November 2024

Advocating for Clients in ICE's Alternatives to Detention Programs

Authors: Evan Benz (evan@amicacenter.org), Jennifer Ibañez Whitlock (jwhitlock@aila.org), and Laura Rivera (laura@justfutureslaw.org)

AILA AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Amica Center for Immigrant Rights
Formerly known as CAIR Coalition

JUST FUTURES LAW

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Introduction

Created in 2002, the Immigration & Customs Enforcement's (ICE) Alternatives to Detention (ATD) program has significantly expanded in recent years.[1] From original pilot sites with 200 individuals, the program has in recent times had as many as 376,000 individuals under monitoring.[2] The largest program within ATD is the Intensive Supervision Appearance Program (ISAP-IV), which is administered by contractor BI Incorporated (BI) through its case specialists. Under ISAP, persons are assigned to various electronic monitoring technologies (ankle monitors, the smartphone application SmartLINK, or telephonic reporting) and office visits, and may be assigned to home visits. ICE Enforcement and Removal Operations (ERO) determines the intensity of supervision and monitoring technology on a case-by-case basis.[3] Outside of ICE/ISAP, there is also an alternative to detention program called the Case Management Pilot Program (CMPP).[4] CMPP is managed by a National Board which is chaired by the DHS Officer for Civil Rights & Civil Liberties. However, the purpose of this guide is to assist attorneys with navigating the conditions imposed by ICE's ATD programs.

Section 1. Legal Authorities for ATD

Congress authorizes the arrest and detention of noncitizens pending a decision on whether they are to be removed from the United States.[5] After arrest, ICE is also authorized to release a noncitizen into pending removal proceedings on either (A) "a bond of at least $1,500" or (B) "conditional parole."[6] Pursuant to this authority, ICE places conditions of supervision on some noncitizens, including limitations on places a person may go, and alerts if a person crosses that perimeter.[7]

ICE can also set conditions on noncitizens who have received a final removal order but may, for a variety of reasons, nevertheless be released from detention or permitted to remain outside of detention. In these cases, ICE will issue an "Order of Supervision (Form I-220B)" and is authorized to impose conditions of supervision, including that the noncitizen report to ICE periodically and provide certain information, including a current address.[8]

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[1] ICE, "Privacy Impact Assessment," Alternatives to Detention Program (Mar. 17, 2023), https://www.dhs.gov/sites/default/files/2023-08/privacy-pia-ice062-atd-august2023.pdf.
[2] ICE, Detention Statistics, https://www.ice.gov/detain/detention-management (last visited Sept. 30, 2024).
[3] ICE, "Alternatives to Detention: ISAP Transition" (updated June 24, 2024), https://www.ice.gov/features/atd ("Each noncitizen enrolled in ISAP receives an individualized determination as to their level of supervision.")
[4] DHS, "Case Management Pilot Program," https://cmpp.org/
[5] 8 U.S.C. § 1226(a).
[6] 8 U.S.C. § 1226(a)(1)(A)–(B).
[7] ICE ERO, *Alternatives to Detention Handbook – Intensive Supervision Appearance Program* 7-8 (Aug. 16, 2017) ("ISAP Handbook"), AILA Doc. No. 24100931; Elizabeth Trovall, NPR Marketplace, "The Growing business of immigrant surveillance" (Aug. 2, 2023), https://www.marketplace.org/2023/08/02/the-growing-business-of-immigrant-surveillance/.
[8] 8 C.F.R. § 241.5(a)(1)-(5).

Prior to the entry of a final removal order, a noncitizen can request "amelioration of the conditions under which he or she may be released."[9] An immigration judge (IJ) has jurisdiction to change the conditions of release for a noncitizen in ongoing removal proceedings.[10] However, an immigration judge can only entertain a motion to reconsider conditions of release if timely filed within seven days of release from detention.[11] After seven days, a noncitizen can only seek a change in their status with ICE.[12] If ICE refuses to change the noncitizen's supervision conditions, the noncitizen can appeal within 10 days to the Board of Immigration Appeals (BIA).[13]

For noncitizens with final removal orders, there do not currently exist similar regulations for reconsideration or amelioration of conditions before ICE or an IJ.[14] This impacts noncitizens who may never be removed because they are stateless or who have won withholding of removal under INA § 241 or relief under the Convention Against Torture. However, nothing prevents these noncitizens from submitting amelioration requests to ICE, and ICE does have a duty under its own policies to regularly review all ATD cases to determine the appropriateness of continuing supervision. Also, one ICE policy memorandum from 2011 stated, in pertinent part, that noncitizens "who are not likely to be removed in the reasonably foreseeable future should not be enrolled (or continued) in the ATD program."[15] Noncitizens with removal orders can also take advantage of ICE's generally applicable ATD policies.

