

“Alternatives to Detention” for Illegal Aliens: Effective with Mandatory Tracking for Entire Process

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KEY TAKEAWAYS

The DHS is required by law to detain aliens arriving illegally in the U.S. until their applicable immigration proceedings are concluded.

Instead of properly using Alternatives to Detention (ATDs) to keep track of illegal aliens, the DHS is creating new programs to provide them with social services.

Congress must take back control from the administrative state, increase ICE’s detention resources, and require the Biden Administration to fully use those resources.

In 1996, Congress created a process for “expedited removal”¹ of aliens presenting themselves at a U.S. port of entry (POE) without a visa or who are apprehended by the Border Patrol while attempting to enter illegally between POEs.² These “inadmissible aliens” can be removed “without further hearing or review” unless they express an intention to apply for asylum or a fear of persecution on specified grounds. If they do express that “credible fear,” according to the statute the aliens “shall be detained pending a final determination of credible fear of persecution, and, if found not to have such a fear, until removed.”³ If an alien is not eligible for expedited removal, then “the alien shall be detained for a [non-expedited removal] proceeding.”⁴

In general, therefore, the DHS is required by law to detain all aliens arriving illegally in the U.S.

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“throughout the completion of applicable proceedings.”⁵ Immigration detention is a tool to ensure compliance with immigration law, particularly removal. During historical surges in illegal arrivals, however, detention of all illegal aliens encountered at the border has been difficult to achieve, as the former Immigration and Naturalization Service (INS),⁶ and today the Department of Homeland Security (DHS), have limited detention space.

The DHS refers to aliens who are in removal proceedings, but are not detained, as being on the non-detained docket (NDD). In 2003, the INS Inspector General reported that only 13 percent of aliens on the NDD who had final orders of removal were, in fact, removed.⁷ To increase compliance, Immigration and Customs Enforcement (ICE) started the ATD program in 2004.

ATD—an Inferior Substitute for Immigration Detention

ICE’s Enforcement and Removal Operations (ERO) division is responsible for the Alternatives to Detention (ATD) program. The intent of the ATD program was to monitor aliens on the NDD with technology and supervision by case officers while their removal proceedings were pending, and thus increase compliance with final orders of removal.⁸ At the conclusion of an alien’s immigration court process, unless he was granted asylum or other immigration benefit, an alien taking part in ATDs would surrender to ICE for detention and eventual removal. ICE’s criteria for placing individuals on ATD include “current immigration status; criminal history; compliance history; community or family ties; being a caregiver or provider; medical conditions; and other humanitarian factors.”⁹

ICE officers, not the federal contractor implementing ATD, decide not only which aliens to enroll and remove from the program, but also which level of supervision is appropriate in each case. Supervision options include the technology discussed below, as well as the alien checking in personally or visits by contractors or ICE officers to an alien’s home. ICE states that it “may escalate or de-escalate [an alien’s] supervision level by considering certain factors.”¹⁰ However, the U.S. Government Accountability Office (GAO) reported in 2022 that “ICE does not ensure ATD supervision reviews are conducted according to policy,” nor within the times specified in its own guidance.¹¹ The factors for raising or lowering supervision levels within ATD appear to have more to do with resource constraints and political optics than law enforcement efficacy.

The Intensive Supervision Appearance Program (ISAP)—the Original ATD

The largest ATD program in terms of numbers of enrolled aliens and budget is the ISAP, which began in 2004.¹²

To manage its large caseloads, ICE has contracted with BI Incorporated to run ISAP since 2004. The most recent five-year contract was signed in March 2020 for \$2.2 billion.¹³ The contractor uses three types of technology to keep track of aliens who are in removal proceedings and enrolled in the ISAP:

1. **SmartLINK.** Roughly 87 percent of aliens in ISAP are tracked using SmartLINK, which uses facial-recognition technology to allow participants to check in using a cell phone. Roughly half of those enrolled use their personal cell phones, and half are provided with devices by the contractor that are limited exclusively to the SmartLINK function. Even though the devices provided by the contractor are “technically capable of continuous location monitoring,” ICE has elected not to use this feature, and location tracking by phone is “not in use for any ISAP participant.”¹⁴
2. **VoiceID.** Around 4 percent of aliens in ISAP are monitored with VoiceID, under which the aliens call a dedicated number to check in at assigned times. Their voices are matched against a voiceprint obtained during enrollment. The system currently operates in four languages and plans to add nine more—a sign that the border is open to crossings from not just Latin America, but more than 150 other countries.
3. **GPS Monitoring.** Just under 2 percent of the aliens in the ISAP are tracked with the Global Positioning System (GPS), which reports their locations in real time through ankle or wrist bracelets. Though this is the most accurate method of keeping track of released aliens, it requires them to wear the device. From November 2014 to December 2020, 70 percent of the aliens who absconded from ATD had been assigned GPS ankle bracelets. The remaining 7 percent of aliens are enrolled in the ISAP without any technological means of supervision.¹⁵

