



COLLATERAL DAMAGE: **An Examination of ICE's Fugitive Operations Program**

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Executive Summary

Since 2003, no immigration enforcement program has experienced a more dramatic increase in funding, nor expanded its staffing and operations more rapidly, than the National Fugitive Operations Program (NFOP). This initiative, led by US Immigration and Customs Enforcement (ICE), a component of the US Department of Homeland Security (DHS), is intended to improve national security by locating and removing dangerous fugitive aliens. ICE defines “fugitive” as a person who has been ordered deported, excluded, or removed by an immigration judge, but has not left the country; or one who has failed to report to DHS as required. ICE further distinguishes between those fugitives who have a criminal history or are otherwise dangerous, and those who have no criminal history whatsoever. NFOP dispatches Fugitive Operations Teams (FOTs) across the country to arrest fugitives. While NFOP is focused specifically on residential operations targeted towards fugitives, it is only one of the federal initiatives that result in the apprehension and removal of deportable noncitizens, including those with criminal convictions.

The NFOP budget has soared over 23-fold in recent years, from \$9 million in fiscal year 2003, its first year of operation, to more than \$218 million in FY 2008. Moreover, the program has experienced a 1,300-percent growth in personnel since its inception. ICE estimates that the program has apprehended more than 96,000 persons through FY 2008. At the same time, NFOP has been at the center of many of the country’s most controversial immigration enforcement operations in the past several years.

To date there has been little analysis of the program or the impact of its rapid growth. This report aims to fill that gap, measuring the program’s actual conduct and accomplishments against its legislative purpose and stated mission priorities. Key findings include:

- Despite NFOP’s mandate to arrest *dangerous* fugitives, almost three-quarters (73 percent) of the individuals apprehended by FOTs from 2003 through February 2008 had no criminal conviction.¹
- Fugitive aliens with criminal convictions have constituted a steadily decreasing share of total arrests over time. In FY 2003, fugitives with criminal convictions represented 32 percent of all FOT arrests, a figure that dropped to 17 percent in FY 2006 and 9 percent in FY 2007, the most recent year for which there is data on criminal arrests available.
- In 2007, Congress appropriated \$183 million for NFOP. With those funds, ICE reported that in 2007 its fugitive operations teams arrested only 672 persons who either had a violent criminal history or were considered dangerous to the community.
- From 2003 to 2005, *nonfugitives*, or what ICE terms “ordinary status violators” — those who have never been charged before an immigration judge, but whom ICE arrests on the belief that they are unlawfully present in the country — represented an

¹ As of this report’s writing, ICE had only publicly released data on FOT criminal apprehensions from 2003 to February 2008.

average of 22 percent of annual FOT apprehensions.

- In FY 2006, after ICE implemented a new arrest quota system, arrests of nonfugitives, or ordinary status violators, grew to 35 percent of total FOT arrests. In FY 2007, this figure rose to 40 percent of total arrests. Such ordinary status violator arrests are sometimes referred to as “collateral arrests.”

The report concludes that NFOP has failed to focus its resources on the priorities Congress intended when it authorized the program. In effect, NFOP has succeeded in apprehending the easiest targets, not the most dangerous fugitives. Furthermore, the program's structure and design appear to encourage officers to jeopardize their own safety, alienate communities, and misdirect expensive personnel resources.

ICE needs to more rigorously and comprehensively manage and evaluate the program to ensure that there is appropriate oversight of operations and guidance for FOT officers. The report's key recommendations include the following:

- NFOP should replace the 1,000-person annual arrest quota with a system that prioritizes arresting dangerous fugitives over all other arrests.
- FOTs should approach only targeted houses and persons.
- NFOP should develop a specific protocol explicitly directed to address constitutional and humanitarian concerns that arise during FOT operations. All FOT agents should be required to undergo comprehensive training in accordance with this new protocol (as well as periodic refresher training), in addition to their basic law enforcement training.
- NFOP should expand its priority system to designate individuals with *in absentia* removal orders and no criminal history as lowest priority.
- ICE should direct substantial NFOP resources to improving the database it uses for information about fugitive aliens.
- NFOP should redeploy resources when particular FOTs are unable to identify or pursue higher-priority fugitives in their geographic region.

I. Introduction

The National Fugitive Operations Program (NFOP) is central to the vision of the Department of Homeland Security (DHS) for national security and immigration enforcement in the post-September 11 world. The program is conducted by the Office of Detention and Removal Operations (DRO), the US Immigration and Customs Enforcement (ICE) division within DHS that is responsible for interior enforcement of immigration laws. In its strategic plan for 2003 to 2012, DHS explicitly justified the work of fugitive operations teams (FOTs) on national security grounds: “Moving toward a 100 percent rate of removal for all removable aliens is critical to allow ICE to provide the level of immigration enforcement necessary to keep America secure. Without this final step in the process, apprehensions made by other DHS programs cannot truly contribute to national security.”^{2,3} Because FOTs target specific fugitives, they often engage in residential enforcement operations, which DRO considers critical to “meet the challenge of this defining moment in our nation’s history.”⁴ Despite the substantial resources allocated to NFOP, ICE estimates that as of October 2008, there were approximately 557,762 fugitive aliens in the United States.⁵

Since its inception in 2003, NFOP has expanded rapidly in size, scope, and cost. In 2003, DRO established eight FOTs; by October 2008, approximately 100 teams were operating across the country.⁶ Congressional funding and NFOP apprehensions have both risen substantially. Annual spending on fugitive operations has grown from \$9 million in 2003⁷ to \$218,945,000 in 2008.⁸ In total, Congress allocated more than \$625 million to the program in its first five years.⁹

Apart from the fact that the program now receives a substantial budget, public scrutiny of NFOP is important for at least two major reasons. First, NFOP is a massive operation with a very narrow congressional mandate: locating dangerous individuals with existing removal orders. It is appropriate to focus on dangerous fugitives, but the reality of NFOP operations indicates that the program is not operating in accordance with this mandate. Second, because FOTs often involve residential enforcement rather than workplace operations, NFOP raises a unique set of legal and humanitarian issues. Indeed, as FOTs have proliferated, they have directed or participated in operations drawing intense public criticism, from allegations of

² US DEPARTMENT OF HOMELAND SECURITY, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012: DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND (June 27, 2003), at 2-2 [hereinafter ENDGAME].

³ Apprehension and arrest are interchangeable words in ICE terminology.

⁴ ENDGAME, at 1-1.

⁵ Border Security and Immigration Enforcement Fact Sheet, ICE, Oct. 23, 2008, http://www.dhs.gov/xnews/releases/pr_1224777640655.shtm.

⁶ Remarks by Homeland Security Secretary Michael Chertoff on the State of Immigration and the No Match Rule, Oct. 23, 2008, available at http://www.dhs.gov/xnews/speeches/sp_1224803933474.shtm; see also ICE Fugitive Operations Teams arrest more than 30,000 in FY2007, ICE News Release, Dec. 4, 2007, <http://www.ice.gov/pi/news/newsreleases/articles/071204washington.htm>.

⁷ OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HOMELAND SECURITY, AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT’S FUGITIVE OPERATIONS TEAMS” (Mar. 4, 2007) [hereinafter OIG REPORT], at 6. See generally N.C. Aizenman and Spencer S. Hsu, US Targeting Immigrant Absconders, WASH. POST, May 5, 2007, at A1.

⁸ Fact Sheet: Fiscal Year 2008, ICE, Dec. 28, 2007, <http://www.ice.gov/doclib/pi/news/factsheets/2008budgetfactsheet.pdf>.

⁹ See *infra* Figure 2.

entering private homes without warrants or consent to detaining nursing mothers and sole caretakers of minor children.

This paper examines the history of NFOP, its current structure, and the available evidence about its practices and impact. It includes an analysis of previously unavailable data on the program's activities and examines NFOP's results in light of the objectives defined by executive branch officials to Congress to justify the program's significant growth. The analysis demonstrates substantial gaps between the public claims for the program and its actual results. The report concludes with recommendations designed to better align the agency's actions with the program's legislative intent and to ensure that enforcement is more carefully aimed at genuinely dangerous persons, and ultimately provides a greater public safety return for taxpayer investment.

II. Background

History

In 1995, Attorney General Janet Reno called for the creation of “abscondee removal teams” as part of a broad effort to focus enforcement priorities and resources of the Immigration and Naturalization Service (INS) on criminal alien issues.¹⁰ INS preceded the immigration agencies within DHS. In 1996 appropriations established funding for these teams, which were intended to locate and remove immigrants with outstanding removal orders (see Table 1 for a definition of this and other common terms). The agency carried out its criminal alien removal mandate through its district offices where deportation officers were instructed to apprehend fugitive aliens as the highest priority task of their ongoing operations. Criminal alien removals increased steadily and were tracked as an explicit metric in the agency's reporting systems.

In 2002, in the aftermath of the September 11 attacks and heightened public concern about terrorism, INS began NFOP, although the program was not funded as an independent unit until 2003. When DHS was created in March 2003, the program was made part of DRO, within ICE.¹¹

¹⁰ OIG REPORT, *supra* note 7, at 3-4.

¹¹ *Id.* at 4. *See also* 79 No. 15 Interpreter Releases 528 (Apr. 8, 2002); 79 No. 7 Interpreter Releases 236, 237 (Feb. 11, 2002).

Table 1: Common Immigration-Enforcement Terms and Definitions

| Term | Definition |
|---|--|
| <i>Fugitive alien</i> | An individual with an outstanding removal order. |
| <i>Outstanding removal order</i> | A removal order issued by an immigration judge (requiring a given individual to leave the United States and return to his or her home country) that has not been obeyed. |
| <i>Immigration violator or ordinary status violator</i> | An individual whom ICE believes is out of status (i.e. not in the United States legally) or has violated a term of his or her status, but whose case has not yet been adjudicated by an immigration judge. |
| <i>Criminal alien</i> | A foreign national convicted of a criminal offense. |
| <i>Absconder</i> | Previous term that ICE and the Immigration and Naturalization Service (INS) used to describe the individuals now known as fugitive aliens. |

The events of September 11, 2001 drew new attention to noncitizens with outstanding removal orders. In December 2001, INS Commissioner James Ziglar announced during testimony before the US House of Representatives that information regarding absconders would be entered into the National Crime Information Center (NCIC),¹² the principal criminal law database of the Federal Bureau of Investigation (FBI), so as to make this information available to the local law enforcement officials who query the database millions of times each day.¹³

In January 2002, the Deputy Attorney General issued guidance to implement NFOP's predecessor program, the Absconder Apprehension Initiative (AAI), with the goal of locating, apprehending, and deporting noncitizens with outstanding removal orders.¹⁴ The Department of Justice specified that AAI prioritize absconders who "come from countries in which there has been Al Qaeda terrorist presence or activity."¹⁵ The program was designed as a collaborative effort between INS, FBI, and the US Marshals Service. Early stages focused on expanding the NCIC database and tasking multiagency fugitive operations teams with investigations.

NFOP became an independent unit within ICE in 2003 and has received targeted funding in every DHS appropriations bill since. Expanding NFOP was one of the "overarching goals" of Bush administration Homeland Security Secretary Michael Chertoff, who emphasized the program as part of his Secure Border Initiative (SBI) in November 2005. Secretary Chertoff

¹² Statement of James W. Ziglar to the National Commission on Terrorist Attacks upon the United States, Jan. 26, 2004, available at http://www.globalsecurity.org/security/library/congress/9-11_commission/040126-ziglar.htm.

¹³ "Crime Index Sets Record: 5.6 Million Queries in a Single Day," FBI, Feb. 15, 2006, <http://www.fbi.gov/page2/feb06/ncic021506.htm> ("NCIC performs 4.8 million transactions daily, 24 hours a day, seven days a week.")

¹⁴ Memorandum from Larry Thompson, Deputy Attorney General, to the INS Commissioner, the FBI Director, the US Marshals Service Director, and US Attorneys (Jan. 25, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>. See generally Kevin Lapp, Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative, 29 N.Y.U. REV. L. & SOC. CHANGE 573.

¹⁵ Memorandum from Larry Thompson, *supra* note 14, at 1.

mentioned NFOP again in the “Second Phase SBI” in April 2006.¹⁶ It is important to note that while NFOP is an important program within DRO it is still only one of ICE’s many initiatives to apprehend and remove deportable noncitizens, including those with criminal convictions.