Section 2. ICE ATD Policy Memos and Directives

The core of ICE's ATD policies are contained in its ISAP handbook, the most recent version of which (issued in August 2017) was obtained via FOIA litigation.[16] (As a reminder, ISAP is the largest of ICE's ATD programs and covers the vast majority of ATD participants, but not all.) According to a U.S. Government Accountability Office (GAO) report from 2022, ICE ATD headquarters considers the ISAP handbook to be the program's standard operating procedure, and it is therefore reasonably understood as binding policy on ICE ATD officials.[17]

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[9] *See* 8 C.F.R. § 236.1(d)(1); 8 C.F.R. § 1236.1(d)(1).

[10] *See Matter of Garcia-Garcia*, 25 I. & N. Dec. 93 (BIA 2009).

[11] *See* 8 C.F.R. § 236.1(d)(1); *see also Matter of Aguilar-Aquino*, 24 I. & N. Dec. 747 (BIA 2009).

[12] 8 C.F.R. § 236.1(d)(2); § 1236.1(d)(2).

[13] 8 C.F.R. § 236.1(d)(3).

[14] Between 1997 and 2000, the regulations explicitly authorized noncitizens with final removal orders to request review of their conditions of release before the local INS district director, but this procedure was eliminated in 2000. *See* 65 FR 80293-94 (Dec. 21, 2000).

[15] ICE ERO, *Alternatives to Detention Guidance* (Feb. 28, 2011), AILA Doc. No. 24100934.

[16] *See* ISAP Handbook at 12.

[17] *See* U.S. Gov't Accountability Off., GAO-22-104529, *Alternatives to Detention: ICE Needs to Better Assess Program Performance and Improve Contract Oversight* 27 (June 22, 2022), https://www.gao.gov/products/gao-22-104529 ("GAO Report") ("The ATD Handbook, published in 2017, outlines these policies and procedures, which ATD headquarters officials stated they consider the program's standard operating procedure.").

The ISAP handbook establishes procedures for ICE officials to conduct regular reviews of a noncitizen's compliance with their ATD conditions and to escalate or de-escalate those conditions accordingly.[18] Under the Multi-Aspect Removal Verification Initiative (MARVIN), as described in the ISAP handbook, ICE officers are instructed to use a "high-low-high" framework in determining supervision conditions.[19] This framework "begins monitoring at the intensive level to establish and determine compliance (high), then de-escalates to a lower level as compliance is established and maintained (low), and then, depending on the participant's individual circumstances, monitoring may be re-escalated to ensure compliance with immigration proceedings and removal (high)."[20] Under this model, "[c]ompliant participants receive reduced monitoring and technology."[21]

The ISAP handbook also establishes specific procedures for handling amelioration requests from program participants.[22] "When ATD officers receive written requests for reconsideration, they document receipt of these requests" in the relevant database.[23] "The ATD officer, the ATD supervisor, the FOD, or the FOD's designee then thoroughly reviews the circumstances as described by the participant in the request."[24] "*Within two business days of receipt*," the relevant ICE official should "provide[] the participant with a written response to his or her request, including an explanation of the decision to grant or deny the request."[25]

Although the ISAP handbook does not lay out an explicit interval for ICE officers to review ATD conditions, in March 2021, ICE issued a policy directing officials to conduct ATD case reviews every 30 days.[26] However, reports from practitioners and the 2022 GAO report indicate that ICE officials are failing to review ATD cases and adjust supervision conditions in a timely fashion.[27] This leaves noncitizens languishing with harmful and onerous supervision conditions for prolonged periods of time and exposes the agency to liability for failing to follow its own policies and procedures.

Policies for Noncitizens Experiencing Certain Vulnerabilities

ICE has also adopted at least three policies regarding ATD conditions and vulnerable populations, including pregnant people, people with serious medical conditions, and/or mental health issues.

