

May 2004

# IMMIGRATION ENFORCEMENT

## Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention



Highlights of GAO-04-434, a report to congressional requesters

### Why GAO Did This Study

The U.S. Supreme Court's June 2001 ruling, *Zadvydas v. Davis*, held that indefinite detention of certain removable aliens was unlawful if their removal was not likely in the reasonably foreseeable future, even if they were deemed to be a threat to the community or a flight risk. U.S. Immigration and Customs Enforcement (ICE) conducts post order custody reviews of removable aliens to determine if continued detention is in compliance with laws and regulations. ICE is to assure that aliens meet the conditions of their release. This report addresses (1) what information ICE has to assure that its custody reviews are timely and consistent with the *Zadvydas* decision and implementing regulations and (2) how ICE has assured that aliens released on orders of supervision have met the conditions of their release.

### What GAO Recommends

GAO recommends that the Secretary of the Department of Homeland Security direct the Assistant Secretary for ICE to (1) ensure that ICE has complete, accurate, and readily available information to help assure compliance with the *Zadvydas* decision and implementing regulations; (2) determine ICE deportation officer staffing needs; and (3) provide guidance to ICE deportation officers on prioritizing their supervision caseloads.

ICE agreed to implement GAO's recommendations.

[www.gao.gov/cgi-bin/getrpt?GAO-04-434](http://www.gao.gov/cgi-bin/getrpt?GAO-04-434).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Richard M. Stana, 202-512-8777, stanar@gao.gov.

## IMMIGRATION ENFORCEMENT

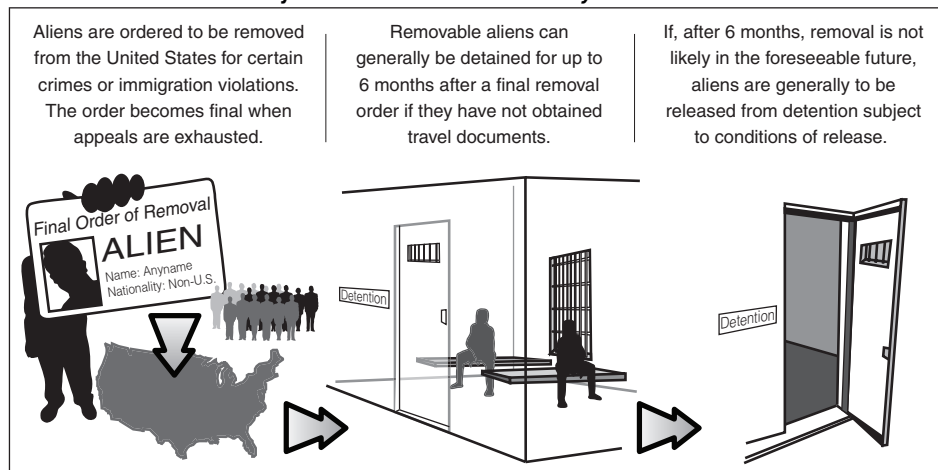
# Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention

### What GAO Found

ICE does not have information that provides assurance that its custody reviews are timely and its custody determinations are consistent with the *Zadvydas* decision and implementing regulations. One reason ICE has difficulty providing assurance is that it lacks complete, accurate, and readily available information to provide deportation officers when post order custody reviews are due for eligible aliens. In addition, ICE does not have the capability to record information on how many post order custody reviews have been made pursuant to regulations and what decisions resulted from those reviews. Therefore, ICE managers cannot gauge overall compliance with the regulations for aliens who have been ordered to be removed from the United States. Although ICE is in the process of updating its case management system, ICE officials said that they did not know when the system will have the capability to capture information about the timeliness and results of post order custody reviews.

ICE also does not have readily available information on how many aliens have been released on orders of supervision pursuant to the *Zadvydas* regulations, or whether these aliens have met the conditions of their release (i.e., periodically report to ICE and continue to seek travel documents from their home country). One reason for this is that ICE does not have the capability to track aliens' actions required by the conditions of their release. ICE officials also reported that ICE has a shortage of deportation staff, but they did not know how many staff are needed to manage the supervision caseload. Despite ICE's challenges in this area, ICE has not provided guidance to its field offices to help them prioritize deportation officer duties and supervision cases. Such prioritization could help ICE target its resources on those supervision cases that present the highest risk to public safety.

### Alien Removal and Custody Review Process under *Zadvydas*



Source: GAO.

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**Abbreviations**

DACS	Deportable Alien Control System
DCI	data collection instrument
DHS	Department of Homeland Security
ENFORCE	Enforcement Case Tracking System
EREM	Enforcement Case Tracking System Removal Module
HQPDU	Headquarters Post Order Detention Unit
ICE	U.S. Immigration and Customs Enforcement Bureau
INS	Immigration and Naturalization Service

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Accountability \* Integrity \* Reliability

United States General Accounting Office  
Washington, DC 20548

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May 27, 2004

The Honorable Russell D. Feingold  
Ranking Minority Member  
Subcommittee on the Constitution, Civil Rights,  
and Property Rights  
Committee on the Judiciary  
United States Senate

The Honorable John Conyers, Jr.  
Ranking Minority Member  
Committee on the Judiciary  
House of Representatives

Until 2001, aliens who were issued final orders of removal from the United States could be held in detention facilities indefinitely if U.S. immigration authorities determined that the aliens were a threat to the community or a flight risk. However, after the June 2001 U.S. Supreme Court decision in *Zadvydas v. Davis*, many aliens with final orders of removal, including aliens determined to be a threat to the community or flight risk, could no longer be detained beyond a period of 6 months if there was no significant likelihood of their removal in the reasonably foreseeable future.<sup>1</sup> Only aliens who posed certain health and safety risks could continue to be detained indefinitely. U.S. immigration authorities are to enforce the Supreme Court's ruling so that (1) aliens covered by the ruling are not held in detention beyond 6 months once it is determined that there is no significant likelihood of removal in the reasonably foreseeable future and (2) aliens released from detention pursuant to the ruling meet the conditions of their release. The meaning of "reasonably foreseeable future" was not defined in the ruling or in regulations and guidance that were subsequently issued. U.S. immigration authorities are to use their judgment, based on the facts and circumstances of each case, to determine what constitutes the "reasonably foreseeable future." The *Zadvydas* decision applies to aliens who have been ordered removed from the United States because they violated the nation's immigration laws. The aliens could have originally entered the country either legally or illegally.

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<sup>1</sup>533 U.S. 678 (2001).

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The Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement Bureau (ICE) is responsible through its Office of Detention and Removals for making alien custody determinations that are consistent with the *Zadvydas* decision.<sup>2</sup> ICE deportation officers are to conduct periodic reviews of aliens' records and decide whether to release or continue to detain the aliens. In these reviews, known as post order custody reviews because they pertain to detained aliens who have been ordered to be removed from the United States, ICE deportation officers are to determine if the alien's continued detention is justified and in compliance with governing laws and regulations. Aliens released from detention as a result of a post order custody review, including those released pursuant to the *Zadvydas* decision, are to be released on orders of supervision that prescribe the conditions of the release. In addition, ICE deportation officers are to determine whether aliens have met the conditions of their release, such as periodically reporting to an ICE office and informing ICE of any address change.

In response to your inquiry regarding the long-term detention of aliens and the implementation of the *Zadvydas* decision, our review addresses the following questions: (1) What information does ICE have to assure that custody reviews are timely<sup>3</sup> and result in decisions that are consistent with the *Zadvydas* decision and implementing regulations? (2) How has ICE assured that aliens released on orders of supervision have met the conditions of their release? (3) When foreign governments refuse or delay issuing travel documents for the aliens to be removed to their countries, what efforts has ICE made to overcome these obstacles, and what are the results of those efforts?

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<sup>2</sup>ICE was established on March 1, 2003, as part of the newly formed DHS (Homeland Security Act of 2002 (Pub.L.No. 107-296, 116 Stat. 2135)). Prior to that time, immigration enforcement functions were the responsibility of the Immigration and Naturalization Service, which has been abolished. In some instances, events that we refer to occurred prior to March 1, 2003. For ease of presentation, in this report we refer to "ICE" as the immigration agency responsible for implementing the *Zadvydas* decision even if events cited in the text occurred prior to March 1, 2003.

<sup>3</sup>Timely conduct of post order custody reviews means that ICE conducts a post order custody review as promptly as possible on or after the date that an alien with a final order of removal reaches 180 days in detention. See 8 C.F.R. §241.4(k)(2)(ii) and 8 C.F.R. §241.4(k)(2)(iv). According to the Deputy Assistant Director, ICE Office of Detention and Removals, Case Management Division, the complexities of the case and the availability of ICE personnel can affect how promptly the post order custody review is conducted.

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To address these questions, we reviewed relevant documents, including ICE regulations and policies. We interviewed officials at ICE headquarters and in its Washington, D.C.;<sup>4</sup> Chicago, Ill.; Los Angeles, Calif.; and New Orleans, La., field offices. We visited these field offices because they had relatively large numbers of aliens who were detained for longer than 180 days, and they were geographically dispersed. In the Washington, D.C., field office, we also selected a random sample of cases for detainees who either were being held in ICE detention with a removal order for at least 180 days as of March 3, 2003, or had been held in ICE detention with a removal order for at least 180 days but were released from detention or removed from the United States between July 1, 2001, and March 3, 2003. However, the information obtained from the case file review may not be generalized to all cases in ICE's Washington, D.C., field office. This is because for many cases, ICE did not have information on whether or when a final order of removal was issued, making it impossible to compute the number of days the alien was held in detention following the removal order. Because we reviewed cases from only one ICE field office, the information from the case file review also cannot be generalized to all ICE long-term detention cases nationwide. In addition, we interviewed officials and reviewed documents at the Department of State.

We conducted our work between December 2002 and March 2004 in accordance with generally accepted government auditing standards. Appendix I provides more details about our scope and methodology.

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## Results in Brief

ICE does not have information that provides assurance that its custody reviews are timely and its custody determinations are consistent with the *Zadvydas* decision and implementing regulations. ICE has an outdated, difficult-to-use, inefficient case management system that cannot readily notify deportation officers when post order custody reviews are due for eligible aliens. Three of the four ICE field offices we visited developed their own methods for trying to ensure timely reviews, but none of the methods automatically identify which aliens are due for post order custody reviews and when these reviews are to be conducted. Our review of 45 case files at ICE's Washington, D.C., field office indicated that in 42 cases, custody reviews were done on time. In 3 of the 45 cases, the post order custody review was either late or not done at all, raising the possibility that ICE did not comply with the *Zadvydas* regulations. ICE's

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<sup>4</sup>The Washington, D.C., field office is located in Arlington, Va.