Of the three ISAP options involving tracking technology, ankle bracelets with GPS monitoring cost \$2.75 a day per alien, SmartLINK costs a dollar a day, and VoiceID costs 18 cents a day per user.¹⁶ ICE estimates that, on

average, ATD costs \$8 per participant in total per day, whereas detention costs \$150 per day.¹⁷ Still, something mismanaged is expensive at any price.

Assessing the Results of ATD

The DHS acknowledges that most inadmissible aliens are economic migrants, and that “most migrants who are initially deemed eligible to pursue their credible fear claims ultimately are not granted asylum in the subsequent Department of Justice immigration court removal proceedings.”¹⁸ This reality argues strongly in favor of detaining them as the law requires.

The DHS produces immigration enforcement lifecycle reports of cases from initial immigration encounter to ultimate disposition, a process that can take many years. Not surprisingly, these reports show that aliens who are detained during their entire removal proceedings are likely to be deported if a court gives a final order of removal, whereas those not detained are rarely deported.¹⁹ Despite this evidence, the Biden Administration claims that it lacks resources to detain inadmissible aliens at the border, though it has never fully used the detention beds that Congress has funded. Under President Biden, the DHS has detained at most 25,000 inadmissible aliens at any one time, and in its most recent budget request, the DHS reduced detention facility capacity by 25 percent, a decrease of 9,000 beds.²⁰

When illegal aliens are released instead of detained, it is not credible to expect a high percentage of them to voluntarily attend their final hearings, where they are likely to be given orders to depart. ATD programs with GPS monitoring or required reporting throughout an alien’s entire immigration court process would prevent such court absences. Despite the evidence that ATDs can increase compliance with hearing attendance and removal procedures if used throughout the alien’s proceedings, ICE is currently releasing the majority of aliens placed into ATD long before their cases conclude. With the exception of high-priority criminals, ICE’s low volume of total annual arrests and deportations²¹ indicates that the Biden Administration is making little effort to track down those who disappear or are released from ATDs on their own recognizance and then fail to attend hearings or comply with court orders.

DHS Enrolls Insufficient Numbers of Aliens in ATDs. Since March 2021, monthly illegal-alien encounters at the Southern border have averaged more than 150,000, and several months more than 200,000.²² One credible expert estimates that more than two million illegal aliens encountered at the border have been released into the U.S. interior since

President Biden took office.²³ According to ICE, nearly 5 million cases were already on the NDD at the end of fiscal year (FY) 2022.²⁴ However, as of March 11, 2023, ICE was supervising only 287,299 aliens under ATDs.²⁵ The DHS budget for ATD in FY 2023 includes a total of \$527.1 million (an increase of \$79 million over 2022), to cover an intended 170,000 total participants.²⁶ That is nowhere near the number of inadmissible aliens likely to be released in FY 2023. A possible explanation for why the DHS is asking for more money to supervise fewer people under ATDs this year is that it intends to prioritize funding of social services over enforcement programs, as discussed below.

Aliens Released from ATDs Prematurely. On average, an alien participating in ATDs is enrolled for only 14 months to 18 months, a sharp contrast from the four-year-to-five-year average time it takes to conclude an asylum case.²⁷ From November 2014 through December 2020, according to a Government Accountability Office report, 79 percent of ATD participants were unenrolled before their immigration cases were concluded.²⁸ In a recent “stakeholder engagement” session with ICE, a participant asked “what percentage of [aliens] are terminated from ISAP prior to their immigration case’s completion?” The answer from ICE, two months later, was that “approximately 90% of participants were terminated from ISAP and migrated to Non-Detained status...the majority were still in removal proceedings.”²⁹ ICE’s decision to remove a particular alien from ATD does not seem clearly linked to that alien’s likelihood of compliance with their immigration proceeding to its conclusion.³⁰