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[18] *See* ISAP Handbook at 12-13.
[19] *Id.* at 12.
[20] *Id.* at 12-13.
[21] *Id.* at 13.
[22] *Id.* at 18-19.
[23] *Id.* at 18.
[24] *Id.* at 18-19.
[25] *Id.* at 19 (emphasis added).
[26] *See* GAO Report at 30 n.44.
[27] *Id.* at 29-34.

- **Medical conditions.** In 2009, ICE issued a policy memorandum discontinuing the use of "ankle [monitors] on persons whose medical conditions render the use of these devices inappropriate."[28] Such medical conditions include, but are not limited to, pregnancy.[29] The memorandum instructs ICE officers to "transfer anyone currently wearing ankle [monitors] and who fall into this category to another form of monitoring."[30]
- **Pregnant people.** In 2021, ICE expanded the policy towards pregnant people to prohibit any ATD participants known to be pregnant, postpartum, or nursing from wearing a GPS monitor.[31]
- **Serious mental conditions or incompetency.** In 2022, ICE issued a directive governing, among other things, safe release planning for detained individuals with serious mental disorders or conditions and/or who are determined to be incompetent by an immigration judge.[32] The 2022 directive states that ICE "FODs will … [w]ork collaboratively with attorneys of record . . . after the release of individuals with serious mental disorders or conditions and/or who are determined to be incompetent by an IJ on ongoing reporting conditions or obligations to ensure they are appropriate and any participation in an ICE Alternatives to [Detention] program is tailored to the individual's special needs."[33]

Section 3. Requesting De-Escalation

Though ICE policy requires local field offices to regularly review the supervision levels of noncitizens in the ATD program, in practice, such reviews occur inconsistently or not at all, depending on the field office. With the average length of enrollment in ISAP nearing two years, de-escalation will often require proactive steps by noncitizens and their counsel.

The main way for attorneys to seek amelioration or "de-escalation" of their client's conditions of ISAP supervision is to submit a written request to the Deportation Officer assigned to the client's case at the local field office. Separately, an attorney may file a motion to request amelioration of ATD conditions with an immigration judge, but only within seven days of the client's release from detention.[34]

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[28] *See* ICE ERO, *Use of GPS Monitoring Devices on Persons who are Pregnant or Diagnosed with a Severe Medical Condition* (Sept. 14, 2009), AILA Doc. No. 24100935.
[29] *Id.*
[30] *Id.*
[31] ICE Directive 11032.4, "Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals," (July 1, 2021), AILA Doc. No. 21070930.
[32] *See* ICE Directive 11063.2, *Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions* (Apr. 5, 2022), AILA Doc. No. 22041203.
[33] *Id.* at 8-10.
[34] Samples of such motions are included in this resource at Appendix B.

What to Include in a De-escalation Request

According to the ISAP handbook, a de-escalation request should contain the following information: "the participant's name; A-number; stage in immigration proceedings; the level of monitoring; and why reconsideration seems appropriate, along with documentation, if any, supporting the request."[35] Attorneys should also explain any criminal history or lack thereof in their client's case. If the initial reason ICE placed certain conditions on your client was due to a criminal history, then evidence of the client's rehabilitation should be offered. If your client has not had any encounters with the criminal justice system, here or abroad, that fact should be underscored.

Your client's ATD compliance history, including any purported failures to comply (missed check-ins, etc.) should be explained. ISAP contractors are required to notify ICE of any alleged failures to comply for potential monitoring escalation, so these instances will be part of your client's file. Given the faultiness of ICE's ATD technology, there may be "violations" in the client's file that were not your client's fault, and those should also be addressed. Similarly, including a statement of your client's attendance at immigration court hearings can be useful.

Any positive equities such as community or family ties should be included to demonstrate that your client is not a flight risk. Additionally, caregiver concerns, and other humanitarian or medical concerns should be prominently highlighted in your request. Attorneys should also preempt suggestions that simply loosening an electronic device or changing the limb to which it is affixed will address any pressing medical or mental health concerns of your client.

Where to Submit the De-escalation Request

Under the terms of ICE's agreement with BI, the contractor's case managers are not authorized to change your client's conditions of release. Accordingly, the best person to submit your de-escalation request to is your client's ERO officer.[36] That said, case managers may recommend modifications to supervision conditions, and given their frequent contact with your client, their view may be persuasive to ICE. Thus, you may wish to request a review of your client's reporting conditions or tech assignment to their case management specialist.