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case management system does not contain information that would enable ICE to determine how many post order custody reviews have been made pursuant to the *Zadvydas* decision and what decisions resulted from those reviews. Therefore, ICE managers are not in a position to know if the custody determinations were consistent with the *Zadvydas* decision and implementing regulations. ICE recognizes the limitations of its current case management system and has been working on developing a new system that should help its officers readily identify aliens who are due for a post order custody review and enable the officers to capture information on the results of the review. However, these improvements are being made in connection with a broader redesign of its detention and removal case management system, and ICE officials did not know when the new system would incorporate the enhanced capabilities. Until ICE can (1) provide complete and timely information to deportation officers on when and for whom post order custody reviews are due and (2) identify which custody decisions were made pursuant to the *Zadvydas* decision, ICE will not be in the best position to assure proper implementation of the *Zadvydas* decision.

ICE does not have readily available information on how many aliens have been released on orders of supervision pursuant to the *Zadvydas* regulations or whether these aliens have met the conditions of their release. When such aliens with final orders of removal are released into communities in the United States, ICE is responsible for assuring that the aliens meet the conditions of their release (e.g., periodically report to the ICE office, obey all laws, and continue to seek to obtain travel documents). However, ICE cannot provide assurance that aliens meet the conditions of their release, even for criminal aliens who might pose a threat to the community, or that these aliens can be found for removal. One reason for this lack of assurance is that ICE's case management system, discussed earlier, cannot provide deportation officers with a summary list of aliens released on orders of supervision, an automatic notification of when the aliens are to report in to ICE, and information regarding the aliens' compliance with the conditions of their release. According to ICE officials, the new case management system will eventually have these capabilities, but these officials did not know when it will be in place. Another reason for the lack of assurance, according to ICE officials and deportation officers, is that there are not enough deportation officers to effectively manage the range of duties and many cases that they are assigned. These challenges notwithstanding, ICE has not determined how many deportation officers it needs to manage the workload and has not collected data that would enable it to make that determination. ICE also has not prioritized the duties of its deportation



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officers and its cases of aliens released on orders of supervision. Deportation officers in some field offices have attempted to prioritize their supervision cases, but ICE has not issued guidance to help its deportation officers target their efforts on those aliens released on orders of supervision who pose the greatest threat to public safety.

ICE has worked, with some success, with the Department of State and foreign governments to try to overcome delays in obtaining travel documents from some foreign governments. In addition, DHS and State have signed a formal agreement to, among other things, foster collaboration with each other in dealing with foreign governments that refuse to issue or delay issuing travel documents for their nationals. There are countries, such as Vietnam, Laos, and China, that have consistently refused to issue travel documents or delayed issuing them, according to ICE officials. ICE and State officials said that foreign governments may decide not to issue travel documents if, for example, the alien has not lived in that country for a long period of time, may not have a means of support upon return, or has a criminal background. State has the authority to deny visas to individuals from countries that do not issue travel documents for the return of their nationals. According to ICE and State officials, this authority has been used only once because of concern about its potential negative impact on overall diplomatic relations with other countries. ICE and State have worked jointly to secure an agreement from the government of Cambodia for it to issue travel documents for some of its nationals in return for U.S. financial assistance with expenses related to the issuance of the documents and reintegration of the alien into Cambodian society.

Because it is important for ICE to identify and do timely reviews for cases subject to the *Zadvydas* decision, determine the extent to which it has implemented the *Zadvydas* decision, and identify and track aliens released on orders of supervision, we are making several recommendations to the Secretary of the Department of Homeland Security. The recommendations are intended to help ICE improve the information it maintains on long-term detainees and supervision cases, better determine its deportation officer staffing needs, and better focus its limited resources by providing guidance to ICE deportation officers on prioritizing their supervision caseloads.

We provided a draft of this report to the Secretary of DHS and to the Assistant Secretary for ICE for their review and comment. On behalf of DHS, the Assistant Secretary for ICE concurred with our

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recommendations and commented on the actions ICE will take to implement them.

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## Background

In its June 2001 *Zadvydas v. Davis* decision, the U.S. Supreme Court established a presumptively reasonable period of time—specifically, up to 6 months—that aliens with final removal orders can be detained if their removal is not likely in the reasonably foreseeable future. Prior to this decision, if aliens were determined to be a threat to the community or posed a flight risk, they could be detained indefinitely while their travel documents were sought.

In response to the *Zadvydas* decision, ICE issued interim regulations in November 2001 amending its post order custody review process for detained aliens with a final order of removal.<sup>5</sup> These interim regulations instituted new processes for determining whether there is a significant likelihood of removing an alien in the reasonably foreseeable future and whether there are special circumstances justifying continued detention.<sup>6</sup> In July 2001, prior to the interim regulations being issued, the Attorney General and ICE issued interim guidance for releasing detainees who were covered by *Zadvydas*. The guidance from the Attorney General directed, among other things, that ICE immediately renew efforts to remove all aliens in post order detention, placing special emphasis on aliens who had been detained the longest. The guidance from ICE explained, among other things, the categories of aliens that were covered by the *Zadvydas* decision and that released aliens should be subject to orders of supervision.

Under the *Zadvydas* decision and implementing regulations, ICE is to release an alien who has been held in detention for 180 days or more if ICE determines that (1) the alien's removal is not likely to occur in the reasonably foreseeable future and (2) the alien is not a "special circumstance" case. A special circumstance case is one in which the alien has a highly contagious disease, could pose a significant threat to national security, could present adverse foreign policy consequences if released, or has a mental health condition that may lead to violent behavior. Under the regulations implementing the *Zadvydas* decision, ICE is not supposed to consider whether the alien may be a threat to the community or a flight

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<sup>5</sup>Interim Regulations, *Continued Detention of Aliens Subject to Final Orders of Removal*, 66 Federal Register, 56967 (2001).

<sup>6</sup>8 C.F.R. §§ 241.13 and 241.14.

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risk in making the custody decision for aliens who have been detained for 180 days or more. Instead, ICE is to release such aliens on orders of supervision that prescribe the conditions of their release.

DHS's ICE, which was established on March 1, 2003, handles immigration enforcement functions in the country's interior.<sup>7</sup> These functions were previously the responsibility of the Immigration and Naturalization Service (INS). Among its duties, ICE, through its Office of Detention and Removals, is responsible for detaining and removing aliens who violate U.S. immigration laws, and for assuring that aliens released on orders of supervision have complied with the conditions of their release. ICE is responsible for working with the consulates and embassies of foreign governments to help removable aliens obtain travel documents so that ICE can return them to their home countries. ICE deportation officers are to conduct custody reviews—known as post order custody reviews—for aliens who are held in detention after they have received a final order of removal.<sup>8</sup> The final order of removal generally means that the alien has exhausted all appeals to remain in the United States and is to be returned to his or her country of origin or citizenship.

ICE regulations require its field offices to conduct a post order custody review 90 days after a detained alien receives a final order of removal.<sup>9</sup> When conducting the 90-day review, ICE can decide to continue to detain an alien if it (1) expects travel documents for an alien to be forthcoming in the reasonably foreseeable future, (2) determines that the alien has not cooperated with his or her removal process, or (3) determines that the alien is a threat to the community or poses a flight risk. Factors that are to be considered in determining whether the alien is a threat to the community or a flight risk include the detainee's criminal history, evidence of rehabilitation, the number of close relatives residing in the United States lawfully, and the alien's history in appearing for immigration or other proceedings. The purpose of the post order custody review is to determine whether to release the alien into the community until a travel document is obtained and the alien can be removed, or to continue to hold the alien in detention for another 90 days, pending removal.

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<sup>7</sup>When INS was abolished, responsibility for protecting the U.S. borders was assigned to DHS's Bureau of Customs and Border Protection.

<sup>8</sup>8 C.F.R. Part 241.

<sup>9</sup>This 90-day period is referred to as the "removal period."

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Aliens who continue to be detained after the 90-day post order custody review are to receive another review by ICE headquarters as soon as is practicable after 180 days in detention.<sup>10</sup> Among other things, the 180-day post order custody review is to consider whether travel documents are likely to be obtained in the reasonably foreseeable future and the alien is cooperating with his or her own removal (e.g., by providing ICE deportation officers with personal information required for a travel document). At this time, aliens either qualify for review under regulations developed pursuant to the *Zadvydas* decision or do not.<sup>11</sup> For example, detained aliens who were stopped at the border would not qualify for review under *Zadvydas* and would be reviewed under the 90-day post order custody review criteria as previously discussed.<sup>12</sup>

When conducting the 180-day review for an alien who qualifies for review under the *Zadvydas* regulations, ICE is to release the alien from detention if (1) ICE does not expect travel documents for the alien to be forthcoming in the reasonably foreseeable future and (2) no “special circumstances,” such as the alien being a national security risk, exist. The alien is to be released from detention even if he or she is deemed a threat to the community or poses a flight risk. When an alien is released from detention as a result of a post order custody review, the alien is to be issued an order of supervision that specifies release conditions that the alien must meet. Aliens on orders of supervision are to

- report periodically to an ICE field office to provide information required by the conditions of his or her release;
- continue efforts to obtain a travel document and assist ICE in doing so;
- obtain advance approval of travel beyond previously specified times and distances;
- provide ICE with a written notice of any change of address within 10 days of the change; and

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<sup>10</sup>ICE field offices are to send a memorandum to ICE headquarters updating the status of the case.