Current program

How FOTs work

FOTs consist of seven-member teams, based in a particular region of the country, charged with identifying, locating, and apprehending fugitive aliens. Typically, teams include four deportation officers and a supervisory deportation officer.¹⁷ According to then-Homeland Security Assistant Secretary Julie Myers, “[f]ugitive work is investigative in nature and primarily conducted ‘under cover.’”¹⁸ In some instances, FOT agents wear plain clothes; the agents sometimes also wear uniforms identifying themselves as “POLICE.”¹⁹

Until August 2008, FOTs obtained immigration and criminal information about fugitive aliens from the Deportable Alien Control System (DACS), a database containing biographical records, detention records, case records, and jail records on more than 4 million individuals.²⁰ According to a 2007 report from the DHS Office of the Inspector General (OIG), the DACS database was notoriously inaccurate and incomplete, substantially hindering the work of FOTs: “One supervisor stated that the database has ‘been neglected for the past 25 years.’ An analyst, who has worked on the DACS help desk for ten years, estimated that approximately 50 percent of the data in the database is accurate.”²¹ After an October 2007 operation in Nassau County, New York, that utilized DACS, for example, officials reported that “all but nine of the 96 administrative warrants issued by the immigration enforcement agency . . . had wrong or outdated addresses.”²²

¹⁶ See, e.g., Fact Sheet: Secure Border Initiative, ICE, Nov. 2, 2005, [available at http://www.dhs.gov/xnews/releases/press_release_0794.shtm](http://www.dhs.gov/xnews/releases/press_release_0794.shtm); Remarks by Homeland Security Secretary Michael Chertoff on 2007 Achievements and 2008 Priorities, Dec. 12, 2007, [available at http://www.dhs.gov/xnews/speeches/sp_1197513975365.shtm](http://www.dhs.gov/xnews/speeches/sp_1197513975365.shtm). It is worth noting that FOT apprehensions represent only a small fraction of all ICE apprehensions. In FY 2007, ICE removed 319,382 immigrants. Department of Homeland Security Office of Immigration Statistics, Immigration Enforcement Actions: 2007, DHS, Dec. 2008, www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf. Less than 10 percent of those removals were a result of the NFOP. See Table 3, page 29.

¹⁷ OIG REPORT, *supra* note 7, at 6.

¹⁸ Letter to New Haven Mayor John DeStefano, Jr., from Homeland Security Assistant Secretary Julie Myers, July 2, 2007 (on file with authors).

¹⁹ OIG REPORT, *supra* note 7, at 6; Letter to Mayor Gavin Newsom from Ronald E. LeFevre, Chief Counsel, San Francisco, ICE, Mar. 26, 2006 (on file with authors).

OIG REPORT, *supra* note 7, at 15. See also US GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING (Oct. 2007), [available at http://www.gao.gov/new.items/d0867.pdf](http://www.gao.gov/new.items/d0867.pdf) [hereinafter GAO report].

²¹ OIG REPORT, *supra* note 7, at 15.

²² Nina Bernstein, *Raids Were a Shambles, Nassau Complains to US*, N.Y. TIMES, Oct. 3, 2007; see also 84 No. 39 Interpreter Releases 2368 (Oct. 8, 2007). In June 2006, DRO established the Fugitive Operations Support Center, which is designed to “enhance[] the efficiency and effectiveness of the National Fugitive Operations Program (NFOP) through the use of technology and partnerships with law enforcement agencies. The Fugitive Operations Support Center reviews and updates absconder cases; develops leads for and assists fugitive operations teams; develops national fugitive field operations and manages the absconder numbers.” No data or assessments have been released with regard to the effectiveness of the Center or its impact on FOT operations. Fact Sheet: ICE Office of Detention and Removal, ICE, Nov. 2, 2006, <http://www.ice.gov/pi/news/factsheets/dro110206.htm>.

To modernize the outdated technology on which DACS and other immigration data systems had been built, DHS created ENFORCE, an updated electronic platform for immigration information.²³ DHS began using ENFORCE in August 2008, but since the data incorporate records previously held in DACS, ENFORCE data is problematic as well.

Based on information contained in DACS/ENFORCE, FOTs obtain administrative warrants from any of 49 categories of immigration officials authorized to execute such warrants.²⁴ The warrants, which specify the names of individuals with outstanding removal orders, are issued by ICE staff and are civil in nature, not traditional search or arrest warrants.²⁵ In other words, a neutral and detached judge has not approved the warrant after reviewing sworn evidence or making a finding of probable cause to believe a law has been violated, as is required for criminal warrants. Secretary Chertoff told the *New York Times* that FOTs “do not carry search warrants or arrest warrants approved by a judge . . . and their administrative warrants of deportation do not allow entry into dwellings without consent. But others they encounter during an operation can be questioned as to their right to be in the United States, and ‘if deemed to be here illegally, may be arrested without warrant.’”²⁶

In some but not all FOT operations, the local DRO office prepares an operations plan in advance.²⁷ The plan typically sets forth the number of fugitive alien targets, the basic plan for locating them, the staff assigned to the operation, and the equipment and uniforms needed for the assignment.²⁸ It appears the operations plan is usually submitted to DRO headquarters for approval.²⁹ In some circumstances, the local DRO office also sends the plan to the state or local police, the US Marshals Service, or other agencies, along with a list of targets and their relevant personal details.³⁰ Other agencies may also participate in the actual operation when they have shared jurisdiction or there is a need for additional resources. In the June 2007 FOT operation in New Haven, Connecticut, for example, personnel from the US Marshals Fugitive Task Force, US Department of State Diplomatic Security Service, and Connecticut State Police assisted FOT officers from ICE.³¹

²³GAO report, *supra* note 19, at 31; *see also* E-mail from Doris Meissner, former Commissioner of the Immigration and Naturalization Service, to authors (Nov. 13, 2008, 12:12 PM EST) (on file with authors).

²⁴ 8 CFR § 287.5(e)(2).

²⁵ *See, e.g., Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967).

²⁶ Nina Bernstein, *Hunts for ‘Fugitive Aliens’ Lead to Collateral Arrests*, N.Y. TIMES, July 23, 2007, at B5, available at <http://www.nytimes.com/2007/07/23/nyregion/23operation.html>.

²⁷ Hartford Field Office, Detention and Removal Operations, *Operational Order/Plan* (2007) (on file with authors).

²⁸ Much of this information was released as result of a Freedom of Information Act lawsuit. *Danaher v. Freedom of Information Communication*, 2008 WL 4308212 (Conn.Super. (Sept. 5, 2008)).

²⁹ Letter from Julie Myers, Assistant Secretary of the Department of Homeland Sec., to Christina DeConcini, Director of Policy, National Immigration Forum (July 6, 2007) (on file with authors).

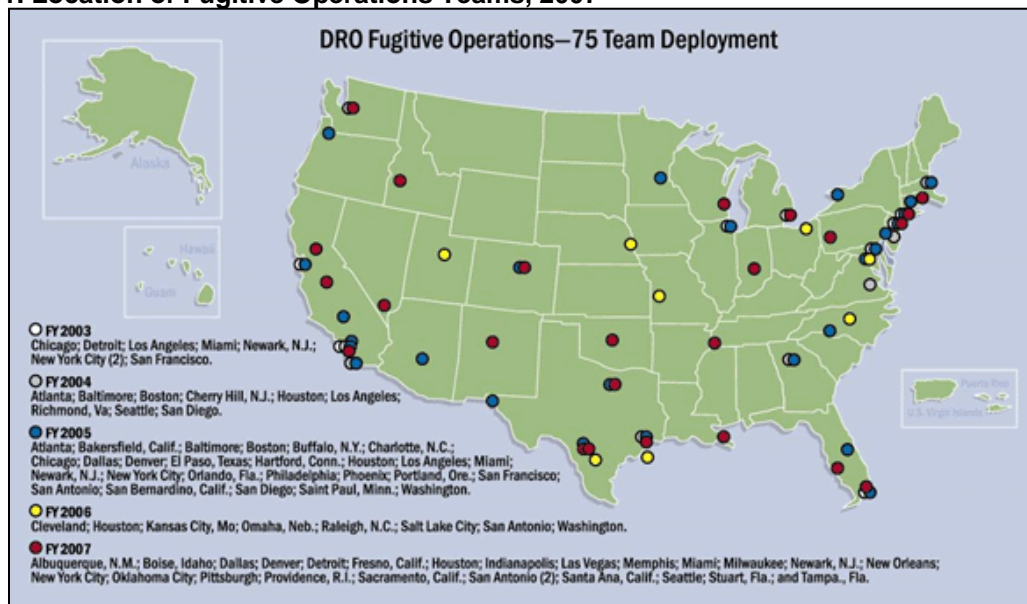
³⁰ E-mail from Justin Cox to author (Feb. 24, 2008, 11:45 AM EST) (on file with authors); Fax from US Marshals Service to Immigration and Customs Enforcement (April 27, 2007) (on file with authors).

³¹ *See, e.g.,* Form I-213 for Luis Narciso Seden-Trujillo, signed by James E. Brown, Deportation Officer (June 6, 2007) (on file with authors). A formal note written by DRO’s Boston Field Office Director to Assistant Secretary Julie Myers also indicates that the Hartford Police, Franklin County Sheriff’s Department, and the Connecticut Probation Department were involved in the operation. NFOP likely alerted the Hartford Police and the Franklin County Sheriff’s Department in order to request bed space for those arrested and contacted the Probation Department to request that it run names through its database in order to update relevant addresses.

Growth and Funding

NFOP started with eight teams and grew to 75 by FY 2007. In FY 2008, Congress authorized 29 new teams, bringing the total to approximately 100.³² The teams, based in at least 34 states, take part in operations nationwide (see Figure 1). California alone had 13 active FOTs as of February 2008.³³ Major FOT operations have included Operation Return to Sender, a nationwide initiative in May-June 2006 that netted 2,179 apprehensions,³⁴ Operation City Lights in Las Vegas, Operation Phoenix in Florida, Operation Deep Freeze in Chicago, and Operation FLASH in New England.³⁵ Recent ICE press releases suggest FOT operations continue in full force. In September 2008, ICE reported multiple operations. In Chicago, four FOTs arrested 144 individuals during a four-day operation.³⁶ The Miami FOT arrested 116 individuals in Miami, Broward, and the Florida Key areas in a five-day operation.³⁷ And FOTs in California arrested more than 1,157 people, including 432 in the San Francisco area, 420 in the Los Angeles area, and 301 in the San Diego area.³⁸

Figure 1. Location of Fugitive Operations Teams, 2007



Note: ICE map. The locations of the 29 teams Congress approved in 2008 have not been released.³⁹

³² Two-Week ICE DRO Operation Targeting Fugitives Yields More Than 330 Arrests in Miami, Broward, and Palm Beach Counties, ICE News Release, April 7, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080407miami.htm>.

³³ Area ICE Fugitive Operations Teams Record Nearly 150 Arrests in January, ICE News Release, Feb. 11, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080211sandiego.htm>.

³⁴ ICE Apprehends More than 2,100 Criminal Aliens, Gang Members, Fugitives, and Other Immigration Violators in Nationwide Interior Enforcement Operation, ICE News Release, June 14, 2006, http://www.dhs.gov/xnews/releases/press_release_0926.shtm.

³⁵ OIG REPORT, *supra* note 7, at 27.

³⁶ Chicago ICE Fugitive Operations Teams Arrest 144 Aliens During 4-day Initiative, ICE News Release, Sept. 17, 2008, <http://www.ice.gov/pi/nr/0809/080917chicago.htm>.