How to Escalate a Request that Has Been Denied or Ignored

If an ERO officer has declined to de-escalate a noncitizen from an onerous reporting or supervision condition, attorneys can attempt to escalate a request via a limited number of agency and oversight agency channels.

[35] ISAP Handbook, p. 18.

[36] A sample de-escalation request is included in this resource at Appendix A.

Within ICE, an attorney can ask for a Supervisory Detention & Deportation (SDDO) Officer to review the initial decision. In some field offices, the SDDO is already assigned to oversee the ATD docket. Prior to submitting an escalation request, an attorney should ask if there is someone in the field office assigned to oversee the ATD docket and direct their escalation request to that individual. If the response is still a negative and you feel strongly that it is in error or ignores your client's pressing medical or mental health needs, an attorney can choose to escalate to the Assistant Field Office Director (AFOD), Deputy Field Office Director (DFOD), and ultimately the Field Office Director (FOD).

The contact information for the SSDO or the FOD is rarely available publicly. An attorney with an AILA membership can contact the local ICE liaison[37] for assistance as this information may be held within the chapter. Alternatively, an attorney can email the assigned ICE Community Relations Officer (CRO)[38] for assistance with securing the contact information. A third option is to email the ICE Field Office's outreach inbox.[39] ICE is currently piloting a website that will be called the "ICE Customer Service Management," portal where the public will be able to submit a request to ICE for information.

Outside of the agency, attorneys can consider filing a complaint with the Office of Civil Rights & Civil Liberties (CRCL). While CRCL has not explicitly identified ATD issues as an area of concern, ICE's policies and practices with respect to ATD fall within CRCL's mandate.[40] Further, there is a strong argument to be made that certain onerous reporting conditions are a violation of a noncitizen's civil rights and civil liberties. A CRCL complaint can be made online[41] and on behalf of a client. A section with helpful tips on filing administrative complaints with CRCL and other oversight agencies can be accessed in "Representing Detained Clients in the Virtual Legal Landscape,[42]" a legal practice resource of AILA and Amica Center (formerly CAIR Coalition).

Section 4. Possible Claims for Judicial Review of ATD Conditions

If ICE does not respond to a de-escalation request or their decision is not satisfactory, a client may be interested in seeking judicial review of their situation in the local federal district court, either via a civil complaint or possibly via a habeas petition. There are several potential bars to such complaints/petitions (including administrative exhaustion and some statutory bars to judicial review) and the exact arguments to include will depend on the governing precedent in

[37] AILA Group Directory, "Local Liaison," https://www.aila.org/group-directory

[38] ICE Office of Public Engagement, "Community Relations Officers," https://www.ice.gov/who-we-are-offices/leadership-offices/office-partnership-and-engagement

[39] ICE Field Office Outreach Email Addresses, https://www.ice.gov/who-we-are-offices/leadership-offices/office-partnership-and-engagement

[40] DHS, Office of Civil Rights & Civil Liberties (CRCL), https://www.dhs.gov/office-civil-rights-and-civil-liberties

[41] CRCL Online Complaint Form, https://www.dhs.gov/file-civil-rights-complaint

[42] AILA, "Representing Detained Clients in the Virtual Legal Landscape," (Oct. 10, 2023), AILA Doc. No. 23101001, https://www.aila.org/library/representing-detained-clients-in-the-virtual-legal

the relevant judicial circuit. As a starting point, this advisory will outline three categories of potential claims to bring on behalf of clients suffering under onerous ATD conditions.

Note: Because these claims in the ATD context are quite novel, and because a negative decision at the district court or circuit court level could negatively impact hundreds or thousands of similarly situated individuals, it is highly recommended that inexperienced federal court litigators seek mentorship from and/or co-counsel with more experienced litigators who are familiar with the relevant district court.

Claims under the Administrative Procedures Act (APA) and the *Accardi* Doctrine

Under the *Accardi* doctrine, agencies are bound to follow their own rules that affect the fundamental rights of individuals, even self-imposed policies and processes that limit otherwise discretionary decisions.[43] This doctrine is not "limited to rules attaining the status of formal regulations."[44] Even an unpublished manual or policy binds the agency if "an examination of the provision's language, its context, and any available extrinsic evidence" supports the conclusion that it is "mandatory rather than merely precatory."[45]

When agencies fail to adhere to their own policies as required by *Accardi*, courts typically frame the violation as arbitrary, capricious, and contrary to law under the Administrative Procedure Act (APA),[46] or as a due process violation.[47] Moreover, prejudice is generally presumed when an agency violates its own policy.[48] To remedy an *Accardi* violation, a court may direct the agency

[43] *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 226 (1954) (holding that BIA must follow its own regulations in its exercise of discretion); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

[44] *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991).