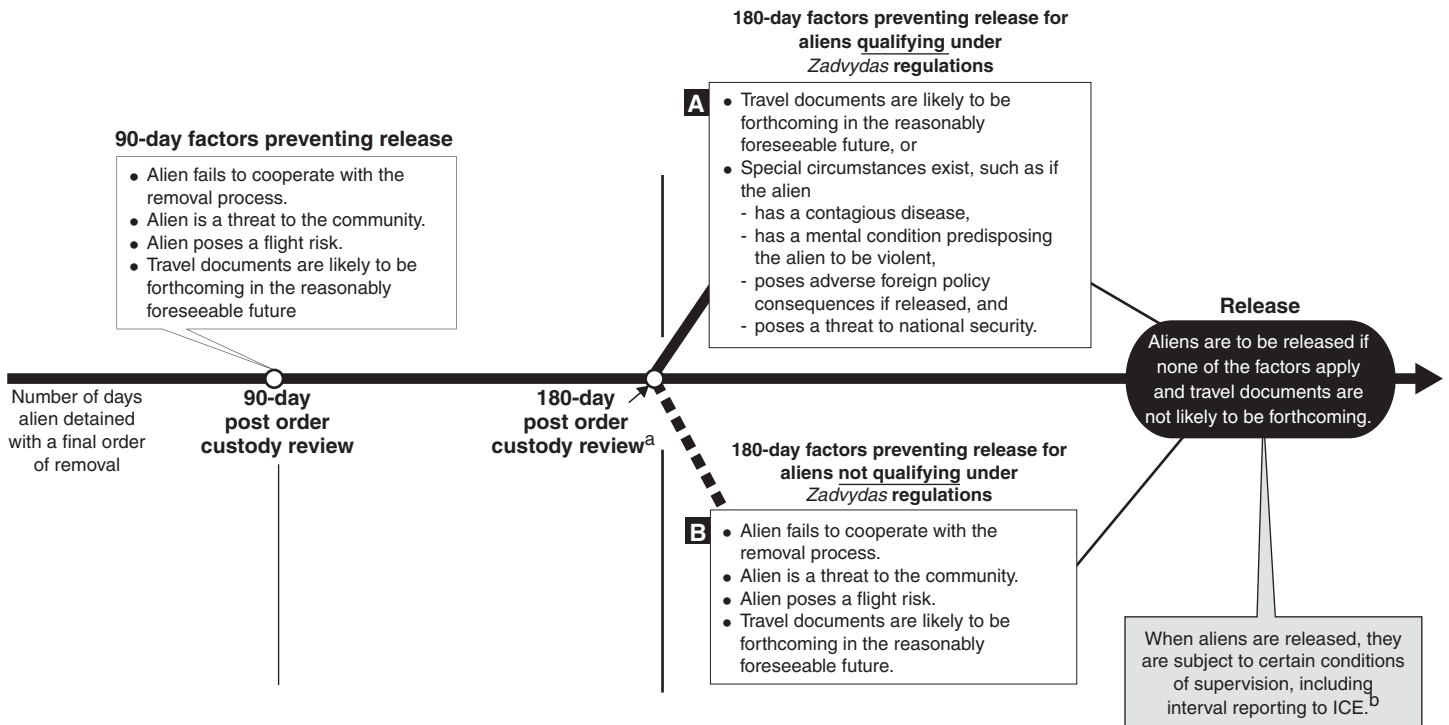
<sup>11</sup>8 C.F.R. § 241.13.

<sup>12</sup>Aliens who do not qualify for a post order custody review under the *Zadvydas* decision and resulting regulations are as follows: (1) aliens who do not cooperate in facilitating their removal; (2) arriving aliens (a) stopped at the border, (b) granted temporary permission to enter the United States, and (c) who are Mariel Cubans, a group of aliens who, in 1980, attempted to enter the United States as part of a mass migration from Cuba without documentation permitting them legal entry; and (3) aliens ordered removed by the Alien Terrorist Removal Court. This court was established in 1996 (8 U.S.C. §§ 1531-1537).

- report as directed for a mental or physical examination as directed by ICE.

Figure 1 shows the factors that affect decision-making at the 90- and 180-day post order custody reviews. Additional information on ICE’s process for detaining and releasing removable aliens is contained in appendix II.

**Figure 1: Factors That Affect Aliens’ Release from Detention**



Source: GAO.

Note: If an alien has filed an action disputing his or her detention (i.e., a petition for a writ of *habeas corpus*), and a court has ordered a stay of the alien's removal, the calculation of the number of days the alien has been detained with a final order does not begin until the court rules that the alien is to be removed. (8 C.F.R. § 241.4(g)(1)(i)(B)).

<sup>a</sup>A post order custody review is to be conducted at 180 days or as soon as practicable thereafter.

<sup>b</sup>ICE continues working to obtain travel documents after the alien is released from detention.

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Relying on the *Zadvydas* decision, over 200 aliens have filed lawsuits requesting relief from extended detention as of January 2004.<sup>13</sup> The rulings in these *Zadvydas* decisions have generally been focused on the facts of the individual case, especially on factors relating to the length of time that the alien has been in custody and on the circumstances surrounding the destination country's response to the removal effort. Many of these lawsuits concern ICE's refusal to release the alien because ICE believes that the travel documents would be forthcoming in the reasonably foreseeable future. The following federal district court cases are two examples of rulings in which federal courts reached opposite conclusions on the likelihood that travel documents would be issued:

- *Kacanic v. Elwood*:<sup>14</sup> In the case brought by Fadil Kacanic, a Yugoslav national, against Kenneth Elwood, ICE District Director, the federal district court found that the alien, a Yugoslav national, had shown good reason to believe that he would not be removed in the reasonably foreseeable future. In reaching this conclusion, the court relied on (1) the fact that the alien had already spent a full year in custody, (2) that the Yugoslavian Embassy never offered any reason for why obtaining travel documents was taking longer than normal and did not provide any definitive answer about when travel documents would be forthcoming, and (3) ICE failed to effectively rebut the alien's claim that receiving travel documents was unlikely. The alien, who had 3 years of supervised release remaining from a sentence for a prior federal offense, was released from ICE detention into the custody of the Bureau of Prisons to serve the term of supervised release.
- *Lema v. INS*:<sup>15</sup> In a case brought by Shibeshi Lema, an Ethiopian national, against INS, the federal district court concluded that the U.S. government and the alien, working together, should be able to convince the government of Ethiopia that the alien is, in fact, a native of Ethiopia. The court concluded that once citizenship was established, it would be reasonable to expect Ethiopia will issue travel documents. Although the court acknowledged that overcoming the country's concern could take time and effort, the alien's deportation was reasonably foreseeable once the legitimacy of the alien's citizenship claim was resolved. Consequently, the alien was kept in detention.

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<sup>13</sup> Aliens may obtain legal counsel at their own expense. 8 U.S.C. § 1362.

<sup>14</sup> 2002 WL 31520362 (E.D. Pa. Nov. 8, 2002).

<sup>15</sup> 214 F. Supp. 2d 1116 (W.D. Wash. 2002).

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Appendix III contains additional discussion of case law pertaining to the *Zadvydas* decision.

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## ICE's Case Management System Does Not Help Assure Timely Custody Reviews and Hampers ICE's Ability to Determine whether the Reviews Are Consistent with the *Zadvydas* Decision

ICE's case management system is not designed to provide readily accessible information on which aliens are due for a post order custody review. Consequently, the system does not facilitate deportation officers' efforts to assure that these reviews are done on time. ICE's case management system is also not designed to identify cases reviewed pursuant to the *Zadvydas* regulations. Therefore, the system does not facilitate ICE's ability to determine (1) if custody decisions are consistent with the *Zadvydas* ruling or (2) the extent of its compliance with the *Zadvydas* regulations. Three of the four ICE field offices we visited developed their own methods for trying to ensure timely reviews. However, these methods do not automatically identify which aliens are due for post order custody reviews and when these reviews are to be conducted. Our review of 45 case files at ICE's Washington, D.C., field office indicated that custody reviews were done on time in 42 cases. In the remaining 3 cases, custody reviews were either not done or done late, raising the possibility that ICE did not comply with the *Zadvydas* regulations in these cases. Because of weaknesses in its case management system, ICE is not optimally positioned to carry out its responsibilities, measure its performance, or determine its compliance with the regulations stemming from the *Zadvydas* ruling.

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## ICE's Case Management System Does Not Help Assure the Timeliness of Its Custody Reviews

ICE has an outdated, difficult-to-use, inefficient case management system that does not help it assure that post order custody reviews are done after an alien has been detained with a final order for 90 days and again at 180 days if the alien is still in detention. The system's inability to notify deportation officers when post order custody reviews are due could result in aliens being held longer than they should be. ICE's current case management system, the Deportable Alien Control System (DACS), does not meet internal control standards for federal agencies set out by the Comptroller General as required by the Federal Managers' Financial Integrity Act of 1982. These standards state that effective information technology is critical to achieving useful, reliable, and continuous recording of information and that pertinent information should be identified, captured, and distributed in a form and time frame that permits people to perform their duties efficiently. Among DACS's limitations is that it lacks the capability to automatically notify deportation officers when a custody review is due for an alien. Although deportation officers can enter post order custody review due dates and reminders in DACS to help them manage their caseload, this approach relies on deportation

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officers manually entering this information for each alien who might be eligible for a post order custody review. Even when they do this, deportation officers will not be automatically notified when the review is due. Instead, they must periodically perform a specific case-by-case DACS query to determine which aliens are due for a review.

ICE supervisors and managers can try to oversee the work of their staff by querying DACS in the same way that a deportation officer can. However, they are faced with the same tracking and notification limitations as deportation officers. In its “Office of Detention and Removal Strategic Plan, 2003–2012,” ICE acknowledges the limitations of DACS by characterizing it as a system that is not responsive to the demands that today’s operational environment places on it.

Because of DACS’s inability to automatically identify which aliens are due for post order custody reviews and when these reviews are to be conducted, officials at three of the four ICE field offices we visited developed their own methods for trying to ensure timely reviews. Field office staff in these offices developed spreadsheets or lists of aliens, identifying key dates, such as when a detained alien must be notified about the review and when a review is due. The spreadsheets and lists have one of the same basic limitations as DACS; that is, they do not have automatic reminders that notify deportation officers when post order custody reviews are due. The deportation officer must proactively enter key information into the spreadsheet or add the information to the list, and the officer must query each case individually to determine when a review is due.

Although they did not have supporting evidence for their view, most of the 33 individuals we spoke with in our 4 field office visits who were responsible for post order custody reviews believed that the reviews were always or almost always done on time. This belief was expressed by 14 of 15 deportation officers, 4 of 7 supervisory deportation officers, and 10 of 11 field office and detention facility managers. Reasons given for a review occasionally not being done on time included the following: (1) other work may need attention, (2) a case that was transferred from one field office to another may already have missed the review date by the time the second office received it, (3) the alien may be detained at a remote location and not readily available if the deportation officer wants to perform a personal interview, or (4) the case is simply overlooked. ICE field officials did not provide information on how significant or widespread these reasons are for causing a delayed review because they did not track such information.



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Our review of a nongeneralizable sample of 45 case files at ICE's Washington, D.C., field office indicated that in the vast majority of cases, custody reviews were done on time. However, we identified 3 cases where the 180-day post order custody review was not done on time.

- In the first case, an ICE headquarters official told us that the 180-day post order custody review was about 3 months late because they were having difficulty verifying the alien's true identity. After the alien's identity was determined, ICE conducted the custody review and decided to detain the alien because they expected travel documents for the alien to be issued in the reasonably foreseeable future. The alien was removed about 1 month after the 180-day post order custody review.
- The second case involves an alien who had been in detention with a removal order for almost 6 years and for nearly 3 years since the *Zadvydas* decision by the Supreme Court. The alien has not had a post order custody review as required by ICE regulations to determine whether there is a significant likelihood of the alien's removal in the reasonably foreseeable future. ICE records show that the alien has a violent criminal history and, based on a psychiatric evaluation of the alien, mental problems. However, the alien was still in detention and the required post order custody review had not been conducted as of February 2004. An ICE headquarters official said that Cambodian government officials are expected to be in the United States in the near future and may issue travel documents for the alien. Although ICE officials provided an explanation for continuing to detain the alien, they failed to justify why the required post order custody review was not conducted.
- The third case involved an alien who received a final removal order in October 2001 but was held in detention for an additional 21 months. Although the alien's case was transferred to ICE headquarters in May 2002 (i.e., about 180 days after the removal order was issued, as called for in the *Zadvydas* regulations), ICE headquarters did not conduct a custody review for the alien until October 2002—a full year after the alien was ordered removed. The October 2002 custody review resulted in ICE deciding to release the alien provided that he posted a \$2,500 bond as a condition of release. According to an ICE headquarters official, ICE decided to impose a bond because the alien had a violent criminal history and prior parole violations. According to ICE regulations, a bond may be

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required as a condition of release. Because the alien did not pay the bond,<sup>16</sup> he continued to be held in detention for an additional 9 months. In July 2003, ICE removed the alien from the United States. According to an ICE headquarters official, the alien's removal took 21 months because the embassy for the alien's country delayed issuing travel documents until they could confirm his identity.