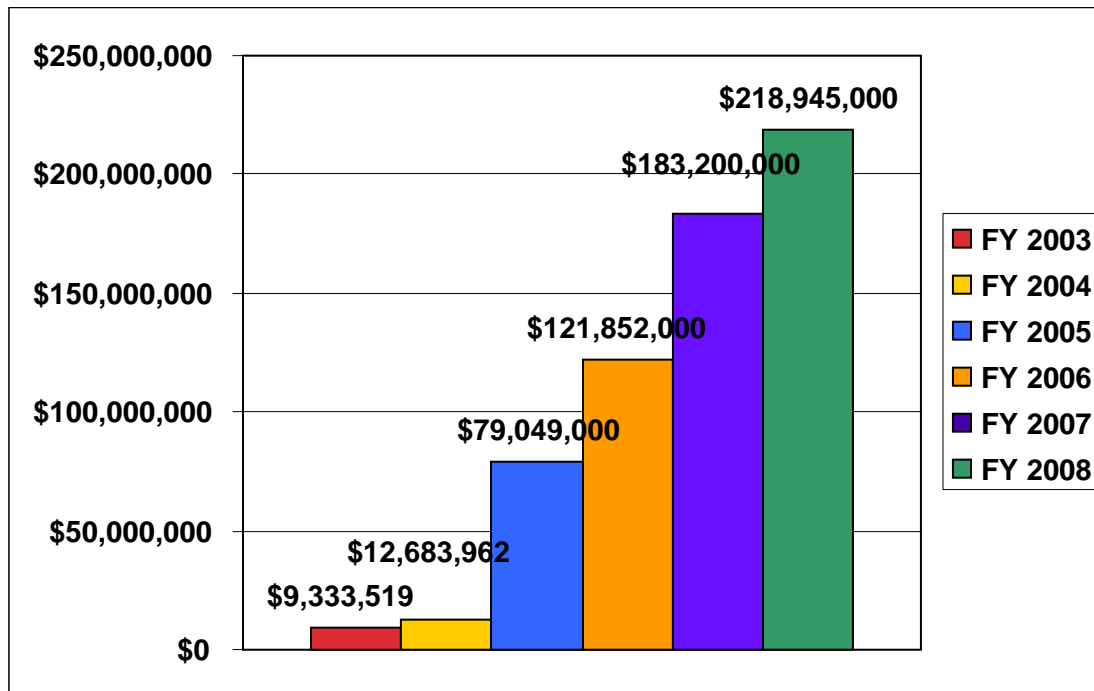
³⁷ ICE Operation Targeting Fugitives Yields 116 Arrests in Miami, Broward, and Florida Key Areas, ICE News Release, Sept. 29, 2008, <http://www.ice.gov/pi/nr/0809/080929miami.htm>.

³⁸ Francisco Vara-Orta, *Statewide Immigration Raids Result in 1,157 Arrests*, L.A. TIMES, Sept. 30, 2008; *see also* ICE Arrests More Than 1,000 in Largest Special Operation Yet Targeting Criminal Aliens and Illegal Alien Fugitives in California, ICE News Release, Sept. 29, 2008, <http://www.ice.gov/pi/nr/0809/080929sanfrancisco.htm>.

³⁹ "This year ICE is in the process of deploying teams in Birmingham, Ala.; Columbus, Ohio; Charleston, S.C.; Colorado Springs, Colo.; Des Moines, Iowa; Fort Worth, Texas; and two in New York City. In California, ICE is adding new teams in

Congress funds fugitive operations as part of the DRO allocation in the DHS budget (see Appendix 1). The FY 2008 budget was \$218,945,000, over 23 times the amount allocated five years ago (see Figure 2).⁴⁰ The largest absolute increase came between 2004 and 2005. In all, the program has experienced a 1,300-percent growth in personnel and 2,300-percent growth in funding since it began in 2003. From FY 2003 through 2008, Congress allocated more than \$625 million⁴¹ to FOTs, with an additional \$200 million authorized for DRO over a two-year period in order to generally “improve and modernize efforts to identify criminal aliens and remove them from the United States.”⁴²

Figure 2. Total Funding for Fugitive Operations Teams, FY 2003 to FY 2008



Source: ICE budget fact sheets and DHS Office of Inspector General report, *An Assessment of United States Immigration and Customs Enforcement’s Fugitive Operations Teams*, March 2007, http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-34_Mar07.pdf.

Objectives and Priorities

As the NFOP budget and personnel levels have grown, so have the number of FOT arrests (see Figure 3).

San Bernardino, San Diego, San Jose, and Ventura County.” Raj Jayadev, *When ICE Comes to Your Town*, NEW AMERICA MEDIA, Oct. 8, 2008.

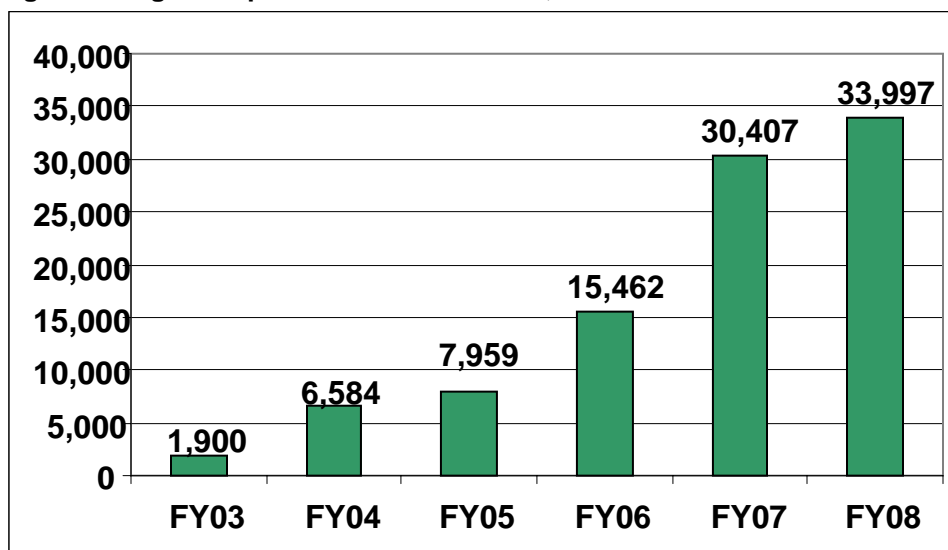
⁴⁰ Fact Sheet: Fiscal Year 2008, *supra* note 8; OIG REPORT, *supra* note 7, at 6.

⁴¹ Where possible, this report relies upon funding information directly released by ICE. Funding data for 2005 through 2008 was released in official ICE budget fact sheets: Fact Sheet: Fiscal Year 2007, ICE, Feb. 5, 2006, *available at* <http://www.ice.gov/doclib/pi/news/factsheets/2007budgetfactsheet.pdf>; Fact Sheet: Fiscal Year 2006, ICE, Feb. 5, 2006, *available at* <http://www.ice.gov/doclib/pi/news/factsheets/2006budgetfactsheet.pdf>; Fact Sheet: Fiscal Year 2005, ICE, Feb. 5, 2006, *available at* <http://www.ice.gov/doclib/pi/news/factsheets/2005budgetfactsheet.pdf>.

The funding totals for 2003 and 2004 are from the report of the OIG, OIG REPORT, *supra* note 7, at 6. Note that the OIG report and the ICE Fact Sheets contain slightly variant data for 2005 and 2006; for those years, the report relies on data from the official ICE Fact Sheets.

⁴² Fact Sheet, Fiscal Year 2008, *supra* note 8.

Figure 3. Fugitive Operations Team Arrests, FY 2003 to 2008



Note: This chart represents *all* FOT arrests, without reference to the nature of the arrest – whether the individual was a fugitive alien or an ordinary status violator, or whether the individual had a criminal conviction of any type.

Source: ICE, “ICE Multifaceted Strategy Leads to Record Enforcement Results,” (news release, October 23, 2008), <http://www.ice.gov/pi/nr/0810/081023washington.htm?searchstring=349,041>.

When the program was first funded in 2003, each FOT was expected to apprehend 125 fugitive aliens per year. Guidelines that DRO implemented in 2004 prioritized dangerousness, stating that at least 75 percent of the individuals apprehended had to be fugitive aliens with criminal convictions.⁴³ In January 2006, the goal increased to 1,000 individuals, a benchmark DRO officials have confirmed.⁴⁴ These revised benchmarks apparently no longer require either an absolute number or specific percentage of criminal alien arrests or fugitive alien arrests.

That said, Secretary Chertoff stated that FOTs target fugitives according to the following priorities, with those “posing a threat to the nation” at the top (see Table 2).⁴⁵

⁴³ OIG REPORT, *supra* note 7, at 8.

⁴⁴ Aizenman & Hsu, *supra* note 7. Recent disclosures by ICE under the Freedom of Information Act confirm that as of summer 2007, ICE agents understood each FOT to be mandated to make 1,000 arrests per year, with up to 500 collateral arrests on headquarters-approved operations counting toward this mandate. These records were released by ICE in a Freedom of Information Act case, *Unidad Latina en Accion v. DHS*, No. 3:07-cv-1224 (D.Conn.). There has been some ambiguity about the precise nature of the quota. At an operational briefing by Homeland Security Secretary Chertoff and DRO Director John Torres, Torres confirmed that “[t]he current goal per team [is] to arrest 1,000 *people* annually.” Remarks by Homeland Security Secretary Michael Chertoff, Border Patrol Chief David Aguilar, and Acting Director of Detention and Removal Operations John Torres, ICE, Feb. 9, 2006, *available at* http://www.dhs.gov/xnews/releases/press_release_0852.shtm (emphasis added). Similarly, ICE’s official response to the OIG report, stated that “[o]ne thousand administrative arrests are expected from each field office.” OIG REPORT, *supra* note 7, at 50. A separate section of the OIG report, however, reported that the per team quota is 1,000 *fugitive aliens* per year. *Id.*, at 8 (emphasis added).

⁴⁵ *Id.* (citing DRO Memorandum, “Fugitive Operations Case Priority and Annual Goals,” Jan. 31, 2006). The *New York Times* reported that Secretary Chertoff confirmed in July 2007 that this priority system was in effect. Bernstein, *Hunts for Fugitive Aliens’ Lead to Collateral Arrests*, *supra* note 26.

Table 2. Apprehension Priorities for Fugitive Operations Teams

| | |
|---|---|
| 1 | Fugitives posing a threat to the nation |
| 2 | Fugitives posing a threat to the community |
| 3 | Fugitive with a violent criminal history |
| 4 | Fugitive aliens with a criminal conviction |
| 5 | Fugitive aliens with no criminal conviction |

Source: ICE, "Area ICE Fugitive Operations Teams Record Nearly 150 Arrests in January," (news release, February 11, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080211sandiego.htm>.

III. Findings⁴⁶

While NFOP was designed to focus on apprehending dangerous fugitives, our results make clear that the program has primarily been arresting the easiest targets, including many persons without a criminal history and nonfugitives, whose cases have not yet been heard by an immigration judge. Key findings include:

- Almost three-quarters (73 percent) of the individuals apprehended by FOTs from 2003 through February 2008 had *no* criminal conviction.
- In 2007, fugitive aliens with criminal convictions represented just 9 percent of total FOT arrests.
- In 2007, Congress appropriated \$183 million to NFOP. With those funds, in 2007 ICE reported that NFOP arrested only 672 persons with violent criminal history or whom ICE considered dangerous to the community.
- From 2003 to 2005, ordinary status violators represented an average of 22 percent of annual FOT arrests. In 2006, after the 1,000-arrests-per-team quota was implemented, ordinary status violators constituted 35 percent of total FOT arrests. In 2007, the figure rose to 40 percent. Arrests of ordinary status violators are sometimes referred to as "collateral arrests."

Incidence of Criminal Convictions

The data released by ICE plainly contradict statements from senior ICE officials that FOTs apprehend "primarily criminal aliens."⁴⁷ In February 2008, ICE reported that "[n]ationwide,

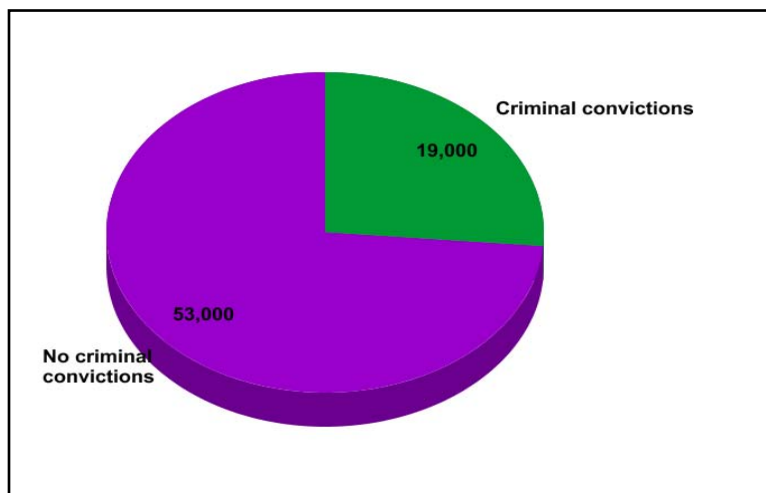
⁴⁶ The following analysis of FOT arrest patterns is based almost exclusively upon data released by ICE through press releases and written requests for information. In a few instances in which ICE has not released critical data, the report relies upon data from the DHS Inspector General report, which ICE was given leave to respond to or correct. Sources are noted for all data.