[45] *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977); *see also Morton*, 415 U.S. at 235–36 (applying *Accardi* to violation of internal agency manual); *U.S. v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969) ("Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labeled a 'Regulation'").

[46] *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018) ("It is clear, moreover, that [*Accardi*] claims may arise under the APA").

[47] *See Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("An agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice and consequently may result in a violation of an individual's constitutional right to due process.") (internal quotations omitted).

[48] *See Montilla*, 926 F.2d at 169 ("[W]e hold that an alien claiming the INS has failed to adhere to its own regulations is not required to make a showing of prejudice before he is entitled to relief. All that need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them."); *Heffner*, 420 F.2d at 813 ("The *Accardi* doctrine furthermore requires reversal irrespective of whether a new trial will produce the same verdict.").

to properly apply its policy,[49] or a court may apply the policy itself and order relief consistent with the policy.[50]

The ICE policies discussed above are precisely the type of rules that ICE is obligated to follow under *Accardi*. They cabin what is otherwise ICE's broad discretion to impose conditions of release on noncitizens, and they are clearly intended, at least in part, to benefit those noncitizens.[51]

Moreover, ICE's failure to follow these policies is prejudicial to noncitizens. Prejudice can be presumed because these policies implicate noncitizens' fundamental liberty interests and due process rights.[52] These policies provide noncitizens with a discrete opportunity to obtain freedom from unduly harmful conditions of release and when ICE fails to review their case and make appropriate changes to their ATD conditions, it withholds that opportunity from them.[53]

Even if prejudice is not presumed, noncitizens can often easily demonstrate how ICE's failure to follow its own policies has resulted in specific harms to a noncitizen. If ICE were to review noncitizens' ATD conditions under these policies, it would likely decide—and indeed, would in many cases be obliged—to either unenroll the noncitizens from the ATD program altogether, or at least remove the harmful ATD restrictions that have negatively affected the noncitizen.

Procedural Due Process Claims

In determining whether ATD conditions that infringe on a noncitizen's liberty interest violate procedural due process, courts will generally consider the three factors outlined in the Supreme Court's decision in *Mathews v. Eldridge*: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

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[49] *See Damus*, 313 F. Supp. 3d at 343 ("[T]his Court is simply ordering that Defendants do what they already admit is required.")

[50] *See Jimenez v. Cronen*, 317 F. Supp. 3d 626, 657 (D. Mass. 2018) (scheduling bail hearing to review petitioners' custody under ICE's standards because "it would be particularly unfair to require that petitioners remain detained . . . while ICE attempts to remedy its failure").

[51] *See, e.g.*, *Damus*, 313 F. Supp. 3d at 324, 337-38 (holding that an ICE directive on parole decisions fell "squarely within the ambit of those agency actions to which the [*Accardi*] doctrine may attach," in part because it "establish[ed] a set of minimum protections for those seeking asylum" and "was intended—at least in part—to benefit asylum-seekers navigating the parole process"); *see also Pasquini v. Morris*, 700 F.2d 658, 663 n.1 (11th Cir. 1983) ("Although the [INS] internal operating instruction confers no substantive rights on the [noncitizen]-applicant, it does confer the procedural right to be considered for such status upon application.").

[52] *See Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986) (holding that "violation of a regulation can serve to invalidate a deportation order when the regulation serves a purpose to benefit the [noncitizen]" and the violation affected "interests of the [noncitizen] which were protected by the regulation") (internal quotations and citation omitted).