Because post order custody reviews were not conducted on time in these cases, the possibility exists that ICE did not comply with *Zadvydas* regulations.

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## ICE Is Developing a New Case Management System

Recognizing the inefficient, cumbersome nature of DACS, ICE has begun to develop a new automated detention and removal case management system. According to ICE officials, the new system, called the Enforcement Case Tracking System (ENFORCE) Removal Module (EREM), will be a Web based system that is to be implemented in four phases.<sup>17</sup> The first phase will generally have the same information as DACS, except it will be Web based and add such enhancements as drop-down menus to aid in finding information easily. According to these officials, each successive phase will have additional capabilities. ICE plans to deploy each successive phase in 6-month increments. The officials said that EREM will eventually be able to automatically identify which aliens are due for a post order custody review and generate key information such as when aliens should be notified of the review and when the review is to be done. However, it is unclear when EREM will incorporate these capabilities. According to ICE officials, ICE has encountered challenges in the development of EREM. For example, an ICE official said that in tests, EREM has had problems saving data when multiple users are entering and attempting to save data into the system at the same time. Additionally, the

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<sup>16</sup>The alien's file contained no information indicating that he paid the bond. According to ICE officials, an alien in this situation can request a redetermination of the bond and provide evidence of financial inability. ICE would then reassess the bond requirement and make a decision to reduce the bond amount, release the alien without a bond, or continue to detain him. There was no information in the alien's case file indicating whether or not the alien was informed that he could seek a bond redetermination. According to an ICE official, ICE began notifying aliens in writing in 2003 that they could request a redetermination of a bond amount.

<sup>17</sup>ENFORCE is used to support ICE's tracking and management reporting of enforcement cases. Specifically, the system documents and tracks the investigation, identification, apprehension, detention, and/or removal of alien immigration law violators. EREM is to be a module within ENFORCE, specifically the ENFORCE Removals Module.

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official said that programmers have experienced difficulty trying to incorporate information from a number of DACS screens into a single EREM screen. The implementation date for the first phase, originally scheduled for December 2003, was changed to October 2004. However, in April 2004, ICE was not satisfied with the performance of its contractor. As a result, an ICE official who is tasked with overseeing development of EREM told us that implementation dates for the first and subsequent phases have not been established.

EREM initially will not fully meet ICE's needs because it will not capture information on actions that can legitimately extend the length of time that aliens can be detained. For example, aliens who obtain a stay of their removal by filing a court action can be legitimately detained until the court resolves the alien's case. In such instances, ICE may continue to detain the alien, but the period of time that a stay of removal is in effect does not count toward the 180 days that ICE may keep an alien in detention. ICE officials refer to this as "stopping the deportation clock." Once the court renders a decision and the stay is lifted, the 180-day period begins over again. According to an ICE headquarters official, ICE does not maintain data on the frequency of stays of removal. As of February 2004, ICE had not decided how or when EREM would capture information on events that start and stop the deportation clock in order to calculate when the post order custody review is due.

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### ICE's Case Management System Hampers ICE's Ability to Accurately Determine whether Its Custody Reviews Are Consistent with the *Zadvydas* Decision

ICE is not in the position to determine whether its custody reviews are consistent with the *Zadvydas* decision because ICE managers do not have readily available information on (1) how many post order custody decisions were made during a given period of time, (2) how many of those decisions were made directly pursuant to the *Zadvydas* regulations, and (3) what the results of those decisions were. DACS does not capture data on these activities. According to an ICE headquarters official, ICE has not assessed whether it is in compliance with the *Zadvydas* regulations because to do so would require manually reviewing each case file to obtain the necessary information. ICE officials told us that EREM would capture such data, but they have not yet identified when these specific enhancements will be incorporated into the various phases of EREM deployment.

According to the Comptroller General's standards for internal control, federal agencies need operating information to determine whether an agency is achieving its compliance requirements under various laws and regulations. ICE does not have readily available information to determine

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its compliance with regulations pursuant to the *Zadvydas* decision. Until such information is incorporated into and can be readily retrieved from ICE's case management system, the system will not meet internal control requirements and will continue to hamper ICE's ability to determine the extent to which its custody determinations are consistent with the *Zadvydas* decision.

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## ICE Lacks Assurance that Aliens Released on Orders of Supervision Met the Conditions of Their Release

Regulations implementing the *Zadvydas* ruling require that aliens released because there is no significant likelihood of removal in the reasonably foreseeable future should be supervised and could be returned to custody if the conditions of supervision are violated. ICE's deportation officers are to assure that aliens released on orders of supervision have complied with the conditions of their release. However, DACS is limited in its ability to identify aliens who have been released on an order of supervision and, according to officials in ICE headquarters and at the field locations we visited, staff shortages make it difficult for deportation officers to assure that aliens have met the conditions of their release. Although providing this assurance is one of a number of duties assigned to deportation officers, ICE has not provided deportation officers with guidance on how to prioritize their duties or supervision cases. Consequently, ICE is unable to determine whether and to what extent such aliens who have been released on orders of supervision have met the conditions of their release.

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## Deportation Officers Are to Assure that Aliens Meet the Conditions of Their Release

Deportation officers are tasked with a number of duties in addition to assuring that aliens comply with their orders of supervision. They are responsible for all case management activity once an alien has been brought into ICE custody until the alien has either been physically removed from the United States or has transferred to a status enabling the alien to stay within the United States. Deportation officers' case management duties include

- making alien custody determinations,
- establishing and maintaining liaison with foreign governments and embassies or consulates to arrange for travel documents,
- assisting ICE and U.S. Attorneys in preparing cases where aliens have appealed ICE actions,
- keeping track of whether aliens on orders of supervision have reported in and complied with the conditions of their release, and
- apprehending and arresting aliens who have absconded from ICE custody.

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In addition, deportation officers are responsible for noncase management duties such as jail inspections; serving as hearing officers for special cases, such as Cuban Review Panels; and providing protective custody for aliens (e.g., aliens cooperating with U.S. authorities in the criminal prosecution of others).

When an alien reports to an ICE field office as specified by an order of supervision, the deportation officer is to question the alien about his or her compliance with the conditions of release and record the information in DACS and in the alien's file. Conditions of release include requirements to obey all laws and to periodically report to an ICE office and provide information on compliance with any other conditions, such as continuing efforts to obtain travel documents and notifying ICE of any address change. If the deportation officer determines that the alien failed to report as required, or violated any other condition of release, the officer is to take corrective action, which may include locating and returning the alien to detention.<sup>18</sup>

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### ICE's Case Management System Cannot Automatically Generate Information on Aliens Released on Orders of Supervision

DACS, which is a database containing the names of about 1.7 million aliens whose cases are active,<sup>19</sup> including supervision cases, is limited in its ability to help ICE deportation officers determine whether aliens released on orders of supervision have met the conditions of their release. In part, this is because DACS cannot readily identify which aliens have been released on an order of supervision or automatically notify deportation officers when an alien fails to report to ICE as required by his or her conditions of release. ICE field offices have to perform a case-by-case review to assemble a comprehensive list of aliens on orders of supervision. Officials in 1 field office told us that they recently developed a unique identifying code in DACS to help them identify which aliens have been released on orders of supervision that they are responsible for monitoring. However, such efforts do not overcome DACS's inability to automatically provide deportation officers with a list of aliens who should be reporting

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<sup>18</sup>If an alien violates the conditions of the order of supervision, a complete review of the circumstances surrounding the violation is to occur in order to determine whether to revoke the order of supervision. In addition, an informal interview with the alien is to be conducted so that the alien can respond to the reasons for the revocation. The alien may be detained following the interview and may also be prosecuted for violating the order of supervision.

<sup>19</sup>An active case is one in which either the alien is currently in removal proceedings or the alien's case was closed during the past 2 fiscal years.

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to them. DACS also does not automatically notify the deportation officer that an alien released on an order of supervision has failed to report as required. Instead, once an alien has been released on an order of supervision, the deportation officer is to manually enter the alien's required reporting dates into DACS and then perform a case-by-case DACS query to determine which aliens are due to report in.

ICE officials told us that EREM, the automated case management system that ICE is developing, will help deportation officers monitor whether aliens have met the conditions of their release. The officials said that EREM will eventually have the ability to automatically identify which aliens are released on orders of supervision and will automatically notify deportation officers of the dates that aliens are required to report to them. As noted earlier, however, ICE has encountered delays in developing EREM and did not know when these capabilities would be implemented.

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### ICE Officials Said Staffing Shortfalls and Heavy Workloads Impede Their Ability to Monitor Aliens' Compliance with Orders of Supervision

Officials at each of the 4 field offices we visited identified staffing shortages and heavy workload as factors that impeded deportation officers' ability to monitor aliens' compliance with their orders of supervision. All 4 field office managers and all 4 supervisory deportation officers who were responsible for cases of aliens released on orders of supervision<sup>20</sup> said that they needed additional staff to improve the monitoring of aliens' compliance with orders of supervision. Although he did not provide specific numbers, 1 field office manager told us that deportation officers have so many cases that it is difficult for them to assure alien compliance with orders of supervision. Another manager told us that as of November 2003, the office had 19 deportation officers responsible for approximately 131,000 cases of nondetained aliens, including an estimated 1,200 cases of aliens released on orders of supervision.<sup>21</sup>

All of the 13 deportation officers we spoke with who were responsible for monitoring aliens' compliance with orders of supervision told us that they

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<sup>20</sup>In our field visits, we interviewed 4 supervisory deportation officers who were responsible for cases of aliens released on orders of supervision, 2 of whom were also responsible for post order custody reviews, and an additional 5 supervisory deportation officers who were responsible for post order custody reviews.

<sup>21</sup>Nondetained aliens include those released into the community while still waiting for determination of their immigration status or removal.