⁴⁷ As part of DHS's request for almost \$219 million in FY 2008, then-Assistant Secretary Myers told the House Appropriations Committee's Subcommittee on Homeland Security that FOTs target "primarily criminal aliens." Statement of Julie Myers, Assistant Secretary, ICE, Before House Appropriations Committee, Subcommittee on Homeland Security, March 27, 2007, available at www.ice.gov/doclib/pi/news/testimonies/070327budget.pdf. Eric Saldana, a deportation officer in a Los Angeles-based FOT, asserted that, "[a]lmost everybody we target are criminals or have some sort of criminal connection The noncriminals will not get any attention." *Constant Watch: For Fugitive Operations Officers, Caseloads Can Be*

ICE Fugitive Operations Teams have arrested more than 72,000 illegal aliens since the first teams were created. Of those, roughly 19,000, or 27 percent, had criminal convictions.⁴⁸ In other words, 73 percent of the total individuals apprehended by FOTs from 2003 to February 2008⁴⁹ did not have any criminal convictions (see Figure 4). This finding is consistent with a 2007 ICE report that states that only 28 percent of the 61,000 immigration status violators FOTs apprehended from 2003 to 2007 had criminal convictions.⁵⁰

The FY 2007 data are particularly striking — just 9 percent of those arrested had criminal convictions (see Figure 5). Yet ICE chief Julie Myers stated in August 2008 that NFOP's targets were still those with a criminal conviction.⁵¹

Figure 4. Fugitive Operations Team Apprehensions, Mid-2003 to February 2008



Source: ICE, "Area ICE Fugitive Operations Teams Record Nearly 150 Arrests in January," (news release, February 11, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080211sandiego.htm>

Overwhelming, THE PRESS ENTERPRISE, Oct. 30, 2005, available at

http://www.pe.com/digitalextra/metro/immigration/vt_stories/PE_News_Local_D_endice30.660f9ac.html.

⁴⁸ Area ICE Fugitive Operations Teams Record Nearly 150 Arrests in January, *supra* note 33.

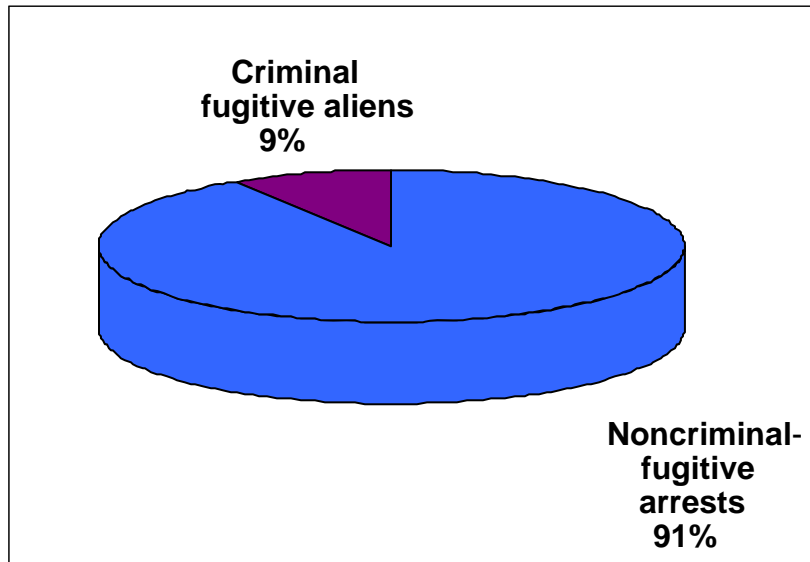
⁴⁹ As of this report's writing, ICE had only publicly released data on FOT criminal apprehensions from 2003 to February 2008.

⁵⁰ Predator arrested by ICE Fugitive Operations Team in Memphis, ICE News Release, Sept. 28, 2007,

<http://www.ice.gov/pi/news/newsreleases/articles/070928memphis.htm>. ("Of the more than 61,000 illegal aliens arrested by ICE fugitive operations teams since the first teams were created in 2003, roughly 17,331 had criminal convictions.")

⁵¹ According to Secretary Chertoff, the priority system is intended to direct FOT resources to the capture of fugitive aliens with dangerous criminal histories. Letter from Julie Myers, Assistant Secretary of the Department of Homeland Security to Doris Meissner, Senior Fellow, Migration Policy Institute (Aug. 11, 2008) (on file with authors) [hereinafter Letter from Myers to Meissner].

Figure 5. Percentage of Fugitive Aliens with Criminal Convictions as Share of All Arrests, FY 2007⁵²



Sources: ICE, “ICE Multifaceted Strategy Leads to Record Enforcement Results,” (news release, October 23, 2008), <http://www.ice.gov/pi/nr/0810/081023washington.htm?searchstring=349,041>; Letter from Julie Myers, Assistant Secretary of the Department of Homeland Security, to Doris Meissner, Senior Fellow, Migration Policy Institute (August 11, 2008).

Nature of Criminal Convictions

As described above, ICE categorizes the individuals it arrests from 1 (“fugitives posing a threat to the nation”) to 5 (“fugitive aliens with no criminal convictions”). Three-quarters of the criminal fugitive aliens arrested in FY 2007 had committed nonviolent crimes,⁵³ such as shoplifting, placing them in category 4. In other words, these individuals do not pose a threat to national security or to their communities. In fact, fugitive aliens posing a threat to the community or with a violent criminal conviction represented just 2 percent of all FOT arrests in FY 2007.⁵⁴

Trends over Time

Fugitive aliens with criminal convictions constitute not only a small fraction of total FOT arrests, but a steadily decreasing share of the total arrests over time. In 2003, fugitive aliens with criminal convictions represented 32 percent of the total FOT arrests.⁵⁵ By 2006, that

⁵² As of the writing of this report, ICE had not publicly released data about the incidence of criminal convictions among fugitive alien arrests in FY2008.

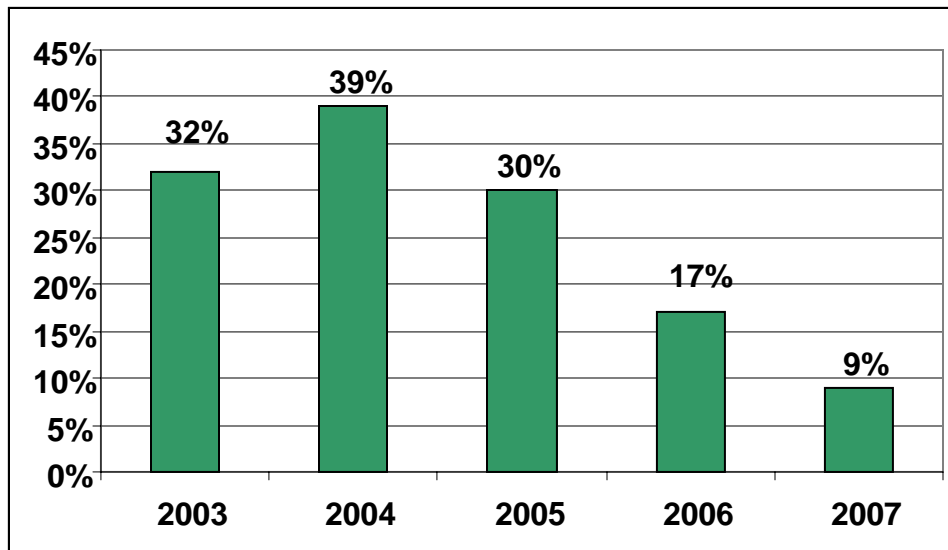
⁵³ According to information released by ICE, FOTs arrested 2,005 Priority 4 fugitive aliens in FY2007. That year, FOTs arrested 2,677 criminal fugitive aliens. Letter from Myers to Meissner, *supra* note 51.

⁵⁴ According to ICE information, FOTs arrested 672 fugitive aliens posing a threat to the community or with violent criminal convictions in FY2007. *Id.* FOTs arrested 30,407 individuals in FY2007. ICE Multifaceted Strategy Leads to Record Enforcement Results: Removals, criminal arrests, and worksite investigations soared in fiscal year 2008, ICE, October 23, 2008, <http://www.ice.gov/pi/nr/0810/081023washington.htm>.

⁵⁵ According to information released by ICE, FOTs arrested 613 fugitive aliens with criminal convictions in FY2003. Letter from Myers to Meissner, *supra* note 51. FOTs arrested 1,901 individuals total that year. *See* Table 3.

figure had dropped to 17 percent.⁵⁶ As mentioned earlier, by 2007, criminal fugitive aliens represented under 9 percent of the total arrests made by FOTs.⁵⁷

Figure 6. Fugitive Aliens with Criminal Convictions as a Percentage of all Fugitive Operations Team Arrests, FY 2003 to FY 2007.⁵⁸



Source: August 11, 2008 letter from Homeland Security Assistant Secretary Julie Myers to MPI Senior Fellow Doris Meissner

The share of fugitive aliens with criminal convictions declined most dramatically after the directive for 1,000-arrests-per-team quota was issued in January 2006. Since then, fewer and fewer of FOT arrests have been the fugitive aliens with criminal convictions whom the program was established to target.

While public arrest data for FY 2008 were incomplete as of this writing, the available statistics demonstrate that individuals with criminal histories continue to represent only a fraction of overall NFOP apprehensions. According to ICE press releases issued in late June 2008, the Chicago ICE office apprehended 1,167 individuals from October 1, 2007 through May 31, 2008. Of that total, 14 percent (164) had criminal histories.⁵⁹ During that same period, the ICE office in Bloomington, Nebraska reported that it had arrested 542 individuals; 19 percent (103) had criminal convictions.⁶⁰ In Boston, 10 percent (130) of the 1,283 apprehended individuals had criminal convictions.⁶¹

⁵⁶ According to information released by ICE, FOTs arrested 2,645 fugitive aliens with criminal convictions in FY2006. Letter from Myers to Meissner, *supra* note 51. FOTs arrested 15,462 individuals total that year. See Table 3.

⁵⁷ According to information released by ICE, FOTs arrested 2,677 fugitive aliens with criminal convictions in FY2007. Letter from Myers to Meissner, *supra* note 51. FOTs arrested 30,407 individuals total that year. See Table 3.

⁵⁸ As of the writing of this report, ICE had not publicly released data about the incidence of criminal convictions among fugitive alien arrests in FY2008.

⁵⁹ ICE Fugitive Operations Team Arrests 48 Illegal Aliens in 5-Day Operation, ICE News Release, June 26, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080626gardencity.htm>.

⁶⁰ ICE Fugitive Operations Team Arrests 44 Absconders, Illegal Aliens in Nebraska, ICE News Release, June 25, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080625omaha.htm>.

⁶¹ ICE Fugitive Operations Team Arrest 42 in Rhode Island, ICE News Release, June 12, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080612providence.htm>.

Table 3. Apprehensions by Priority Category, FY 2003-2007

| Fiscal Year | Category 2-4 fugitive aliens (criminal history or danger to community) | | Category 5 fugitive aliens (no criminal convictions) | | Ordinary Status Violators | | Total arrests Number |
|-------------|--|--------------------|--|--------------------|---------------------------|--------------------|-------------------------|
| | Number | % of total arrests | Number | % of total arrests | Number | % of total arrests | |
| 2003 | 613 | 32 | 946 | 50 | 341 | 18 | 1,900 |
| 2004 | 2,596 | 39 | 2,689 | 41 | 1,299 | 20 | 6,584 |
| 2005 | 2,416 | 30 | 3,365 | 42 | 2,178 | 27 | 7,959 |
| 2006 | 2,645 | 17 | 7,464 | 48 | 5,353 | 35 | 15,462 |
| 2007 | 2,677 | 9 | 15,646 | 51 | 12,084 | 40 | 30,407 |

Notes: Categories 2-4 represent fugitive aliens (people with removal orders) *with* criminal convictions or whom ICE deems a danger to the community. Category 5 is for fugitive aliens (people with removal orders) *without* criminal convictions. Ordinary status violators are individuals without removal orders, whose cases not been heard by an immigration judge (the incidence of criminal convictions among that population is not available).

