report recognizes, the primary means by which officers and agents are advised of legal developments is via the local Offices of the Chief Counsel. Each Chief Counsel and their staff monitor developments in the law, and use their experience and professional judgment to decide which of those developments merit dissemination to the officers and agents within their areas of responsibility. This localized process reflects the fact that significant developments in case law often result from decisions of the twelve United States Courts of Appeal. These decisions generally have no application outside the geographic boundaries of the circuit in which they arise. In addition, various circuit

[www.dhs.gov](http://www.dhs.gov)

courts often decide the same legal issue in differing and even contradictory ways. By relying primarily upon the local chief counsel to analyze and disseminate new developments in the law, ICE benefits from the professional experience of its most senior field attorneys in offices throughout the country.

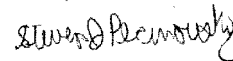
ICE recognizes the consistency in the dissemination of legal updates is of great importance to agents and officers. To that end, ICE will look to develop best practices to ensure the latest legal updates are disseminated to agents and officers through each Chief Counsel's Office.

**Recommendation 3:** Evaluate the cost and alternatives of developing a reporting mechanism by which ICE senior managers can analyze trends in the use of discretion to help identify areas that may require management actions-such as changes to guidance, procedures, and training.

**Response:** Concur. ICE anticipates initiating this evaluation by December 1, 2007.

We thank you again for the opportunity to review the draft report and provide comments.

Sincerely,



Steven J. Pecinovsky  
Director  
Departmental GAO/OIG Liaison Office

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# Appendix III: GAO Contact and Staff Acknowledgments

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## GAO Contact

Richard M. Stana, (202) 512-8777

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## Staff Acknowledgments

In addition to the above, John F. Mortin, Assistant Director; Teresa Abruzzo; Joel Aldape; Frances Cook; Katherine Davis; Kathryn Godfrey; Wilfred Holloway; and Ryan Vaughan made key contributions to this report.

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