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have had difficulty assuring that aliens meet the conditions of their release. For example, 1 deportation officer told us that the large size of his caseload and his numerous additional duties, such as jail inspections, interfered with his ability to monitor released aliens' compliance with their orders of supervision. Similarly, another deportation officer said that he is overwhelmed by his caseload and does not know when aliens are not complying with orders of supervision. He also said that even if he inadvertently learns that an alien is not in compliance with an order of supervision, he does not have time to investigate the case and take the appropriate action.

In one location that we visited, we observed an office area filled with unopened boxes of files. A deportation officer told us that they were the case files of aliens released on orders of supervision and that the deportation officer responsible for those cases had been assigned on a detail out of the office. The deportation officer noted that supervision cases continued to be assigned to the detailed officer even in his absence. He said that no one was monitoring those cases to determine if the aliens had met the conditions of their release. He further told us that the detailed officer's cases were not reassigned to another officer because all the officers were already overwhelmed with their own caseloads.

Our case file review showed that ICE deportation officers do not always know whether aliens have complied with their orders of supervision. In our review of 45 randomly selected cases at the Washington, D.C., field office, we found that 12 aliens had been released on orders of supervision. In 4 of the 12 cases, there was no evidence in the file that the alien had ever reported to an ICE deportation officer; in another 4 cases, there was evidence indicating that the alien reported for some, but not all, of the required reporting times; and in the remaining 4 cases, there was evidence indicating that the alien had reported in for all required reporting times.

DACS data indicate the total number of aliens on orders of supervision increased during a 7-year period, from about 1,300 in fiscal year 1997 to about 16,000 in fiscal year 2003.<sup>22</sup> ICE officials said that although these figures from DACS may not be precise, they believe that they are a reasonable indicator of the growth in supervision cases.<sup>23</sup> However, these

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<sup>22</sup>To provide us with figures on how many aliens were on supervision orders, ICE tasked a contractor with writing a special computer program to generate the information.

<sup>23</sup>ICE could not provide the margin of error for these data.

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estimates do not include deportation officers' case management duties for other nondetained aliens. According to ICE officials, supervision cases are a small percentage of the total caseload of deportation officers, but they did not have data indicating what that percentage was. During the same time period, from fiscal year 1997 through fiscal year 2003, the number of ICE deportation officers on board increased from 461 to 611. Although these figures show that ICE's supervision caseload grew at a faster rate than the workforce assigned to handle the caseload, ICE officials did not know how many deportation officers would be needed to handle the caseload. ICE has acknowledged that its detention and removal program does not have a reliable method for determining what the ratio of cases to deportation officers should be.<sup>24</sup> ICE officials told us that they had not addressed this issue because they believed it would be costly to develop a model that would reliably estimate their deportation officer staffing needs for supervision cases and because of other priorities.

Although deportation officers reportedly have difficulty managing their caseloads, most of the deportation officers we interviewed said that they did not prioritize their order of supervision cases to enable them to focus on the most important ones. Specifically, of the 13 deportation officers we interviewed who were responsible for handling order of supervision cases, 9 said that they did not prioritize their order of supervision cases. Four of the 13 deportation officers said that they did prioritize or had just begun to prioritize their order of supervision cases, but each had established different priorities. For example, 1 deportation officer said that he instructed aliens to report to ICE more frequently if the aliens were from countries that were more likely to provide travel documents so that he could arrange for removal as soon as possible. Another deportation officer said that she instructs aliens with criminal backgrounds to report to ICE more frequently than noncriminal aliens.

Having uniform guidance for ICE officers is important because some released aliens can pose a greater threat to society than others. For example, an alien with a history of violent criminal behavior can potentially be a greater danger to the community than a criminal alien without a violent past or an alien with no criminal history. Although the reportedly large workload of some deportation officers may make it difficult for them to keep track of all supervision cases assigned to them, ICE has not provided them with guidance on how to prioritize their

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<sup>24</sup>*Office of Detention and Removal Strategic Plan, 2003-2012*, ICE, June 2003.



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supervision cases. As a result, there exist potential risks associated with such aliens being released into U.S. communities. Determining how to mitigate such risks would entail considering factors such as the significance of the risk and the likelihood or frequency of its occurrence. Such an approach could help ICE determine how deportation officers should prioritize their supervision cases when job demands prevent them from doing a consistent and thorough job of assuring alien compliance with orders of supervision.

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## ICE Has Had Some Success Working with the Department of State When Travel Documents Are Difficult to Obtain

ICE's ability to deport removable aliens is impeded when the aliens' governments refuse to provide or delay providing travel documents for them. ICE headquarters and field officials said that difficulties with obtaining travel documents is the major problem they encounter in attempting to remove aliens with a final removal order. The difficulty in obtaining travel documents has a direct impact on the number of aliens who either remain in detention or are released on orders of supervision.

The process of obtaining travel documents can be complex and time-consuming. ICE headquarters and field officials cited a variety of reasons why governments may not want to issue a travel document for their nationals, and these reasons may vary for aliens from the same country depending on the individual alien's circumstances. For example, if aliens have not lived in their country of origin for a long period of time, their government may delay issuing the travel document until it has assurance that the aliens will have the means to support themselves when they are returned. The government may also want to ensure that it can keep track of aliens with criminal backgrounds. In its Detention and Removal Strategic Plan, ICE noted that the political environment in various countries can also affect their travel document policies.

According to ICE officials, several countries have consistently refused to issue travel documents or delayed issuing them, thereby limiting ICE's ability to return aliens to these countries. Specifically, ICE officials mentioned that they have significant problems obtaining travel documents from Cuba, Laos, Vietnam, China, India, Jamaica, former Soviet Republics, Iraq, Iran, Eritrea, Ethiopia, Poland, and Nigeria. Table 1 shows the numbers of aliens from Laos and Vietnam with removal orders categorized by the criminality and detention status of the aliens as examples of two countries where ICE officials reported significant problems obtaining travel documents.

**Table 1: Removable Aliens from Laos and Vietnam Awaiting Travel Documents as of February 8, 2004**

Country	Number of detained aliens with removal order	Number of nondetained aliens with removal order
<b>Laos</b>	<b>101</b>	<b>2,395</b>
Criminal	96	1,715
Noncriminal	5	680
<b>Vietnam</b>	<b>301</b>	<b>4,467</b>
Criminal	298	4,243
Noncriminal	3	224

Source: ICE DACS data.

Of the 402 aliens from Laos and Vietnam who were in detention as of February 8, 2004, 97 had been in detention at least 180 days after their removal orders.<sup>25</sup>

According to ICE officials, China and India have a slow process for verifying the alien’s identity. The officials said that Chinese consulates in the United States need approval from the Chinese central government prior to issuing any travel documents and that Chinese consulates can vary in how long it takes them to issue travel documents. ICE officials told us that Chinese policies and guidelines for issuing travel documents change frequently and this contributes to delays in issuing travel documents. An ICE official said that it takes Chinese consulates at least 2 to 3 months to issue travel documents, but that in most cases it takes longer. With respect to India, ICE officials said that India has a slow, complex process for verifying an alien’s citizenship. The officials said that although India has made some changes in its process for issuing travel documents, the process can still result in wait times that average between 6 and 8 months.

The Departments of Homeland Security and State have signed a formal agreement to, among other things, foster collaboration with each other in dealing with foreign governments that refuse to issue or delay issuing travel documents for their nationals. Specifically, if a foreign country continues not to cooperate in issuing travel documents for its nationals, the Secretary of Homeland Security may notify the Secretary of State of this situation. When notified, the Secretary of State is to order U.S.

<sup>25</sup>According to the ICE official who provided the data, DACS does not contain data on whether a removal order was final.

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consular officers in the foreign country to discontinue issuing visas enabling citizens of those countries to come to the United States.<sup>26</sup> ICE and State officials told us that this occurred on only one occasion. On September 7, 2001, the Attorney General requested that the Secretary of State impose sanctions on Guyana for refusing or unreasonably delaying issuing travel documents for its nationals. On October 10, 2001, State discontinued granting nonimmigrant visas to employees of the government of Guyana, their spouses, and their children. Within 2 months, the government of Guyana issued travel documents to 112 of the 113 Guyanese aliens who had been ordered removed from the United States.<sup>27</sup> On December 14, 2001, State lifted the visa sanction against Guyana.

ICE and State officials said that diplomatic, trade, and financial issues may weigh against a decision to restrict visas. ICE and State officials have expressed concern that applying visa sanctions can have a negative impact on U.S. foreign and economic relations with other countries. ICE and Department of State officials told us that the informal threat of sanctions has been successfully used as leverage in negotiating an agreement with one foreign country to facilitate the removal of its nationals ordered removed from the United States.

ICE has successfully worked with the Department of State to develop a formal agreement with one foreign government for obtaining travel documents for its nationals. Specifically, ICE and State collaborated to develop a formal agreement with the government of Cambodia. A memorandum of understanding between the United States and Cambodia, signed on March 22, 2002, laid out plans for establishing and operating a joint commission on repatriation for certain removable aliens. An addendum to the agreement, signed on August 27, 2003, allows ICE to compensate Cambodia \$300 per alien for the travel document application, document search, verification expenses, and in-country relocation travel expenses. The agreement also allows State to reimburse a Cambodian nongovernmental organization of the department's choice \$650 per alien for expenses related to the aliens' reintegration into Cambodian society.

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<sup>26</sup>Section 243 (d) of the Immigration and Nationality Act (8 U.S.C. § 1253(d)) and the memorandum of agreement between DHS and the State Department prescribe how this action should be taken. Prior to the creation of the DHS in 2003, the Attorney General had this responsibility.

<sup>27</sup>One individual had died.

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The Cambodian government and the U.S. Embassy are to jointly monitor the activities of the nongovernmental organization. The work of this commission resulted in 78 Cambodians being removed from the United States by January 20, 2004. Although 78 aliens were removed, ICE data indicated that, as of February 2004, 1,203 Cambodians with removal orders remained in the United States. Of these, 945 were criminal aliens and 258 were noncriminal aliens; 109 were in detention and 1,094 were not detained. Of the 109 Cambodians in detention, 41 had been detained for more than 180 days after the removal order. ICE and State officials said that they have been working informally to negotiate an agreement with another country.

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## Conclusions

ICE lacks complete, accurate, and readily available information to help it assure that custody decisions are made in a timely fashion and the regulations implementing *Zadvydas* are adhered to. Currently, ICE does not know the extent to which aliens may or may not be accorded the right to be released from detention as the Supreme Court intended. In 3 out of 45 cases, our work raised questions about whether custody review decisions were consistent with the decision and implementing regulations. Although ICE intends to deploy a new automated case management system, it has not developed specific plans that would indicate whether the system will meet internal control standards required for federal agencies and whether, or when, deficiencies discussed in this report will be addressed. ICE deportation officers need readily available, reliable data on aliens who are due for post order custody reviews to help assure that aliens are not kept in detention longer than is necessary. Better data would also assist ICE in effectively managing and overseeing its compliance with the *Zadvydas* regulations.