Sources: Letter from Myers to Meissner; ICE, "ICE Multifaceted Strategy Leads to Record Enforcement Results," (news release, October 23, 2008),

<http://www.ice.gov/pi/nr/0810/081023washington.htm?searchstring=349,041>.

Funding

Even as the percentage of arrests of fugitive aliens with criminal convictions declines, Congress has appropriated ever more money for NFOP. According to data released by ICE, the number of fugitive aliens with criminal convictions arrested by FOTs remained relatively constant between FY2004 and FY2008. Congressional allocations to NFOP, by contrast, grew 17-fold over the same period.

Table 4. Congressional Funding to NFOP Relative to Arrests of Criminal Fugitive Aliens, FY 2004-2008

| Year | Number of fugitive aliens with criminal convictions arrested (Categories 2-4) | Congressional funding to NFOP |
|------|---|-------------------------------|
| 2004 | 2,596 | \$12,683,962 |
| 2005 | 2,416 | \$79,049,000 |
| 2006 | 2,645 | \$121,852,000 |
| 2007 | 2,677 | \$183,200,000 |
| 2008 | N/A | \$218,945,000 |

Note: Complete data for FY 2008 is not available at the time of writing. Partial-year data, however, indicates that in FY 2008 arrests of criminal fugitives rose, in absolute and percentage terms, and that arrests of nonfugitives declined on a percentage basis.

Sources: Letter from Myers to Meissner; Fact Sheet: Fiscal Year 2008, ICE, December 28, 2007, <http://www.ice.gov/doclib/pi/news/factsheets/2008budgetfactsheet.pdf> ; Fact Sheet: Fiscal Year 2007, ICE, February 5, 2006,

<http://www.ice.gov/doclib/pi/news/factsheets/2007budgetfactsheet.pdf>; Fact Sheet: Fiscal Year 2006, ICE, February 5, 2006,

<http://www.ice.gov/doclib/pi/news/factsheets/2006budgetfactsheet.pdf>; Fact Sheet: Fiscal Year 2005, ICE, February 5, 2006,

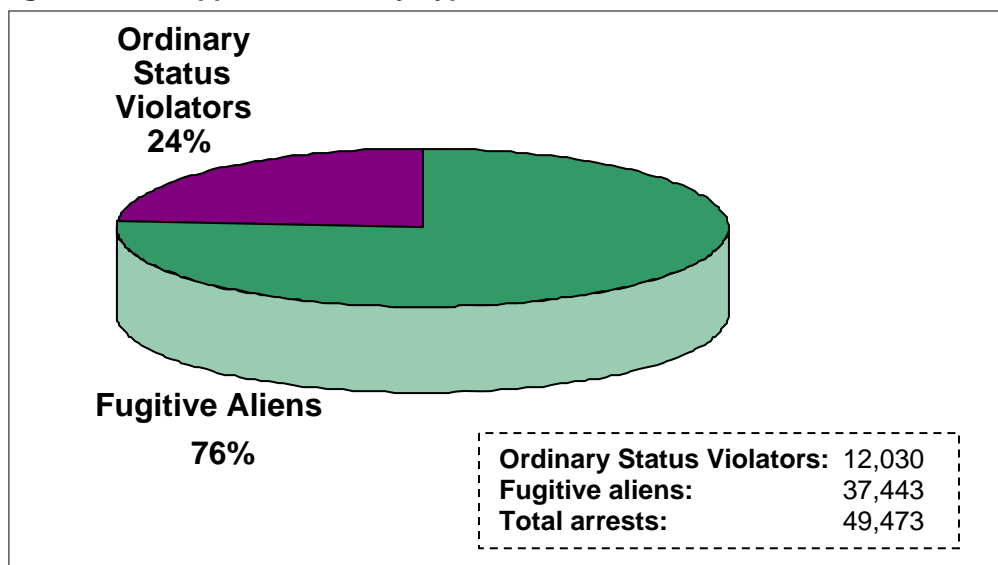
<http://www.ice.gov/doclib/pi/news/factsheets/2005budgetfactsheet.pdf>; OIG REPORT 6.

Arrests of Ordinary Status Violators

Perhaps even more significant than the number of low-priority fugitive alien apprehensions is the substantial percentage of ordinary status violators among all FOT arrests. Then-Secretary Chertoff emphasized that FOTs’ “policy is to focus their efforts on specific fugitive aliens at specific locations,” and not “to conduct ‘raids,’ or take an ad hoc approach to enforcing immigration law.”⁶² The data, however, are inconsistent with this claim and indicate that ordinary status violators represent a significant share of overall FOT arrests.

According to the OIG report, DRO made 49,473 arrests from 2003 to June 2006.⁶³ Of that total, 37,443 were fugitive aliens. The other 12,030 (24 percent) were ordinary status violators.

Figure 7. FOT Apprehensions by Type of Alien, 2003 to June 2006



Note: DRO changed adopted the 1,000-per-team quota in January 2006.

Source: DHS Office of the Inspector General Report 8, 18.

That proportion, however, changed substantially in subsequent years. In 2006, 35 percent of the 15,462 individuals arrested by FOTs were ordinary status violators, not fugitive aliens.⁶⁴ The following year, FOTs arrested 12,085 ordinary status violators,⁶⁵ or 40 percent of the 30,407 total FOT arrests in FY 2007. The percentage of arrests of ordinary status violators doubled from 2004⁶⁶ to 2007 (see Figure 8). Operation Return to Sender, a major nationwide

⁶² Letter from Secretary of Homeland Security Michael Chertoff to US Sen. Christopher Dodd (June 14, 2007), *available at* <http://www.nytimes.com/packages/html/nyregion/20070723Chertoff.pdf>.

⁶³ OIG REPORT, *supra* note 7, at 18. These statistics do not reflect FOT apprehensions, but rather apprehensions by all DRO officers as well as local law enforcement agents working in accordance with NCIC information. The OIG report notes that DRO recordkeeping is inadequate in this regard and does not allow for specific findings about FOT apprehension rates. “[B]ecause [DRO] reported apprehensions made by team and nonteam members, the statistics presented . . . overestimate the teams’ productivity.” OIG REPORT, *supra* note 7, at 9.

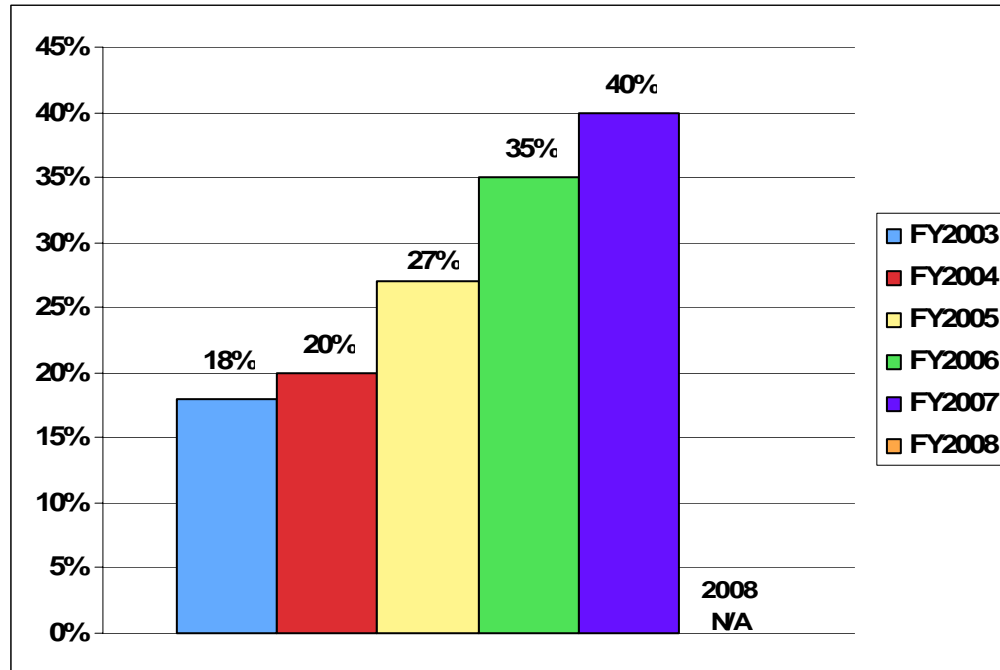
⁶⁴ FOTs arrested 10,109 fugitive aliens in FY2006. Letter from Myers to Meissner, *supra* note 51.

⁶⁵ FOTs arrested 18,323 fugitive aliens in FY2007. *Id.*

⁶⁶ FOTs arrested 5,285 fugitive aliens in FY2004. *Id.* Accordingly, ordinary status violators represented 20 percent of the 6,584 total individuals arrested by FOTs.

FOT initiative undertaken in May and June 2006, illustrates the general trend since 2003: FOTs arrested 2,179 individuals — 71 percent — of them ordinary status violators.⁶⁷

Figure 8. Ordinary Status Violators as Percent of Total FOT Arrests, FY 2003-2008



Sources: Letter from Myers to Meissner; Figure 3 (above).

Although ICE has not released full data with respect to NFOP apprehensions in FY2008 at the time of writing, available data show that the share of ordinary status violators decreased in FY2008. It remains unclear, however, whether the decrease is the result of a specific policy change. According to ICE: “In fiscal year 2008, ICE’s NFOP has made 34,000 arrests nationwide, which included more than 25,000 fugitives.”⁶⁸

IV. Issues and Analysis

The large number of ordinary status violators arrested by FOTs naturally raises concerns about their practices, policies, and conduct. Here we focus on use of investigative resources, metrics of success, the failure to distinguish *in absentia* removal orders, community relations, and officer safety and liability. The larger picture that emerges from examining these areas is stark: ICE is out of touch with well-established norms in law enforcement, and its approach to fugitive aliens is inefficient and costly.

⁶⁷ ICE Apprehends More than 2,100 Criminal Aliens, Gang Members, Fugitives, and Other Immigration Violators in Nationwide Interior Enforcement Operation, ICE News Release, June 14, 2006, http://www.dhs.gov/xnews/releases/press_release_0926.shtm.

⁶⁸ 84 Aliens Arrested by ICE Fugitive Operations Teams in the Dallas Area, ICE News Release, Dec. 19, 2008, <http://www.ice.gov/pi/nr/0812/081219dallas.htm>.

Use of Investigative Resources

Then-Secretary Chertoff emphasized that “DHS must be an effective steward of public resources.”⁶⁹ Effectuating that vision for “greater efficiency and effectiveness throughout the entire system,” he explained, requires “willingness to set priorities [and] disciplined execution of those priorities.”⁷⁰

Since its inception, NFOP has been described and justified as a program that promotes national security. In news releases, public remarks, budget proposals, and congressional testimony, DHS officials have consistently stated that the program is intended primarily to apprehend and remove threats to national security and dangerous criminal fugitive aliens.⁷¹

In keeping with those objectives, DHS has designed a detailed priority system for NFOP, in which the apprehension of fugitive aliens who pose threats to national and community security is explicitly assigned a higher priority than apprehension of fugitive aliens without criminal records or unauthorized immigrants who do not have outstanding removal orders.

Insofar as those statements and priorities reflect the underlying NFOP goals, there is a significant disparity between the program’s stated goals and its actual results. Secretary Chertoff argued generally that ICE resources generally should “focus on drug dealers and terrorists,” and not rounding up “maids and landscapers.”⁷² However, the above evidence shows that the vast majority of individuals apprehended by FOTs either represent the lowest-priority fugitive aliens (Category 5 noncriminal fugitive aliens) or fall outside the priority system entirely (nonfugitive ordinary status violators). In FY 2007, for example, 40 percent of the 30,407 individuals arrested by FOTs were ordinary status violators – not fugitives at all. If the priority system is to be meaningful and the program to focus on its underlying criminal removal and national security goals, resources must be directed in a more disciplined and targeted manner.

The majority of the arrests of ordinary status violators presumably occur because such individuals happen to be nearby while FOTs conduct their operations. ICE has argued that FOT agents are sworn to uphold immigration laws and therefore obliged to arrest all violators.⁷³ However, exercising discretion with respect to immigration apprehensions is well within ICE’s power — and necessary for the administration of safe, efficient, and sustainable operations.⁷⁴ Indeed, FOTs are not designed, equipped, mandated, or funded to be general, roving enforcers of immigration law.