[53] *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail.[54]

The *Mathews* analysis is slightly different for noncitizens without final removal orders and those with final orders, particularly regarding the liberty interest involved. Regarding this first factor, the strength of a noncitizen's liberty interest "may vary depending upon [the noncitizen's] status and circumstance[s]," including their manner of entry/admission and ties to the United States, as well as on the relevant circuit case law.[55] On one end of the spectrum would be a lawful permanent resident with long-standing family and community ties to the U.S.; on the other would be a recent arrival with no substantial ties to the U.S. who has been classified as an "arriving alien" and/or subjected to expedited removal.[56] Courts have also recognized in the habeas context that the strength of a noncitizens' liberty interest tends to increase as their length of time in custody increase.[57] Put another way, the balance of the *Mathews* factors tends to shift towards the noncitizen as time in custody becomes prolonged.[58]

In terms of the second *Mathews* factor, the government's interest, the Supreme Court has recognized in other contexts two compelling government interests in supervision -- public safety and preventing flight.[59] In the immigration context, the BIA has incorporated both interests into the framework governing bond decisions for noncitizens detained under 8 USC

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[54] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citation omitted).

[55] *Zadvydas*, 533 U.S. at 694; *see also Clark v. Martinez*, 543 U.S. 371, 378–79 (2005) (construing the presumptive time limitation established in *Zadvydas* as also applying to unadmitted aliens who were being detained after their removal orders became final because the statute authorizing post-order of removal detention made no distinction between admitted and nonadmitted noncitizens, and should have the same meaning for both categories).

[56] *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 107 (2020) ("[Noncitizens] who have established connections in this country have due process rights in deportation proceedings," but a noncitizen "at the threshold of initial entry," including a person who is detained shortly after unlawful entry, has only those protections regarding admission that Congress provided by statute); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("These cases, however, establish only that [noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce a[noncitizen] gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The [noncitizen], to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

[57] *See Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020) (Petitioner's prolonged discretionary detention under 1226(a) violated due process under *Mathews* factors because Petitioner's liberty interest outweighed Government's minimal interest in continued detention); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 29 (1st Cir. 2021) ("We recognize that removal proceedings have an end point and that the liberty interest of a noncitizen detained under section 1226(a) may therefore be slightly less weighty than that of individuals facing indefinite and prolonged detention. But only slightly less: The exact Length of Detention under section 1226(a) is impossible to predict and can be quite lengthy, as Hernandez's case illustrates well.").

[58] *Velasco Lopez*, 978 F.3d at 842 ("While the Government's interest may have initially outweighed short-term deprivation of Velasco Lopez's liberty interests, that balance shifted once his imprisonment became unduly prolonged.").

[59] *United States v. Salerno*, 481 U.S. 739, 752-53 (1987).

1226(a).[60] When immigrants are assigned to electronic monitoring as part of their ATD conditions, it is largely based on a generalized theory that electronic monitors (ankle monitors, the SmartLINK app, or a wrist-worn GPS monitor) serve these two interests, but studies from the criminal context do not support this theory.[61] In the immigration context, DHS has provided little data on whether electronic monitoring of noncitizens effectively prevents flight and promotes public safety, and what it has produced shows mixed messages.[62] Thus, the government should face a difficult burden in proving that electronic monitoring is appropriate -- let alone necessary or effective -- for any individual case.

Finally, considering the third *Mathews* factor, an erroneous deprivation of liberty occurs when an individual is subjected to monitoring conditions that are unnecessary and not narrowly tailored to satisfy the government's interest in preventing flight and protecting public safety.[63] Erroneous deprivations are highly likely under the current system. From the outset, ICE officials impose conditions of release in a non-transparent way and without any input from an impartial decisionmaker.[64] After the imposition of these conditions, ICE's ATD regulations provide a theoretical opportunity to seek review of an individual's ATD conditions before an IJ for noncitizens without a final removal order.[65] However, the same regulations arbitrarily cut off IJ review of release conditions seven days after the noncitizen is "released from custody," which

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[60] *See Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006) (A noncitizen detained under 8 USC 1226(a) "must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.") (citing *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999)).

[61] *See, e.g.*, Jyoti Belur, Amy Thornton, Lisa Tompson, Matthew Manning, Aiden Sidebottom & Katie Bowers, *A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders*, J. OF CRIM. JUST. 68 at 8-9, 15 (2020), https://openresearch-repository.anu.edu.au/bitstream/1885/220330/1/1-s2.0-S004723522030026X-main.pdf (finding that evidence showed increased recidivism for those on pre-trial ankle monitors and, even in the post-trial studies, "[t]here is limited evidence ... to enable confident identification of the *mechanisms* that produced the effect of EM on [reducing] recidivism").