In addition to ICE releasing ATD participants from the program early, aliens violate their ATD conditions. From November 2014 to December 2020, the overall rate of absconsion (aliens removing tracking devices, not checking in, or otherwise failing to adhere to the program) was 17 percent.³¹ Conversely, for those ATD cases in which ICE elects to assign an additional “court tracking” service (the contractor tracks ATD participants’ court hearing schedules and attendance), 99 percent of such aliens attended all their scheduled immigration hearings in FYs 2015 to 2020.³² However, from November 2014 through December 2020, ICE assigned court tracking to only 39 percent (125,259) of all participants (320,152).³³

No Consequences for Failure to Adhere to ATD. In a December 2022 ATD seminar, ICE claimed that “those who do not report [to the contractor, ICE, or court according to the release conditions under ATD] are subject to arrest and potential removal.”³⁴ The results show otherwise. Under the Biden Administration, deportation has dropped precipitously, from 186,000 in 2020, an already low number due to COVID-19, to only 59,011 in 2021 and

72,000 in 2022.³⁵ Although 400,000 of the aliens currently on the NDD have been convicted of more serious crimes (in addition to the millions who are in removal proceedings for entering or remaining in the U.S. illegally), ICE's budget for FYs 2023 and 2024 has set targets of deporting only 29,389 such aliens.³⁶ From these figures, it follows that aliens who simply fail to report under the ATD program stand a low chance of being arrested, much less removed.

Around 3.5 percent of issued ankle monitors and mobile devices are reported as “lost” by the participating alien.³⁷ According to ICE guidelines, GPS trackers should be assigned to the highest-risk cases, but making this risk-management tool effective requires swift follow-up when problems arise. For example, in April 2022, a Colombian who was on a U.S. terrorism watchlist was arrested when attempting to enter the U.S. illegally at the border in Arizona, then released with a GPS tracker under the ISAP.³⁸ Once ICE realized that he was on the watchlist, it took ICE two weeks to arrest him—in Florida.

ATD Hamstrung by Ideology, NGOs Get Federal Contracts

ATDs are not as good as immigration detention, but when properly and thoroughly used, tracking and supervision with technology is better than nothing to improve the likelihood that aliens comply with their immigration proceedings. However, the Biden Administration's immigration policy is directed by ideologues who strongly oppose enforcement. President Biden's head of U.S. Citizenship and Immigration Services (USCIS), Ur Jaddou, was formerly head of DHS Watch at America's Voice, a group that advocated amnesty (“a path to legalization”) for illegal aliens and against the Migrant Protection Protocols and Asylum Cooperative Agreements that successfully reduced pull factors for illegal immigrants during the Trump Administration.³⁹

White House Policy Advisor on immigration and border issues Katherine Pantangco⁴⁰ previously worked at the American Civil Liberties Union (ACLU), where she “oversaw a team of immigrant rights field organizers who built deportation defense networks in the wake of the Trump administration.”⁴¹ The ACLU advocates and regularly sues the federal government on behalf of illegal aliens, and the organization's agenda opposes detention of illegal immigrants and interior enforcement.⁴²

Leidy Perez-Davis, “special assistant to the president for immigration” in the Biden White House, previously worked at the Asylum Seeker Advocacy Project (ASAP), which believes that “all asylum seekers deserve to find safe

haven in the United States.”⁴³ This appears to mean that the ASAP believes that all foreigners merely *seeking* asylum, not just those whose claims are legitimate, should be allowed to remain in the U.S. In fact, roughly nine of 10 putative asylum claimants are not granted asylum⁴⁴ because the aliens do not apply after passing a credible fear interview, or fail to complete the full process, or because an immigration judge rules that they do not qualify for asylum.⁴⁵

The Open Borders project believes that “[f]reedom of movement is a fundamental human liberty and it would be anti-liberty to restrict migration” in any way.⁴⁶ The American Friends Service Committee (AFSC) says that “no one should ever be detained” and has called for Congress to cut funding for ICE and the Customs and Border Protection (CBP) under both the Trump⁴⁷ and Biden⁴⁸ Administrations. Activists who support limitless immigration are not only against detention, but they also oppose any ATDs that track migrants. For example, Just Futures Law opposes any digital surveillance of illegal immigrants (such as GPS bracelets), calling it “e-carceration.”⁴⁹