⁶⁹ Secretary Michael Chertoff, US Department of Homeland Security Second Stage Review Remarks (July 13, 2005), *available at* http://www.dhs.gov/xnews/speeches/speech_0255.shtm.

⁷⁰ *Id.*

⁷¹ See, e.g., Fugitive Operations Teams Active Across the Country, Inside ICE, June 27, 2007, *available at* http://www.ice.gov/pi/news/insideice/articles/InsideICE_070626_Web4.htm.

⁷² *Immigration Breakthrough Could Pave Way for Citizenship*, CNN, May 18, 2007, <http://www.cnn.com/2007/POLITICS/05/17/senate.immigration/index.html> (“Right now, I’ve got my Border Patrol agents and my immigration agents chasing maids and landscapers. I want them to focus on drug dealers and terrorists”).

⁷³ See, e.g., Andres Viglucci, *Immigration Targeted Family, Activist Says*, MIAMI HERALD, March 4, 2008 (“In an e-mailed response to a request for comment, ICE spokeswoman Barbara Gonzalez...added: ‘What I can tell you is that ICE officers are sworn to uphold our nation’s immigration laws. Those who are in violation of US law should not be surprised if they are arrested.’”).

⁷⁴ See, e.g., GAO REPORT, *supra* note 19.

Both of the major independent reports written about NFOP have noted the importance of making targeted decisions about whom to arrest. The Government Accountability Office (GAO) pointed out in an October 2007 report that ICE, as a whole, already regularly exercises discretion about whom to apprehend in the course of operations: “[ICE] [o]fficers noted that several factors — such as the availability of detention space, travel time to an alien’s location, and competing enforcement priorities — affect their decisions to initiate removal action against an alien.” The GAO report also argued for greater use of discretion as a strategic matter: “[B]ecause of limited resources [ICE agents] have to make trade-offs between dedicating resources to aliens who pose a threat to public safety and those who do not — that is, noncriminal aliens. . . . [I]n some instances [this] result[s] in decisions to not initiate removal action against noncriminal aliens.”⁷⁵

Based on its audit, the OIG’s initial report called upon ICE to “[u]se Fugitive Operations Team members solely for apprehending fugitive aliens with unexecuted final orders of removal or closing fugitive alien cases.”⁷⁶ In support of that recommendation, the OIG referenced the Detention and Deportation Officer’s Field Manual, which provided that FOTs “[s]hall *only* be assigned to fugitive cases with an emphasis on backlog cases” and “shall *not* be assigned to any duties that will deter them from conducting fugitive operations . . . including collateral duties normally accomplished by general assignment deportation officers.”⁷⁷

This exercise of discretion falls squarely in line with then-Secretary Chertoff’s insistence upon the “disciplined execution of [ICE] priorities.”

Metrics for Success

The 1,000-arrests-per-team guidance established in January 2006 places significant pressure on FOTs to make hundreds of arrests.⁷⁸ And the agency’s crediting of nonfugitive arrests towards that 1,000-arrest total channeled that overarching pressure towards enforcement against nonfugitives. For example, the arrest of an unauthorized mother who has no criminal history or outstanding removal order counts as much as the arrest of a fugitive alien who deliberately disregarded his removal order and who poses a serious risk to national security. Therefore, the quota system, and its crediting of nonfugitive arrests, does not encourage FOTs to direct scarce resources to higher-priority apprehensions; in fact, assuming it is more resource intensive to capture one person who threatens national security than ten arbitrary unauthorized immigrants, a team determined to reach 1,000 arrests would be wise to ignore hard-to-locate national security threats and concentrate on the least dangerous immigrants, including nonfugitives.

⁷⁵ *Id.* at 12.

⁷⁶ OIG REPORT, *supra* note 7, at 50.

⁷⁷ *Id.* at 49-50 (citing the Detention and Deportation Officer’s Field Manual, Ch. 19, Sec. 4.1) (emphasis added). The OIG’s recommendation that FOTs be used solely for apprehending fugitive aliens was later revised after ICE contested the recommendation and suggested that the OIG instead recommend that DRO “[a]ssign Fugitive Operations Team members in a manner consistent with its Detention and Deportation Officer’s Manual or amend the manual to reflect current assignment practices.” OIG REPORT, *supra* note 7, at 54.

⁷⁸ OIG REPORT, *supra* note 7, at 8; *see also* text accompanying note 44.

Indeed, research has shown that law enforcement quotas are highly susceptible to abuse and typically function to distract law enforcement officials from core public safety objectives. Professor Mary Fan of American University Washington College of Law recently observed that “[f]ocusing solely on output without consideration of contextual factors penalizes rather than recognizes the courage and integrity to go after the hard case that actually impacts crime.”⁷⁹

Police arrest quotas were widely discredited in the 1980s on the grounds that they “collapse qualitative difference and incentivizing undesirable behavior because of statistical pressure.”⁸⁰ In the traffic violation context, for example, police officers concerned about meeting quotas have been known to “select easy targets . . . regardless of an officer’s opinion of the seriousness of an offense or public safety implications.”⁸¹

Many states, including California, Maryland, Florida, Connecticut, North Carolina, Minnesota, Nebraska, New Jersey, and Texas, have barred law enforcement agencies from establishing “formal or informal quota[s] for the law enforcement agency or law enforcement officers of the agency.”⁸²

FOT quotas run the risk of replicating these disincentives. In fact, quotas may be particularly troubling in the immigration context because the relative cost of apprehending an unauthorized immigrant is starkly different from the cost of identifying, targeting, and apprehending a *specific*, preidentified, high-priority fugitive alien. The Pew Hispanic Center estimated in 2006 that there were 11.5 to 12 million unauthorized immigrants living in the United States.⁸³ ICE estimates there are 557,762 fugitive aliens⁸⁴ — including those with no criminal records and those who were ordered removed *in absentia* (meaning they were not present at the hearing in which they were ordered removed). Fugitive aliens, then, represent approximately 5 percent of the total number of unauthorized immigrants in the United States, and high-priority fugitive aliens with criminal convictions constitute an even smaller fraction.⁸⁵ A quota system that does not distinguish among the different types of immigration violators *de facto* incentivizes arrests of ordinary status violators and the least dangerous fugitives, and undermines the principle that “DHS must base its work on priorities that are driven by *risk*.”⁸⁶

⁷⁹ Mary D. Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE J. L. & POL’Y 1, 27 (2007).

⁸⁰ *Id.*

⁸¹ Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 445 (2002).

⁸² Md. Code Ann., Pub. Safety, § 3-504(b) (2006); *see also* Ark. Code Ann. §§ 12-6-301 to -303 (West 2007) (arrest and citation quotas); Cal. Veh. Code §§ 41600-41603 (West 2007) (citation and arrest quotas); Conn. Gen. Stat. Ann. §§ 7-282d, 29-2b (West 2007) (traffic ticket quotas); Fla. Stat. Ann. § 316.640(1)(a)(2) (West 2007) (traffic citation quotas); Minn. Stat. Ann. §§ 169.985, 299D.08 (West 2007) (traffic citation quota); Md. Code Ann., Pub. Safety, § 3-504(b)(1) (2007) (arrest and citation quotas); Mont. Code Ann. § 46-6-420 (2007) (arrest and citation quotas); Neb. Rev. Stat. § 48-235 (2007) (traffic citation quotas); N.C. Gen. Stat. § 20-187.3(a) (2007) (traffic citations or ticket quotas); N.J. Stat. Ann. §§ 40A:14-181.1, 40A:14-181.2a (West 2007); Tex. Transp. Code § 720.002 (Vernon 2007) (traffic citations) (citing Fan, *supra* note 79, at 25 n.122).

⁸³ JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE US* (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

⁸⁴ Border Security and Immigration Enforcement Fact Sheet, Oct. 23, 2008, ICE, http://www.dhs.gov/xnews/releases/pr_1224777640655.shtm.

⁸⁵ The precise number of high-priority fugitive aliens cannot be calculated because ICE has not released data about Priority 1 fugitive aliens. Letter from Myers to Meissner, *supra* note 51.

⁸⁶ Second Stage Review Remarks, *supra* note 69 (emphasis added).

Failure to Distinguish *In Absentia* Orders

Efficient use of resources requires that ICE focus not simply on apprehensions but also on actual *removals*. Indeed, ICE has articulated the importance of “[m]oving towards a 100 percent removal rate for all removable aliens.”⁸⁷ However, ICE has released little information about the removal rates of the individuals FOTs apprehended; its statistics focus instead almost entirely on the number of arrests.

In contrast to ordinary status violators, who generally have had no contact with ICE their arrest by an FOT, many of the fugitive aliens arrested by FOTs have been ordered removed *in absentia*. The *New York Times* reported in 2004 that two-thirds of removal orders are entered *in absentia*.⁸⁸ While some cases no doubt involve an intentional absence, in many other cases, the person has never received the hearing notice or is unaware of a resulting removal order for a number of common reasons: the immigration database might have inaccurate information about the person, causing notices to be sent to a wrong address;⁸⁹ the agency might have misplaced the person’s change-of-address notice;⁹⁰ or the person’s removal process as a whole might be plagued with administrative errors.

In addition to concerns about fairness and reasonable notice, removing a person with an *in absentia* order takes substantially longer than other removals and is particularly costly. To ensure constitutional due process in immigration proceedings, the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, permits a person to move to reopen an *in absentia* order “at any time” based upon a lack of proper notice of a hearing,⁹¹ and provides for an automatic stay pending a decision by the immigration judge on any such motion.⁹² Denial of a motion to reopen is subject to appeal to the Board of Immigration Appeals (BIA) and the appropriate US Court of Appeals. Thus, the removal of a person with an *in absentia* order is likely to be substantially more expensive than other removals; greater judicial resources and bed space are required due to the likelihood of lengthy administrative processes.⁹³

Impacts on Community Relations

Like most law enforcement activities, the ultimate success of ICE operations depends substantially on the degree of cooperation the agency receives. ICE frequently relies on state,

⁸⁷ ENDGAME, *supra* note 2, at 2-2.

⁸⁸ Nina Bernstein, *Old Deportation Orders Put Many Out Unjustly, Critics Say*, N.Y. TIMES, Feb. 19, 2004; *see also* NATIONAL IMMIGRATION FORUM, BACKGROUNDER: IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE (2007), *available at* <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgrounder-StateLocalEnforcement.pdf>.

⁸⁹ *See supra* text accompanying notes 21 and 22.

⁹⁰ *See, e.g.*, NATIONAL IMMIGRATION FORUM, SUMMARY OF SENATE IMMIGRATION REFORM LEGISLATION, (2006), *available at* <http://www.immigrationforum.org/documents/PolicyWire/Legislation/SenBillPassedSummary.pdf> (“It is worth noting that INS acknowledged that it had failed to record hundreds of thousands of change of address notices that were filed by immigrants”).

⁹¹ INA § 1229a(b)(5)(C).

⁹² By law, a motion to reopen an *in absentia* deportation order (as opposed to a removal order) based on lack of notice results in an automatic stay during the pendency of the motion before an immigration judge and any appeal to the BIA. INA § 240(b)(5)(C) (1995).

⁹³ ICE estimates that a bed space for a single unauthorized immigrant costs taxpayers \$97 per night, with additional costs associated with personnel. US Senate Committee on Homeland Security and Governmental Affairs Pre-hearing Questionnaire for the Nomination of Julie Myers to be Assistant Secretary, Department of Homeland Security, at 48.

local, and tribal law enforcement agencies for logistical and personnel support. In addition, businesses, civic institutions, and individual community residents must offer local knowledge and tips in order for FOT operations to function effectively. Accordingly, a compelling concern is that many business organizations, labor unions, faith leaders, community groups, local elected officials, and media commentators have reacted with fear and anger to FOT conduct and practices. Even the *perception* that FOTs are abusive jeopardizes community acceptance and support, and places FOTs in an adversarial stance toward the communities in which they work. Such poor community relationships can undermine ICE's effectiveness and endanger officers and civilians alike.