ICE also faces challenges in assuring that aliens released on orders of supervision have met the conditions of their release. Among other things, ICE's case management system does not assist deportation officers in efficiently identifying supervision cases, and a reported shortage of deportation officers suggests it may be difficult for them to perform all of their assigned duties. ICE does not know how many cases deportation officers should manage or how many deportation officers it needs to consistently monitor all supervision cases. Without accurate and reliable data to inform its human capital decisions, ICE will not be able to make informed judgments about its staffing needs for monitoring released aliens' compliance with orders of supervision. Despite its reported shortage of deportation officers, ICE has not prioritized the duties or

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supervision cases of these officers. Establishing priorities would help ICE focus on those aliens who require more careful monitoring than others and potentially help ICE manage the risk of releasing potentially dangerous aliens into communities.

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## Recommendations for Executive Action

To help assure that ICE's custody reviews are consistent with the *Zadvydas* decision and implementing regulations, and to promote the effective supervision of released aliens, we recommend that the Secretary of DHS direct the Assistant Secretary for ICE, consistent with the department's evolving systems integration strategy, to take the following three actions:

- Ensure that ICE has complete, accurate, and readily available information on (1) all detained aliens for whom 90- and 180-day post order custody reviews are due, (2) how many post order custody reviews have been made pursuant to the *Zadvydas* regulations and what decisions resulted from those reviews, (3) which aliens are released on orders of supervision, and (4) when aliens released on orders of supervision are required to report to an ICE deportation officer.
- Develop a methodology for assessing how many staff are needed to manage the supervision caseload and other duties assigned to deportation officers, and use the results to support funding and staffing requests.
- Develop and disseminate guidance that will enable deportation officers to prioritize ICE's caseload of aliens on orders of supervision so that ICE can focus limited resources on supervising aliens who may be a threat to the community or who are not likely to comply with the conditions of their release.

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## Agency Comments and Our Evaluation

We provided a draft of this report to the Secretary of DHS and the Assistant Secretary for ICE for comment. On behalf of DHS, the Assistant Secretary for ICE provided written comments on a draft of this report that are reproduced in appendix IV. ICE concurred with all three of our recommendations and discussed actions it will take to implement them.

In the short term, ICE plans to utilize its existing DACS to maintain complete, accurate, and readily available information on detainee cases. This will include additional guidance and training for field offices and a headquarters review of all *Zadvydas* cases. In the long term, ICE plans to develop EREM as a new case management system that incorporates the information we recommend in this report.

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The Assistant Secretary also said that ICE will develop a methodology and model to assess the number of staff necessary to effectively manage its alien docket and use the results of this assessment to support funding and staffing requests, as we recommended. ICE also will review current guidance and make necessary changes to ensure that deportation officers are able to prioritize their caseload of aliens released on orders of supervision. He stressed that ICE seeks to manage and properly supervise *Zadvydas* cases and is exploring the use of alternatives to detention to determine whether they may be applied to these cases.

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As arranged with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies of this report to the Secretary of the Department of Homeland Security and interested congressional committees. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>. Major contributors to this report are listed in appendix V.

If you or your staffs have any questions concerning this report, please contact me on (202) 512-8777.



Richard M. Stana  
Director, Homeland Security  
and Justice Issues

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# Appendix I: Objectives, Scope, and Methodology

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With reference to how the U.S. Immigration and Customs Enforcement Bureau (ICE) has implemented the *Zadvydas v. Davis* decision, this report addresses the following objectives: (1) What information does ICE have to assure that custody reviews are timely and result in decisions that are consistent with the *Zadvydas* decision and implementing regulations? (2) How has ICE assured that aliens released on orders of supervision have met the conditions of their release? (3) When foreign governments refuse or delay issuing travel documents for the aliens to be removed to their countries, what efforts has ICE made to overcome these obstacles, and what are the results of those efforts?

To address the first two objectives, we interviewed officials at ICE headquarters and its Washington, D.C.; Los Angeles, Calif., Chicago, Ill., and New Orleans, La., field offices. We visited these field offices because they had relatively large numbers of aliens who were detained for longer than 180 days and they were geographically dispersed. We interviewed 11 ICE managers of field offices and detention facilities. Four of these 11 were responsible for post order custody reviews and supervision cases. Seven of the 11 were responsible only for post order custody reviews because they were detention facility managers. Also, we interviewed 9 supervisory deportation officers. Two of the 9 were responsible for post order custody reviews and supervision cases. Five of the 9 were responsible for post order custody reviews and 2 were responsible for supervision cases. We interviewed 28 deportation officers. Fifteen of the deportation officers were responsible for post order custody reviews and 13 were responsible for supervision cases. We also reviewed a randomly selected sample of 45 out of 140 case files of long-term detainees at ICE's Washington, D.C., field office. Because ICE officials told us that ICE does not maintain a database of cases that meet the *Zadvydas* standard, we asked ICE for a list of aliens with final removal orders who either (1) were being held in ICE detention for at least 180 days as of March 3, 2003, when ICE developed the list of cases or (2) had been held in ICE detention for at least 180 days but were released from detention or removed from the United States between July 1, 2001, and March 3, 2003. This list would contain the population of cases that would most likely be cases eligible for post order custody reviews using the *Zadvydas* standard. Because the Deportable Alien Control System (DACS) does not identify whether an order of removal is final or not, the list consisted of aliens with orders of removal, but not necessarily final orders of removal. According to an ICE official, the list also did not include thousands of cases where the date of the order of removal was missing from DACS because it was not possible to compute the number of days in detention since the removal order in such cases. Of 5,739 cases that ICE generated using this criteria, 140 were

listed as being assigned to the Washington, D.C., field office. We randomly selected 50 cases from the 140 and asked ICE to provide us with its case files. ICE was unable to provide us the case files of 5 of the 50 cases that we requested because the files could not be located at the time of our file review. Using a structured data collection instrument (DCI), we reviewed the remaining 45 case files to determine the timeliness of post order custody reviews and ICE's efforts to monitor aliens' compliance with orders of supervision. Some of the questions on our DCI were intended to check the accuracy of the DACS data used to produce the case list, and from these questions we determined that these cases were correctly selected. The information obtained from the case file review may not be generalized to all long-term detainee cases in ICE's Washington, D.C., office or to ICE nationwide. We assessed whether ICE's case management system met the Comptroller General's standards for internal control for federal agencies. We also interviewed ICE's Office of Detention and Removals Acting Chief for Program Analysis and Information Technology regarding the development of ICE's new case management system. We reviewed available documentation regarding the implementation of post order custody reviews at ICE headquarters and its field offices. We also reviewed available documentation regarding how ICE monitors aliens' compliance with orders of supervision.

To determine what efforts ICE has made to overcome obstacles when governments refuse or delay the issuance of travel documents, we reviewed available documentation, interviewed ICE headquarters and field officials, and interviewed Department of State officials regarding their coordination with ICE in obtaining travel documents for removable aliens.

We conducted our review from December 2002 to March 2004 in accordance with generally accepted government auditing standards.



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# Appendix II: ICE's Basic Custody Review and Supervision Process for Long-Term Detainees with Final Orders of Removal

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ICE deportation officers are to conduct custody reviews for aliens who have been in detention for 90 days after the aliens receive a final order of removal. This initial 90-day detention period is referred to as the "removal period." Specifically, the post order custody review process calls for a number of steps to occur:

- Aliens are to be served a Notice of Review for the initial post order custody review approximately 30 days in advance of the pending review. This notice is to provide instructions to the alien on evidence or documentation that may be considered during the 90-day post order custody review. If the alien or his or her representative requests additional time to prepare materials, then the requirement that the custody review occur before the end of the 90-day removal period may be waived. The deciding official may base the post order custody review solely on a file review or may augment the file review with a telephone, videoconference, or personal interview.
- The initial 90-day post order custody review decision is to be made by the ICE field office having jurisdiction over the alien.<sup>1</sup> At that point, if a travel document is not available to return the alien to his or her country, ICE may decide to continue to hold the alien in detention or release the alien into the community subject to conditions of release.<sup>2</sup>
- When the field office advises the alien at the 90-day post order custody review that he or she will remain in custody pending removal, ICE is to conduct a second post order custody review once the alien has served a total of 180 days in detention.<sup>3</sup>

Factors that affect the manner in which the alien's days in detention are calculated include the following:

- If the alien has filed a court action and is granted a stay of removal, then the "deportation clock" stops. That is, the counting of the days in detention is stopped while the stay of removal is in effect, and, based on the results of a post order custody review, ICE may continue to detain the alien until the court decides the alien's case. Once the court case is

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<sup>1</sup>8 C.F.R. § 241.4(c)(1).

<sup>2</sup>8 C.F.R. § 241.4(j)(1).

<sup>3</sup>8 C.F.R. § 241.4(k)(2)(ii).

resolved, the removal period starts over again, with the date of the court decision counting as the first day of detention.<sup>4</sup>

- If the alien fails or refuses to make timely application for travel documents necessary for his or her departure, or otherwise conspires or acts to prevent his or her removal, the removal period is suspended until the alien begins to cooperate in facilitating his or her own removal.<sup>5</sup>

In December 2000, ICE published a regulation to centralize the custody review process at ICE headquarters for certain detainees with final removal orders. Specifically, the regulation called for the District Directors to conduct the initial custody determination prior to the expiration of the 90-day removal period. After the 90-day period, at the discretion of the field offices, an alien's case could be referred to ICE headquarters or retained in the field. ICE field offices were to refer the alien's case to headquarters when the alien completed 180 days in detention following a final order of removal. ICE established a headquarters Post-Order Detention Unit (HQPDU) to make all future custody determinations after the referral.

In its June 2001 ruling in *Zadvydas v. Davis*, the U.S. Supreme Court concluded that detaining aliens for up to 6 months following a final order of removal is "presumptively reasonable." Otherwise, except when "special circumstances" exist, the alien must be released on an order of supervision. Special circumstances that justify continued detention beyond 180 days occur when (1) the alien has a contagious disease, (2) the alien is deemed "specially dangerous," for example, having a mental condition that predisposes him or her to be violent, (3) the alien's release poses adverse foreign policy consequences, or (4) the alien poses a threat to national security. The Court also held that the alien may be held in detention past the 6-month period if the government determines that there is a significant likelihood of his or her removal in the reasonably foreseeable future. Aliens may also be kept in detention if they fail to cooperate with the removal process.

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<sup>4</sup>8 U.S.C. § 1231(a)(1)(B)(ii).

<sup>5</sup>8 U.S.C. § 1231(a)(1)(C).