[62] *See, e.g.*, U.S. Dept. Of Homeland Sec., *U.S. Immigr. And Customs Enf't Budget Overview* 153 (2022), Https://Www.Dhs.Gov/Sites/Default/Files/Publications/U.S._Immigration_And_Customs_Enforcement.Pdf; U.S. Immigr. And Customs Enf't, *Intensive Supervision Appearance Program (ISAP), First Semiannual Fiscal Year 2018-2020 Report To Congress* at iii (2020), Https://Cis.Org/Sites/Default/Files/2022-05/571131207-Ice-Reporton-Isap.Pdf; Rebecca Gambler, GAO-18-701t, *Immigration: Progress And Challenges In The Management Of Immigration Courts And Alternatives To Detention Program* 14 (2018), Https://Www.Gao.Gov/Assets/Gao-18-701t.Pdf; Off. Of The Inspector Gen., U.S. Dept. Homeland Sec., OIG-15-22, U.S. Immigration And Customs Enforcement's Alternatives To Detention (Revised) 6 (2015).

[63] As explained more below, substantive due process requires a close fit between the governments' interest and the deprivation of liberty—or, at the very least, a "reasonable relation" between the two. *See Hernandez-Lara v. Lyons*, 10 F.4th at 32 n.5.

[64] 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(c)(8); 8 C.F.R. § 1236.1(c)(8); *see also* ICE, Detention Statistics, https://www.ice.gov/detain/detention-management (last visited Sept. 30, 2024). ICE maintained that it alone could impose these conditions, but the Board of Immigration Appeals and federal courts have recognized that immigration judges have authority to impose non-monetary conditions of release as well. *See, e.g.*, *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 98 (BIA 2009); *Hernandez v. Sessions*, 872 F.3d 976, 991–93 (9th Cir. 2017). *See generally* Mary Holper, Immigration E-Carceration: A Faustian Bargain, 59 SAN DIEGO L. REV. 15–16 (2022).

[65] 8 C.F.R. § 236.1(d)(1); *see also* 8 C.F.R. § 1236.1(d)(1).

the BIA has interpreted as "released from detention."[66] Thereafter, ATD enrollees in removal proceedings must seek review of conditions from ICE, their former jailer and current prosecutor.

By cutting off IJ review so quickly after release, ICE is depriving noncitizens of the basic due process protection of a meaningful opportunity to be heard before a neutral arbiter on the appropriateness of their conditions of supervision. A perfunctory review, even when guided by the nominally beneficial ICE ATD policies discussed above, by an overwhelmed ICE officer who has every incentive to maintain the status quo of supervision, is hardly a sufficient procedural protection against erroneous deprivations of liberty for ATD enrollees. And as ICE has admitted previously, ICE officers do not always perform the timely ATD case reviews that agency policy requires.[67]

Furthermore, although the regulations provide for an appeal to the BIA from a negative ATD review decision from an IJ or an ICE officer, the practical reality is that very few noncitizens are able to exercise that appellate right. First, most noncitizens will not be able to access IJ review within seven days of being released from detention, especially since they will likely not have access to counsel before or after their release.[68] As for appealing from negative ICE decisions, practitioners report that ICE frequently fails to respond to noncitizens' reconsideration requests, meaning there is no decision to appeal from.[69] Finally, as noted above, for noncitizens with a final removal order, there is no ATD review procedure whatsoever that is explicitly established by the statute or the regulations, meaning that there are no procedures in place to address the enormous risk of erroneous deprivations of liberty for these individuals.

Thus, in many cases, a noncitizen will be able to show an actual, erroneous deprivation of their liberty by showing that their ATD conditions have remained consistently onerous, despite demonstrated compliance and lack of flight risk or risk to public safety. They can further show that the probable value of additional procedural safeguards – especially a review hearing before an IJ with the burden on the government to show that the ATD conditions are narrowly tailored to reduce a current risk of flight or risk to public safety – would be quite high. This *Mathews* factor should, therefore, weigh in the noncitizens' favor in the typical case.

Substantive Due Process Claims

[66] *Id.*

[67] GAO Report at 29-34.

[68] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

[69] *See* Amica Center for Immigrant Rights, et al., "Petition for Rulemaking: Immigration Judge Review of Immigration & Customs Enforcement's Alternatives to Detention Conditions of Supervision," (July 12, 2024), 13, https://amicacenter.org/app/uploads/2024/07/Amica-Center-et-al-Petition-for-Rulemaking-re-IJ-review-of-ATD-conditions.pdf.