Critics have faulted ICE for detaining sole caretakers and nursing mothers, disregarding arrestees' significant health conditions, and failing to notify relatives and friends about detainees' whereabouts. Police departments have objected to ICE failures to advise them in advance of major operations.⁹⁴ School officials have reported sharp drops in attendance following FOT operations, and law enforcement agents have criticized the chilling effect of FOT operations on crime reporting, witness cooperation, and overall community policing strategies.⁹⁵ Local officials have condemned the operations, and cities have passed resolutions calling on ICE to cease its operations in their localities.⁹⁶ Media coverage critical of the program has been common.⁹⁷

Officer Safety and Liability

According to ICE, “[t]he foremost goal of ICE enforcement personnel is officer safety and public safety.”⁹⁸ The reality of NFOP operations, however, may involve highly dangerous situations for FOTs and state or local police officers due to poor coordination and information. FOT agents who enter a private home with unreliable intelligence and without a warrant are at heightened risk of error or attack. This is particularly true in the case of FOTs, which often conduct residential enforcement operations and regularly make arrests without individualized warrants. Indeed, agents may already be creating dangerous situations. In October 2007, for example, the *New York Times* reported that in two instances when

⁹⁴ Raquel Aldana, *Of Katz and 'Aliens': Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1115; Letter to Mayor Gavin Newsom from Ronald E. LeFevre, ICE, *supra* note 19.

⁹⁵ Jessie McKinley, *San Francisco Bay Area Reacts Angrily to Series of Immigration Raids*, N.Y. TIMES, Apr. 28, 2007; Julia Harumi Mass & Philip Hwang, *Immigration Raids Trample the Constitution Without Securing the Nation*, ACLU DAILY JOURNAL, July 10, 2007, available at

http://www.aclunc.org/news/opinions/immigration_raids_trample_the_constitution_without_securing_the_nation.shtml.

In testimony before a congressional subcommittee in May 2008, elementary school principal Kathryn Gibney reported: “On a day when we were scheduled to administer the state exams, 40 students were absent – seven times the normal absentee rate. Throughout the day, muted and trembling voices asked teachers if agents would come to school and take them away, what would happen to their mommy or daddy or aunt or uncle, and what would happen to them.” Kathryn M. Gibney, Principal, San Pedro Elementary School, Testimony before the Subcommittee on Workforce Protections of the US House of Representatives Education and Labor Committee (May 20, 2008), available at edlabor.house.gov/testimony/2008-05-20-KathrynGibney.pdf.

⁹⁶ McKinley, *supra* note 95.

⁹⁷ See, e.g., Jennifer Radcliffe, *Students Suffer When Migrants Rounded Up*, HOUSTON CHRONICLE, Oct. 24, 2008; Bernstein, *Raids Were a Shambles*, *supra* note 22; Bernstein, *Hunts for 'Fugitive Aliens' Lead to Collateral Arrests*, *supra* note 26; McKinley, *San Francisco Bay Area Reacts Angrily to Series of Immigration Raids*, *supra* note 95; Nina Bernstein, *US Raid on an Immigrant Household Deepens Anger and Mistrust*, N.Y. TIMES, Apr. 10, 2007.

⁹⁸ Letter from Karyn Lang, Director, Office of Congressional Relations, ICE, to US Representative Anna G. Eshoo (Mar. 29, 2007) (on file with authors).

FOTs were entering homes in Nassau County, the agents mistakenly drew their guns on Nassau County police detectives.⁹⁹

The Supreme Court has long recognized that warrants and advance intelligence in police settings are critical not only as a constitutional matter but also for basic officer safety. Justice Robert H. Jackson, for example, wrote in 1948 about the particular dangers associated with undertaking police operations without a search warrant: “When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot [him] . . . I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.”¹⁰⁰ More recently, the Supreme Court emphasized the importance of so-called knock-and-announce rules for officers entering residences, in order to “protect . . . human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident.”¹⁰¹

Considering the risks, it seems reasonable to expect that FOTs receive extensive training. As the International Association of Chiefs of Police has warned, “[f]ailure to train effectively carries significant ramifications, risks and liability.”¹⁰² However, FOTs lack sufficient training for their jobs. Both the OIG and GAO have called for more extensive, consistent, and specific training for FOT agents. The OIG report noted that although ICE provides a three-week training module for FOT agents in addition to basic law enforcement training, many team members have never attended the training program.¹⁰³ The OIG also expressed concern that ICE offers no national in-service or “refresher” training to provide information about changes in department policy or developments in immigration law.¹⁰⁴ Similarly, GAO pointed out that NFOP lacks mechanisms “to help ensure that officers receive consistent information regarding legal developments.”¹⁰⁵ Consequently, GAO concluded, ICE officers are at heightened risk “of taking actions that do not support the agency’s operational objectives” and running afoul of legal and constitutional requirements.¹⁰⁶

Protecting officer safety is particularly important in the context of FOT operations. Residential immigration enforcement generally represents a significant departure for immigration officers. The complexities of immigration enforcement in residential settings are unique and are more typically handled by local law enforcement agencies. Thus, existing guidance is less likely to account for the unique legal, humanitarian, and safety issues involved.

ICE’s position on training and educating its FOTs stands in stark contrast to standards in state and local law enforcement agencies, which have long appreciated the importance of

⁹⁹ Nina Bernstein, *Raids Were a Shambles*, *supra* note 22.

¹⁰⁰ *McDonald v. US*, 335 U. S. 451, 460-61 (1948) (Jackson, J., concurring). *See also Miller v. US*, 357 U.S. 301, 313 n.12 (1958) (“Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder”).

¹⁰¹ *Hudson v. Michigan*, 547 U. S. 586, 594 (2006).

¹⁰² INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES (2007), *available at* www.theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf.

¹⁰³ OIG REPORT, *supra* note 7, at 29-30.

¹⁰⁴ *Id.* at 30-31, 38.

¹⁰⁵ GAO REPORT, *supra* note 19, at 17.

¹⁰⁶ *Id.*

taking proactive measures. For example, in its training materials, the Seattle Police Department encourages officers to focus on *dangerousness* when deciding whether to make an arrest (“[a]rrest quotas . . . should be avoided”). The department’s training materials also express concern about database accuracy (“[d]on’t rely solely on computer information that may be stale or otherwise erroneous”) and call attention to the importance of individualized probable cause in order to avoid civil liability.¹⁰⁷

As with any law enforcement agency, ICE should prioritize shielding itself from litigation and civil liability. Lawsuits demand time and resources and generate negative publicity and community resentment.

However, ICE faces numerous lawsuits challenging FOT practices. Cases are pending in Minnesota, Connecticut, New Jersey, New York, and California, among other locations.¹⁰⁸ The lawsuits seek damages for alleged FOT misconduct, such as unreasonable entry, illegal search and seizure, wrongful arrest, and racial profiling. Some plaintiffs have alleged that FOTs “regularly disregarded the obligation to secure a judicial warrant or probable cause in carrying out unlawful entries and dragnet searches of homes in which the agents only loosely suspect immigrant families may reside” and that they “conduct home raids without reasonable grounds for believing that the purported target of their search is present in the home being raided.”¹⁰⁹

Furthermore, litigants have contended that ICE has “conducted a campaign of intimidation . . . by identifying locations such as trailer parks and apartment buildings with known concentrations of Latino residents, then conducted unconstitutional stops and detentions of individuals based solely on the individual’s race or apparent national origin.”¹¹⁰

Irrespective of the outcome of these suits, the accusations are serious, the litigation is costly, and the negative media attention is considerable.

¹⁰⁷ Leo Poort, *Tips for Avoiding Civil Liability Lawsuits*, SEATTLEPI.COM, Feb. 27, 2008, <http://seattlepi.nwsourc.com/specials/strongarm/docs/obstruction/tipsforpolice.asp>. The specific legal requirements for warrants and probable cause differ somewhat in the immigration context, but the importance of complying with constitutional search and seizure requirements in order to avoid civil liability applies equally to immigration operations.

¹⁰⁸ See, e.g., Complaint, *Arias et al. v. US Immigrations and Customs Enforcement*, No. 07-CV-1959 (D. Minn. July 27, 2007), available at <http://www.aifl.org/lac/chdocs/Arias-ammcmpl.pdf> (Minnesota); Complaint, *Barrera et al. v. Boughton et al.*, No. 3:07-cv-01436-RNC (D. Conn., November 26, 2007), available at <http://www.aifl.org/lac/chdocs/barrera-complaint.pdf> (Connecticut); Complaint, *Reyes v. Alcantar* (N.D. Cal. April 26, 2007), available at <http://www.aifl.org/lac/chdocs/Reyes-Complaint.pdf> (California); Amended Class Action Complaint, *Aguilar et al. v. US Immigrations and Customs Enforcement*, No. 07 CIV 8224 (S.D.N.Y. October 4, 2007), available at <http://www.aifl.org/lac/chdocs/Aguilar-complaint.pdf> (New York); Complaint, *Flores et al. v. Myers* (D. N.J. April 3, 2008), available at <http://law.shu.edu/cs/ice/complaint.pdf> (New Jersey).

¹⁰⁹ Complaint, *Flores et al. v. Myers* (D. N.J. April 3, 2008), available at <http://law.shu.edu/cs/ice/complaint.pdf> (New Jersey).
¹¹⁰ Memorandum, *Aguilar v. US Immigrations and Customs Enforcement*, No. 07 Civ. 8224 (S.D.N.Y. Dec. 7, 2007), available at <http://www.aifl.org/lac/chdocs/Aguilar-msupport-mtd.pdf>.

V. Conclusions and Recommendations

NFOP was established to further important goals: locating, apprehending, and removing fugitive aliens who endanger the nation or their communities. Congress has exponentially increased NFOP's budget to enable ICE to achieve this mission.

Yet ICE's own data indicate NFOP has failed to focus on the priorities it claimed in justifying its program to Congress. Since shifting the objective in January 2006 to 1,000 arrests per fugitive operations team, and crediting arrests of some nonfugitives towards this total, the program has apprehended the easiest targets, not the most dangerous ones.

Furthermore, available data raise concerns about the program's basic design. At present, NFOP is structured as a national security program: officers are armed, appear at residences late at night and early in the morning, and often undertake operations without advising local law enforcement or social services agencies in advance. While these measures may be warranted for a program that solely or largely apprehends dangerous fugitives, this approach, when used to arrest immigrants who have no criminal history, may lead to excessive force, overuse of high-powered weapons, and other escalations. In addition, FOTs do not have adequate information or training to perform their jobs, placing themselves at risk, wasting resources, alienating communities, and exposing the agency to costly lawsuits. Clearly, NFOP needs more rigorous and comprehensive management and evaluation to ensure it meets its stated goals safely and efficiently.

Recommendations

Recommendation 1: NFOP should replace the 1,000-arrests-per-team annual quota with a system that prioritizes arresting dangerous fugitives over all others.

Rather than binding itself to rigid arrest quotas, NFOP should set numerical objectives that reflect the program's goals and congressionally endorsed priorities. Specifically, NFOP should require that FOTs focus on *dangerous* fugitive aliens – those currently classified as threats to national security or the community, or with a violent criminal history. Between 2004 and January 2006, NFOP directed its teams to ensure that fugitive aliens with criminal convictions constituted at least 75 percent of their apprehensions.¹¹¹

Alternatively, the NFOP could impose specific numerical goals for each priority category, which would serve DRO's desire to set and achieve rigorous goals while also reflecting the importance of using resources in a manner consistent with the program's stated goals.

Both approaches would restore the program's congressionally-approved focus on *dangerousness* and direct resources to the greatest threats to public safety.

As a general rule, FOTs should not arrest ordinary immigration violators. NFOP was not designed as a general immigration enforcement and removal program, and arresting alleged status violators diverts resources intended for targeting and arresting higher-priority fugitive aliens. Indeed, it is worth noting that new Homeland Security Secretary Janet Napolitano on

¹¹¹ OIG REPORT, *supra* note 7, at 8.

January 30th issued a directive requiring ICE to examine its plans and policies, including those that differentiate between fugitives and ordinary status violators, so that NFOP can better prioritize its enforcement efforts.¹¹²

Recommendation 2: FOTs should approach only targeted houses and persons.

Since NFOP was designed to apprehend a specific group of dangerous fugitive aliens, FOTs should approach only targeted houses and persons and not question neighbors, pedestrians on the street, or other bystanders simply because they are nearby when the operation happens.

In addition to ensuring that NFOP uses resources efficiently, approaching only targeted individuals and houses would implement the constitutional command, and longstanding law enforcement value, of individualized suspicion as the touchstone for all investigations. Like other law enforcement officials, FOTs must have reasonable suspicion to question suspected fugitives and probable cause to arrest any person. Requiring individualized suspicion would reduce liability and restore community trust in ICE's enforcement initiatives.