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## Factors That Affect Aliens' Release from Detention after the 90-Day Post Order Custody Review

The 90-day post order custody review may result in a decision to further detain or to release the alien. Factors that would result in a decision to continue to detain the alien include (1) the alien not complying with requirements to assist in his or her removal,<sup>6</sup> (2) a significant likelihood of removing the alien in the reasonably foreseeable future, and/or (3) the alien being considered a threat to the public or a flight risk if released. When none of these three conditions exists, the alien is to be released from detention on an order of supervision with required conditions.

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## Factors That Affect Aliens' Release from Detention after the 180-Day Post Order Custody Review

The 180-day post order custody review may result in a decision to further detain or to release the alien. Aliens fall into either of two categories: those who do or do not qualify for a post order custody review under the *Zadvydas* regulations.

- The following categories of aliens do qualify under the *Zadvydas* regulations: aliens ordered removed from the United States who either initially entered legally or those who entered without inspection. If ICE deportation officers (1) do not expect travel documents for an alien to be forthcoming in the reasonably foreseeable future and (2) no "special circumstances" exist, then the alien is to be released from detention even if he or she is deemed a threat to the community or poses a flight risk.<sup>7</sup>
- The following categories of aliens do not qualify for review under the *Zadvydas* regulations: (1) aliens who do not cooperate with ICE in facilitating the process of obtaining their travel documents; (2) arriving aliens (e.g., stopped at the border, granted temporary permission to enter

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<sup>6</sup>If an alien refuses to make timely application for travel documents or conspires or acts to conspire to prevent his or her removal, the alien's removal period is to be extended, and the alien may remain in detention during such extended period. A post order custody review is to be done and a Notice of Failure to Comply is to be served on the alien advising him or her of the reason for the extension of the removal period and the actions needed to restart the calculation of the removal period. Aliens are to be considered for criminal prosecution if they fail to cooperate with the removal process.

<sup>7</sup>In all "special circumstances" cases that fall into the category of "contagious disease" or "specially dangerous," HQPDU is to refer the case to the Public Health Service for certification of the condition. For an alien determined to be "specially dangerous" by ICE headquarters, the decision to detain is to be forwarded to an immigration judge for review. If the judge rules against ICE, then ICE may appeal the case to the Board of Immigration Appeals.

the United States, or Mariel Cubans<sup>8</sup>); and (3) aliens who are ordered removed by the Alien Terrorist Removal Court pursuant to Title 5 of the Immigration and Nationality Act.<sup>9</sup> This group of aliens, with the exception of Mariel Cubans, is subject to the 90-day post order custody review criteria—which enable ICE to continue the alien's detention if the alien is deemed a threat to the community or a flight risk.<sup>10</sup> When neither of these two conditions applies, the alien should be released from detention on an order of supervision.

Aliens who received a review pursuant to the *Zadvydas* regulations but were denied release can request additional post order custody reviews under the *Zadvydas* criteria every 6 months.

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## Orders of Supervision

All aliens released based on a post order custody review are to be released on an order of supervision, specifying conditions the alien is to meet. An order of supervision includes the following conditions, among others. The alien is

- required to appear before an immigration officer periodically for identification;
- required to submit, if necessary, to a medical and psychiatric examination at the expense of the U.S. government;
- to continue efforts to obtain a travel document and assist ICE in obtaining a travel document;
- to obtain advance approval of travel beyond previously specified times and distances; and
- to provide ICE with written notice of any change of address within 10 days of the change.

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<sup>8</sup>“Mariel Cubans” are a group of approximately 129,000 aliens who fled Cuba by boat in 1980 and attempted to enter the United States without documentation. Most of these aliens have been in the United States since that time and, in some instances, paroled into the community. They are not considered to have legally entered the United States. Custody determinations for Mariel Cubans are made by Cuban Review Panels under the procedures in 8 C.F.R. §212.12.

<sup>9</sup>The Alien Terrorist Removal Court was established in 1996 by the Antiterrorism and Effective Death Penalty Act of 1996 (8 U.S.C. §§ 1531-37).

<sup>10</sup>Mariel Cubans have their own Review Panel separate from this post order custody review process.

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**Appendix II: ICE's Basic Custody Review and Supervision Process for Long-Term Detainees with Final Orders of Removal**

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An order of supervision may also include any other conditions that HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal.

Any alien who has been released on an order of supervision who violates any of the conditions of release may be returned to custody and may be subject to a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.<sup>11</sup> In some cases, HQPDU can refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may then be detained for an additional 6 months in order to effect the alien's removal, if possible.

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<sup>11</sup>8 U.S.C. § 1253(b).

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# Appendix III: Description of the Supreme Court's *Zadvydas v. Davis* Decision

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In *Zadvydas v. Davis*, the U.S. Supreme Court ruled on one aspect of the lawfulness of indefinite detention.<sup>1</sup> The Court held that Section 241(a)(6) of the Immigration and Nationality Act, (8 U.S.C. 1231(a)(6)),<sup>2</sup> read in light of due process protections for aliens who have been admitted to the United States, generally permits the detention of aliens who are under a final order of removal only for a period reasonably necessary to bring about their removal from the United States. The Court held that detention of such aliens beyond the statutory removal period, for up to 6 months after entry of a final removal order, is “presumptively reasonable.” After 6 months, if an alien can provide “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,” the government must rebut the alien’s showing to continue the detention. If the government cannot meet that standard, then in general, the government must release the alien. Finally, the Supreme Court indicated that there may be cases involving “special circumstances,” such as terrorists or other especially dangerous individuals in which continued detention might be appropriate even if removal is unlikely in the reasonably foreseeable future.

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## Attorney General Guidance and Regulations

In July 2001, about 3 weeks after the Supreme Court’s *Zadvydas* decision, the Attorney General issued interim guidance for releasing detainees who were covered by *Zadvydas*. According to this guidance, arriving aliens and aliens ordered removed on an order of exclusion do not fall within the classes of aliens covered by the decision. For example, aliens seeking

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<sup>1</sup>533 U.S. 678 (2001).

<sup>2</sup>Section 1231(a)(6) provides that: “An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title [for violations of nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).”

Kestutis Zadvydas, a resident alien of the United States, was born apparently of Lithuanian parents in a displaced persons camp in Germany in 1948. At the age of 8, he immigrated to the United States with his parents and other family members and has lived here since. He has a long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft. In 1994, he was ordered removed because of a conviction for possession of cocaine with intent to distribute, a crime under section 1227(a)(2). However, Germany would not accept Zadvydas because he was not a German citizen and Lithuania refused to accept him because he was neither a Lithuanian citizen nor a permanent resident of that country. The government also tried unsuccessfully to remove him to the Dominican Republic (Zadvydas’s wife’s country).

admission, excludable aliens, Mariel Cuban parolees, and other parolees would not be covered by the Supreme Court's analysis.<sup>3</sup> ICE issued interim regulations in November 2001 amending the custody review process governing the detention of aliens subject to a final order of removal.<sup>4</sup>

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## Judicial Application of *Zadvydas* Standards

Many aliens have filed lawsuits demanding relief under *Zadvydas* from indefinite detention. A brief discussion of some of the issues that have been litigated and the courts' rationale for their holdings follows:

In order to be granted relief from post removal order detention pursuant to *Zadvydas*, an alien must make a two-part showing. See *Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1362, 1363 (N.D. Ga. 2002), relying on *Akinwale v. Ashcroft*, 287 F. 3d 1050 (11th Cir. 2002):

1. The alien must first show that he or she has been detained beyond the 6-month period that the U.S. Supreme Court declared to be a presumptively reasonable time to detain a removable alien awaiting deportation;
2. The alien must provide good reason to believe that there is no likelihood of removal in the reasonably foreseeable future.

Regarding the first point, there has been litigation on the calculation of the 6-month period. As discussed in the *Fahim* case cited above, a 6-month custodial period of time following the order of removal must have elapsed prior to the filing of a *habeas corpus* petition challenging the confinement under *Zadvydas*. In *Fahim*, the court concluded that the 6-month period was tolled<sup>5</sup> during the time the alien acted to prevent his removal. In support of this conclusion, the court cited 8 U.S.C. 1231(a)(1)(C), which

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<sup>3</sup>Memorandum from Attorney General to the Acting Commissioner, INS, re Post-Order Custody Review After *Zadvydas v. Davis*, July 19, 2001.

<sup>4</sup>Interim Regulations, Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg., 56969 (2001).

<sup>5</sup>"Tolled" means to suspend or stop temporarily.

provides that the “removal period shall be extended...if the alien...acts to prevent the alien’s removal subject to an order of removal.”<sup>6</sup>

There has also been litigation on whether the decision rendered by the Immigration judge was a final order. For instance, in *Habtegabrer v. Jenifer*, 256 F. Supp. 2d 692 (E.D. Mich. 2003), the court concluded that the alien’s order of removal became final on the date that the immigration judge determined that the alien was removable and issued the removal order. Thus, the presumptively reasonable 6-month period for the alien’s detention following the removal order commenced on that date, rather than on the date that the alien withdrew his appeal of the removal order to the Board of Immigration Appeals.

Regarding the second point, courts have held that an alien must provide good reason to believe there is no likelihood of removal in the reasonably foreseeable future. In making this determination, courts have taken into account the amount of time the alien has been in custody, the actions of the foreign government in responding to requests for travel documents, and the actions of the government. Also, where appropriate, the courts have taken into account whether the petitioner has cooperated in seeking to obtain the requisite travel documents.

In *Kacanic v. Elwood*, 2002 WL 31520362 (E.D. Pa. Nov. 8, 2002), the federal district court found that the alien had shown good reason to

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<sup>6</sup>The district court explained the pertinent dates as follows: on Feb. 27, 2001 the Board of Immigration Appeals dismissed the alien’s appeal, which the alien construes as the date that his removal order became final. The alien filed the present petition on February 6, 2002, which is almost a year after the order of removal became final. Typically, one would count 6 months from the date of this final order of removal to reach the date on which detention would no longer be presumptively reasonable. With such a calculation, the alien contends that he was in custody for 1 year prior to filing his petition. However, the alien filed a petition for review of the order of removal with the Eleventh Circuit on March 27, 2001. It was dismissed on January 9, 2002. The court concluded that only a 1-month period of detention had elapsed—from January 2, 2002 to February 6, 2002—when the alien filed the current petition.