ICE's imposition of onerous ATD conditions infringes on noncitizens' substantive due process rights, at least for those noncitizens without final removal orders.[70] In an analogous criminal context, the Supreme Court has held that the government may abridge the "fundamental" right to pretrial liberty only in the context of a statute narrowly tailored to protecting the community from a demonstrable danger where no other conditions would provide a reasonable assurance of safety.[71] The Court also held in a prior case that people in pretrial criminal custody could prove a constitutional violation if they could show that detention facility officials intended to inflict punishment, or that, even absent intent, the restriction is not rationally related to a legitimate nonpunitive governmental purpose or appears to be excessive in relation to that purpose.[72] This same standard should apply to all noncitizens who are detained or otherwise in ICE's custody, as ICE is operating pursuant to a civil – not criminal – legal scheme, and thus punishment and irrational restrictions on noncitizens' liberty are not permitted.

Courts should, therefore, carefully scrutinize the nature of the liberty deprivations of ATD enrollees and the government's purported interest – a test that will be challenging for ICE's current ATD regime to withstand. Not only does the data show the ineffectiveness of electronic monitoring, but there are generally no restrictions on the categories of people who may be subjected to ATD conditions (other than the bright-line prohibition against GPS monitors for pregnant people noted above), and the conditions may be imposed for months or years.[73] Moreover, noncitizens enrolled in ATD with electronic monitoring conditions are effectively subject to the same conditions as people with criminal convictions who are on electronic monitoring as a condition of probation or parole.[74] Thus, a court could – and should – draw the inference that ICE has imposed and/or refused to remove onerous ATD conditions for punitive reasons. Finally, where there are not individualized reasons supporting the effectiveness of a particular kind or set of ATD conditions (either at the initiation of ICE supervision or after demonstrated periods of compliance by the client), the violation is not narrowly tailored to satisfying the government's interest in public safety and preventing flight.

Even setting aside a strict scrutiny analysis, ICE's onerous ATD conditions should fail the *Bell v. Wolfish* test for the same reasons: these conditions are "excessive" in relation to the government's interests in public safety and preventing flight.[75] There is no evidence to support

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[70] Much of the substance of this section draws heavily from Sara Zampierin, *Mass E-Carceration: Electronic Monitoring As A Bail Condition*, 2023 UTAH L. REV. 589, 637 (2023).

[71] *United States v. Salerno,* 481 U.S. 739, 750-51 (1987).

[72] *Bell v. Wolfish*, 441 U.S. 520, 538, 561 (1979)

[73] According to ICE, the national "Average Length in Program" for all ATD enrollees was 585.8 days as of Sept. 17, 2024, with some field offices posting averages of over two years. See ICE ERO, Detention Management Statistics (Sept. 17, 2024), https://www.ice.gov/doclib/detention/FY24_detentionStats09172024.xlsx. *Cf. Salerno,* 481 U.S. at 747 (relying on the fact that pre-trial detention was limited in duration by the Speedy Trial Act).

[74] *See Commonwealth v. Cory*, 911 N.E.2d 187, 195-97 (2009) (finding electronic monitoring to constitute punishment under the *Mendoza-Martinez* test because it imposed a large burden on liberty and was excessive in relation to the offered purposes).

[75] 441 U.S. 520, 538 (1979) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)); *Salerno*, 481 U.S. at 747-48.

that ICE's onerous ATD conditions effectively contributes to these goals, and there are far less restrictive measures--including court date reminders or other forms of community support--that support those goals in a far less burdensome manner.[76] Thus, the proper substantive due process analysis also should result in the conclusion that onerous ATD conditions – especially GPS electronic monitoring – violate the substantive due process rights of noncitizens.

Conclusion

While enrollment in the Alternatives to Detention program allows a noncitizen to be in their community, reporting and supervision conditions are often onerous and unnecessary. This resource encourages attorneys to strive on behalf of their clients not just for permanent relief from removal, but for their client's ability to move and live freely in their communities.

[76] Evan Benz, *Community-Based Case Management Programs: A True Alternative to ICE's Harmful Surveillance Programs*, AMICA CENTER FOR IMMIGRANT RIGHTS 3–4 (Dec. 14, 2023), https://amicacenter.org/policy-briefs/community-based-case-management/.