Also, concentrating on specific targets would likely improve officer safety, as FOTs would be less likely to find themselves in risky circumstances. When FOTs approach residences simply because they are near targeted houses, they are less likely to know anything about the individuals inside those houses, to arrive prepared with surveillance or other advance intelligence, and could enter situations that are both inappropriate and dangerous for the agents.

Furthermore, officers should be trained to conduct basic investigations in advance of operations in order to ensure that the fugitive alien in question is likely to be inside of the targeted residence. Agents need not actually visit the home prior to the operation, but should be required to make an appropriate effort, using an improved database and the information accessible at their desks, to confirm to the best of their ability that the targeted person lives at that address and will likely be present at the time of the operation.

Recommendation 3: NFOP should develop a new protocol explicitly directed to address constitutional and humanitarian concerns that arise during FOT operations. All FOT agents should be required to undergo comprehensive training in accordance with this new protocol (as well as periodic refresher trainings), in addition to their basic law enforcement training.

At present, fugitive operations agents are required to attend a three-week training session. The training course is conducted at the ICE Academy located at the Federal Law Enforcement Training Center and focuses on “enabl[ing] participants to effectively utilize Internet, database, and other sources of information to locate where a fugitive lives, visits and/or works.”¹¹³ According to ICE, there is a chapter in the Officer's Manual regarding

¹¹² Secretary Napolitano Issues Immigration and Border Security Action Directive, ICE News Release, Jan. 30, 2009, http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm. (“Please provide the current metrics of fugitive apprehension and removal (clearly differentiate the number of fugitives that are actually removed versus those aliens unlawfully present who are simply encountered by the teams while on assignment). How can fugitives be more effectively prioritized for these purposes and what steps can be taken to expedite removal?”).

¹¹³ National Fugitive Operations Program, ICE, Nov.10, 2008, <http://www.ice.gov/pi/dro/nfop.htm>; see also OIG REPORT, *supra* note 7, at 30.

overall policies and procedures for DRO, including field directives about various aspects of FOT operations.¹¹⁴ These materials are not publicly available, so it is difficult to assess how comprehensive they are. No formal, binding protocol exists to govern FOT operations.¹¹⁵

NFOP's residential focus and the enormous growth of the program call for careful and detailed standards to address officer conduct and community relations. A new, explicit protocol, which state and local law enforcement agencies rely on, is crucial.

At a minimum, any new protocol should require that FOTs:

- properly identify themselves, obtain lawful consent to enter residents' homes, and comply with the constitutional requirements governing their work;
- coordinate with, and provide advance notice to, local law enforcement agencies;
- coordinate with, and provide advance notice to, local social service organizations;
- comply with special guidelines for individuals of humanitarian concern, such as those with medical needs and sole caretakers of minor children;
- promptly issue a list of the people detained and their whereabouts, and share the list with local police and any social service organization that requests it.

In addition, the new protocol should require "refresher trainings" for agents to learn about the constitutional and legal requirements governing their work.¹¹⁶

Consistent, thorough, and rigorous training would help to realize congressional and agency commitments that all DHS actions in pursuit of national security take place "within established constitutional and legal limits," and also help NFOP avoid expending its limited financial, legal, and personnel resources defending against litigation.¹¹⁷

Recommendation 4: NFOP should expand its priority system to designate individuals with *in absentia* orders and no criminal history as Category 6.

To address the cost, efficiency, and fairness concerns that *in absentia* orders pose, ICE should add a sixth category to the existing priority system for persons with no criminal history who were ordered removed *in absentia*. In light of the real possibility that notice was never received, it makes sense to focus first on individuals who deliberately flouted the law before targeting and apprehending those whose claims for relief may not previously have been heard by any court. Moreover, the removal of individuals with *in absentia* orders is more

¹¹⁴ Phone conversation between Doris Meissner, Migration Policy Institute, and James T. Hayes, Jr., Director, Office of Detention and Removal (Nov. 13, 2008).

¹¹⁵ *Id.*

¹¹⁶ According to the GAO's study, "ICE's guidance does not comprehensively address key aspects of the alien apprehension and removal process." GAO REPORT, *supra* note 19, at 34. The Standard Operating Procedure detailed above would replace the current operational manuals, "which are largely unchanged from before the creation of the Department of Homeland Security and ICE's placement in it, do not reflect ICE's expanded . . . fugitive operations, nor do they clearly and comprehensively address humanitarian and other issues associated with these operations." *Id.* at 7.

¹¹⁷ Neil A. Lewis, *A Nation Challenged: The Hearings; Justice Dept. and Senate Clash over Bush Actions*, N.Y. TIMES, Nov. 29, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9C03E3DD143DF93AA15752C1A9679C8B63>.

costly, lengthier, and more uncertain, due to the greater due process requirements entailed in the adjudication of their cases. In other words, these aliens should be NFOP's lowest priority.

Recommendation 5: ICE should direct substantial NFOP resources to improving the database from which information about fugitive aliens is drawn. Specific standards for database accuracy should be set, achieved, and verified by government audit.

Database accuracy is essential for NFOP success because of the specificity of its mandate and the unique invasiveness of residential operations. Although DRO has implemented ENFORCE, a new database system for storing and accessing information about fugitive aliens, the transition is recent and ongoing. Due to the known high degree of flawed information in the predecessor database DACS and ICE's history of chronic data management problems,¹¹⁸ NFOP should not rely upon existing databases until they meet basic standards of accuracy.

Recommendation 6: NFOP should redeploy resources when FOTs are unable to identify or pursue dangerous fugitives.

FOTs have permanent offices throughout the country, and teams are responsible for apprehending individuals within their specific geographical regions. However, maintaining permanent staffing in areas where there are few high-priority targets or in which high-priority targets cannot be located can lead to high overhead costs and encourage teams to pursue nonpriority apprehensions. Redeploying resources in those situations would ensure that NFOP funds are expended where they are most needed and maximize the program's security goals.

Precisely how NFOP might alter its resource deployment to match its priorities is best left to DRO to determine, but several options are preferable to the status quo. For example, if an FOT in a given region has exhausted leads for Category 1, 2, or 3 fugitives (fugitive aliens who pose a threat to the nation or the community, or who have been convicted of violent crimes), DRO might (a) lend desk-staff time to FOTs in other regions that have leads on high-priority aliens; (b) detail agents to other regions; or (c) lend staff to other ICE programs targeting dangerous individuals in the same region. These programs include Operation Predator, an effort to protect young people from sex offenders, and Operation Community Shield, an effort to dismantle transnational street gangs by, among other things, deporting criminal aliens.¹¹⁹

¹¹⁸ See *supra* text accompanying notes 21 and 22.

¹¹⁹ See generally Operation Community Shield: Targeting Violent Transnational Street Gangs, ICE, <http://www.ice.gov/pi/investigations/comshield>; Fact Sheet: Operation Predator, The White House, July 2004, <http://www.whitehouse.gov/news/releases/2004/07/20040707-10.html>.

VI. Appendix

Appendix 1. ICE, DRO, and NFOP Budgets, FY 2005-2008

| Fiscal Year | ICE Total Budget | DRO Budget | | NFOP Budget | |
|-------------|---------------------------|---------------------------|--------------------|---------------------------|--------------------|
| | Dollars (in thousands) | Dollars (in thousands) | % of ICE budget | Dollars (in thousands) | % of DRO budget |
| 2005 | 3,557,454 | 1,218,391 | 34.2 | 79,049 | 6.5 |
| 2006 | 4,206,443 | 1,645,370 | 39.1 | 121,852 | 7.4 |
| 2007 | 4,726,641 | 1,984,345 | 42.0 | 183,200 | 9.2 |
| 2008 | 5,581,217 | 2,381,481 | 42.6 | 218,945 | 9.2 |

Note: The fiscal 2005 and 2006 budget numbers include enacted and supplemental funding.

Source: ICE Fact Sheets, Fiscal Year 2008, ICE, December 28, 2007,

<http://www.ice.gov/doclib/pi/news/factsheets/2008budgetfactsheet.pdf> ; Fact Sheet: Fiscal Year 2007, ICE, February 5, 2006,

<http://www.ice.gov/doclib/pi/news/factsheets/2007budgetfactsheet.pdf>; Fact Sheet: Fiscal Year 2006, ICE, February 5, 2006,

<http://www.ice.gov/doclib/pi/news/factsheets/2006budgetfactsheet.pdf>; Fact Sheet: Fiscal Year 2005, ICE, February 5, 2005,

<http://www.ice.gov/doclib/pi/news/factsheets/2005budgetfactsheet.pdf>.

About the Authors

Margot Mendelson is a third-year student at Yale Law School. She graduated from Harvard College *magna cum laude* in 2003. After college, she spent a year community organizing in Central America on a Frederick Sheldon Fellowship, and then worked on behalf of immigrants in deportation proceedings for the following two years. While in law school, she has worked at the United Nations High Commissioner for Refugees in Geneva and the ACLU's Legislative Office in Washington, DC, where she concentrated on issues related to immigrants' rights and national security. Among her publications are an article in the *Berkeley Women's Law Journal* on the impact of drivers' license laws on unauthorized immigrant victims of violence and a guide to the immigration provisions of the Violence Against Women Act. She is a senior editor of the *Yale Law Journal* and has been active in the Yale Law School Worker and Immigrant Rights and Advocacy Clinic and the National Litigation Project.

Shayna Strom is a third-year law student at Yale Law School. She holds a master's degree in politics and international relations research from the University of Oxford, which she attended as a Rhodes Scholar. Her master's thesis focused on intercultural understanding and policies towards immigrants in Leicester, England. She also holds a bachelor's degree *summa cum laude* in ethics, politics, and economics from Yale University. While at law school, she has been a member of the Worker and Immigrant Rights Advocacy Clinic and has worked on the intersection of immigration and labor issues at the Service Employees International Union and the US Senate Committee on Health, Education, Labor, and Pensions. Before coming to law school, Ms. Strom was a community organizer and political organizer in Ohio, New York, and New Jersey.

Michael J. Wishnie is Clinical Professor of Law at Yale Law School. His teaching, scholarship, and law practice have focused on immigration, labor and employment, habeas corpus, civil rights, and administrative law. For years, he and his students have represented grassroots organizations in a range of litigation, legislative, media, and community education matters. He is counsel for nearly all of the 32 persons detained in the June 2007 New Haven FOT operation and for community groups that have brought state and federal Freedom of Information Act suits arising from the operation, *see Unidad Latina en Accion v. DHS*, No. 3:07-cv-1224 (D.Conn.), all mentioned in this paper. Wishnie is also a Nonresident Fellow of the Migration Policy Institute and frequently handles cases as a cooperating attorney for the American Civil Liberties Union Immigrants' Rights Project. He is a graduate of Yale College and Yale Law School and served as a law clerk to Judge H. Lee Sarokin of the US District Court of New Jersey and US Court of Appeals for the Third Circuit, and to Supreme Court Justices Harry A. Blackmun and Stephen G. Breyer.

Doris Meissner, former Commissioner of the US Immigration and Naturalization Service (INS), is a Senior Fellow at the Migration Policy Institute (MPI) where she directs MPI's work on US immigration policy. She also contributes to the Institute's work on immigration and national security, the politics of immigration, administering immigration systems and government agencies, and cooperation with other countries. Ms. Meissner has authored and co-authored numerous reports, articles, and op-eds and is frequently quoted in the media.

She recently served as director of MPI's Independent Task Force on Immigration and America's Future, a bipartisan group of distinguished leaders. The group's report and recommendations address how to harness the advantages of immigration for a 21st century economy and society. From 1993 to 2000, she served in the Clinton administration as Commissioner of the INS, then part of the US Department of Justice. She first joined the Department of Justice in 1973 as a White House Fellow and special assistant to the Attorney General. She served in various senior policy posts at Justice until 1981, when she became acting commissioner of INS and then executive associate commissioner, the third-ranking post in the agency. In 1986, she joined the Carnegie Endowment for International Peace as a senior associate. Ms. Meissner created the Endowment's Immigration Policy Project, which became MPI in 2001. A graduate of the University of Wisconsin-Madison, where she earned BA and MA degrees, she began her professional career there as assistant director of student financial aids. She was also the first executive director of the National Women's Political Caucus (NWPC).

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