The court noted that the alien might well argue that even though his 6-month period of detention had not run when he first filed his *habeas* petition with this court in February 2002, it has certainly run by the present time, almost 8 months later. However, the district court noted that the 6-month period of time must have expired at the time the *habeas* petition was filed in order to state a *Zadvydas* claim. Citing *Akinwale*, the court explained that an alien who is attempting to avoid deportation should not properly be able to count the time spent litigating that attempt as part of the detention period spent waiting for actual physical removal to his native country. 227 F. Supp. 2d at 1363-1365.



believe that he would not be removed in the reasonably foreseeable future. In reaching this conclusion, the court relied on the amount of time that the alien had already spent in custody, the inaction of the Yugoslavian Embassy, and the admissions of the government. At the time of the litigation, the alien had spent 1 year in detention awaiting his removal. The court also found that for 10 months, the foreign consulate had been in possession of all the information the government was capable of providing. The court pointed out that during this time the consulate never stated that the alien was likely to be granted travel documents. Nor had the consulate even been able to tell the government when a decision would be reached and never offered any reason why obtaining travel documents in this case took longer than normal. The court concluded that considering this lack of any definitive answer, or any indication that a definitive answer was likely soon, there was no legitimate reason to believe that removal would occur in the reasonably foreseeable future.<sup>7</sup> The court also concluded that the government failed to present competent evidence to rebut the alien's showing that there was no significant likelihood that removal would occur in the reasonably foreseeable future. "[O]ther aliens having been removed to Yugoslavia in the past is not a credible indication [as the government argued] that *this* alien will be removed in the near future." The court concluded, "[i]t simply does not follow from the fact that Yugoslavia has not said "no" that they must be ready to say "yes" within the foreseeable future." The court noted several delays in government efforts to remove the alien activity and concluded that the lack of effort "only reinforces this Court's conclusion that removal in the near future does not seem likely." 2002 WL 31520362 at \*3-5.

Another district court reached the opposite conclusion in *Lema v. INS*, 214 F. Supp. 2d 1116 (W.D. Wash. 2002). In *Lema*, the court determined that in this particular instance, the continuing failure of a destination country to respond to a request for travel documents did not provide the court with "good reason to believe" that deportation is not likely in the reasonably foreseeable future. The court reasoned that the government and the alien, working together, should be able to convince the government of Ethiopia that the alien is in fact, a native of that country. More specifically, the court provided that the "[p]etitioner [the alien] has provided no reason to believe that, once Ethiopia's legitimate concerns are

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<sup>7</sup>See also *Mohamed v. Ashcroft*, 2002 U.S. Dist. LEXIS 16179 (W.D. Wash. April 15, 2002) and *Okwilagwe v. INS*, 2002 U.S. Dist. LEXIS 3596 (N.D. Texas March 2, 2002). The courts in these cases also found that the lack of a definite answer from the foreign consulate indicated that no removal was likely in the reasonably foreseeable future.

addressed, travel documents will not issue in the foreseeable future. Of course, overcoming the Ethiopian government's current misunderstanding (which has undoubtedly been memorialized in various reports and decision documents) may take some time and effort, but petitioner's [the alien's] deportation remains reasonably foreseeable even though it may not happen quickly." *Lema*, 214 F. Supp. 2d at 1118.

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## Judicial Action Regarding the Expansion of the *Zadvydas* Holding

There have been lawsuits petitioning courts to extend the *Zadvydas* holding to cover inadmissible aliens stopped at the border while attempting to enter.<sup>8</sup> Recent decisions in the U. S. Courts of Appeals for the Ninth<sup>9</sup> and Sixth Circuits<sup>10</sup> have applied the Supreme Court's analysis in *Zadvydas* to these aliens.

The government's position has been that the *Zadvydas* holding is limited to those aliens who had been "admitted" or gained "entry" into the United States. It interprets the Supreme Court's ruling as not governing those aliens who are legally still at our borders as arriving aliens. This would include those who have been paroled into the country such as the Mariel Cubans, who are treated as still seeking admission.<sup>11</sup>

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<sup>8</sup>The category of inadmissible aliens includes arriving aliens and any alien ordered removed under an order of exclusion. For example, this includes aliens seeking admission, excludable aliens [aliens barred from entry under 8 U.S.C. §1182(a)], Mariel Cuban parolees and other parolees. Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, to Regional Directors, Interim Guidance-*Zadvydas v. Davis*, July 19, 2001.

<sup>9</sup>*Xi v. INS*, 298 F.3d 832 (9th Cir. 2002).

<sup>10</sup>*Rosales-Garcia v. Holland*, 322 F. 3d 386 (6th Cir. 2003), petition for a writ of *certiorari* denied, 71 U.S.L.W. 3789 (U.S. June 23, 2003) (No. 02-1464). (A writ of *certiorari* is a petition to the Supreme Court to hear an appeal of a case.)

<sup>11</sup>Cuban nationals who attempted to enter the United States without documentation permitting them legal entry, as part of the 1980 Mariel boatlift, have been physically present in the United States since that time and in some instances paroled into the community. However, they are legally considered to be detained at the border and hence as never having effected entry into the United States.

The U.S. Courts of Appeals for the Third, Fifth, Seventh, Eighth, and Eleventh Circuits have issued decisions that agree with the government's interpretation of *Zadvydas*.<sup>12</sup>

The U.S. Courts of Appeals in the Ninth and Sixth Circuits, however, have taken a different view. In *Rosales-Garcia*, the Court of Appeals for the Sixth Circuit acknowledged that the aliens it was dealing with were inadmissible, unlike the aliens in *Zadvydas* who were removable. Nonetheless, the court concluded that the holding in *Zadvydas* extended to inadmissible aliens because the Supreme Court interpretation of section 1231(a)(6) made no distinction among the categories of aliens listed. That is, the holding addresses the statute as a whole and thus applies to not just removable aliens—but to all the categories of aliens listed in section

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<sup>12</sup>*Sierra v. Romaine*, 347 F. 3d 559 (3d Cir. 2003); *Rios v INS*, 324 F. 3d 296 (5th Cir. 2003); *Hoyle-Mesa v. Ashcroft*, 272 F. 3d 989 (7th Cir. 2001); *Borrero v. Aljets*, 325 F. 3d 1003 (8th Cir. 2003); and *Benitez v. Wallis*, 337 F. 3d 1289 (11th Cir. 2003). The aliens in all of these cases were Mariel Cubans who, as such, had never been granted admission to the United States. The Courts of Appeals held that the presumptive 6-month limit to the post-removal period of detention set forth in *Zadvydas* did not apply to nonadmitted aliens. The cases concluded that the *Zadvydas* decision did not affect the government's long-standing authority to detain nonadmitted aliens.

On October 14, 2003, the petitioner Benitez filed a petition to the U.S. Supreme Court for a writ of *certiorari*. On January 16, 2004, the Supreme Court granted the petition. 2004 U.S.L.W. 67860 (U.S. Jan. 16, 2004) (No. 03-7434). The case will be argued before the Supreme Court in April 2004, with a ruling to be issued before July 1, 2004.

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1231(a)(6). Therefore, in *Rosales-Garcia*, the U.S. Court of Appeals for the Sixth Circuit concluded that the implicit reasonable time limitation applies to aliens who are inadmissible under section 1182.<sup>13</sup>

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<sup>13</sup>The U.S. Court of Appeals for the Ninth Circuit reached this same conclusion in *Xi v. INS*, 298 F. 3d 832 (9th Cir. 2002). The court concluded that the holding of *Zadvydas* applies to aliens deemed inadmissible. Xi was a citizen of China. The U.S. Coast Guard apprehended Xi off the coast of Guam on a boat that was being used to smuggle aliens in violation of U.S. immigration laws.

# Appendix IV: Comments from the Department of Homeland Security

Office of the Assistant Secretary

U.S. Department of Homeland Security  
425 I Street, N.W.  
Washington, D.C. 20536



U.S. Immigration  
and Customs  
Enforcement

May 17, 2004

Richard M. Stana  
Director, Homeland Security and  
Justice Issues  
U.S. General Accounting Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Stana:

We have received your draft report, *Immigration Enforcement: Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention GAO-04-434 (440174)* and appreciate being provided the opportunity to comment. Below we have commented on each recommendation as well as on information presented in the report.

**Recommendation 1: Ensure that ICE has complete, accurate, and readily available information on (1) all detained aliens for whom 90- and 180-day post order custody reviews are due, (2) how many post order custody reviews have been made pursuant to *Zadvydas* regulations and what decisions resulted from those reviews, (3) which aliens are released on orders of supervision, and (4) when aliens released on orders of supervision are required to report to an ICE deportation officer.**

We concur and the Office of Detention and Removal Operations is currently developing a new case management system (ENFORCE Removals Module (EREM)) and the requirement for this recommendation has been incorporated into the functional requirements documentation of this new system. Development of EREM is a high priority, but performance issues have caused the delay of the implementation of EREM until fiscal year 2005, thus making it a long-term solution to this problem.

ICE will continue to utilize the existing Deportable Alien Control System (DACS) to maintain complete, accurate, and readily available information on these cases. ICE has issued guidance to the field on specific procedures that must be followed in *Zadvydas* cases, as well as implemented a DRO headquarters review function for all *Zadvydas* cases. ICE is developing additional guidance and training to assist the field offices in meeting this requirement.

Richard M. Stana  
Page 2

**Recommendation 2: Develop a methodology for assessing the number of staff needed to manage the supervision caseload and other duties assigned to deportation officers, and use the results to support funding and staffing requests.**

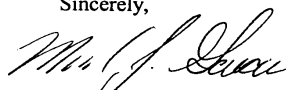
We concur and the Office of Detention and Removal Operations will develop a methodology and model to assess the number of staff necessary to effectively manage the alien docket, which includes aliens released on an order of supervision, as well as performing other duties for which deportation officers are responsible. The results of this assessment will be utilized to support funding and staffing requests.

**Recommendation 3: Develop and disseminate guidance that will enable deportation officers to prioritize ICE's caseload of aliens on orders of supervision so that ICE can focus its limited resources on supervising aliens who are identified as a possible threat to the community or who are not likely to comply with the conditions of their release.**

We concur and will review current guidance and make necessary changes to ensure that deportation officers are able to prioritize their caseload of aliens released pursuant to orders of supervision. Current ICE policy is to keep in custody those aliens who may pose a threat to the community, or pose a flight risk. However, under the *Zadvydas* decision, there are instances where ICE is required to release aliens who may pose a threat to the community. When this occurs, ICE seeks to manage and properly supervise these cases to ensure to the maximum extent possible the safety of U.S. communities, including placing additional conditions on aliens being released pursuant to the *Zadvydas* decision. ICE is also exploring the use of alternatives to detention (such as electronic monitoring) to determine whether they may be applied in this context.

Thank you again for the opportunity to respond to the draft report. If you have any questions, please contact Eddie L. Carlisle, Audit Liaison, U.S. Immigration and Customs Enforcement, at (202) 305-0132.

Sincerely,



Michael J. Garcia  
Assistant Secretary

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# Appendix V: GAO Contacts and Acknowledgments

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## GAO Contacts

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Evi L. Rezmovic (202) 512-8777

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## Acknowledgments

In addition to the above, David Alexander, Shawn Arbogast, Leo Barbour, Grace Coleman, Ann Finley, Mark Macauley, Jan Montgomery, Sam Van Wagner, and Keith Wandtke made key contributions to this report.

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