The Biden Administration’s immigration policies align with those of the ASAP, ACLU, and other activist groups that believe in a universal right of migration and seek to defund immigration enforcement. ICE invited “more than 100 stakeholders from nongovernmental organizations (NGOs), academia, and private industry” to its December 2022 symposium on ATDs, many of which advocate reduced immigration detention and enforcement, and some of which will benefit from increased funding for the non-ISAP social services ATD programs.⁵⁰

Biden ATD Programs Prioritize Social Services, Not Immigration Enforcement

Under the Biden Administration, two new programs have been added under ATD: the Case Management Pilot Program (CMPP) in 2021, and the Young Adult Case Management Program (YACMP) in 2022.⁵¹ The CMPP and the YACMP are examples of the Biden Administration’s preference for “weak alternative [ATD] programs with no accountability”⁵² that focus on providing social services to aliens and not on ensuring their compliance with court process and eventual removal.

The CMPP receives \$5 million in funding to “provide voluntary case management and other services to [aliens] in immigration removal proceedings.”⁵³ Law enforcement does not feature in CMPP’s motto, which is “Trauma Informed Case Management.”⁵⁴ The CMPP claims to conform to

the DHS Strategic Plan for FYs 2020 to 2024, specifically with the goal of enforcing “immigration laws throughout the United States in a manner that upholds the rule of law, American values, and national security.”⁵⁵ Yet, the CMPP assists aliens who have broken U.S. immigration law, provides them with social services not offered to many needy American citizens, and does nothing to further national security.

The CMPP’s governing National Board is chaired by the DHS Officer for Civil Rights and Civil Liberties, not someone from ICE’s ERO, and it is made up of NGOs “with experience providing and evaluating case management programs for asylees and refugees.”⁵⁶ The CMPP “supplement[s] existing Alternatives to Detention programs” and “inform[s] best practices moving forward.”⁵⁷ The CMPP’s national board includes the Church World Service (CWS), which has opposed ICE and the enforcement of immigration law.⁵⁸ The CWS acts as the administrator of the CMPP and oversees grants to NGOs and local governments to provide a list of social services to illegal aliens, some of whom are enrolled in ATDs. These include “mental health services; human and sex trafficking screening; legal orientation programs; cultural orientation programs; connections to social services; and for individuals who will be removed, reintegration services.”⁵⁹ The Grants Notice for NGOs and local government recipients stated that “connection to a range of services that CMPP participants identify as a priority could include access to counsel, affordable housing, childcare, transportation, healthcare, schooling, language classes, and orientation.”⁶⁰ Providing such comprehensive services and “cultural orientation programs” to people who have a slim chance of being granted asylum indicates that the Biden Administration has little intention of enforcing judgments other than those allowing illegal immigrants to remain in the U.S.

The YACMP is intended for 18-year-olds’ and 19-year-olds’ “catch-and-release” cases at the border.⁶¹ In September 2022, the DHS awarded an \$80 million contract to Acuity International for the YACMP. The contract explicitly bans the use of GPS tracking, leaving only VoiceID and other methods that depend on aliens complying with the supervision. When participants eventually fail to do so, or are removed from the ATD program, they are highly unlikely to be detained or deported, given the Administration’s non-enforcement priorities.⁶² Under the contract with Acuity, the YACMP will develop “a network of age-appropriate and culturally sensitive community resources” including “trauma-informed care.” Acuity must also provide deported YACMP aliens with a “support system” in their home countries upon deportation.⁶³

As of March 2023, Acuity was actively recruiting case managers in 16 U.S. cities (seven of which are known “sanctuary cities”) from San Diego to Boston to handle this youth ATD program.⁶⁴ Under the YACMP, the Administration will be providing significant government support and financing to a population of indigent foreign youth, while sending thousands of putative 18-to-19-year-olds, mostly male, into U.S. cities already experiencing high crime, homelessness, and budget shortfalls.⁶⁵

Recommendations for Congress and the DHS

In addition to defying mandatory detention and other enforcement provisions of the Immigration and Nationality Act (INA), the Biden Administration has significantly shifted ATDs away from their intended or useful purpose. The DHS and Congress must ensure that the laws are enforced and direct funding and resources accordingly.

Congress should:

- **Terminate and defund** the CMPP and YACMP. Congress should stipulate that ICE has complete authority over aliens on the NDD, including those enrolled in ATDs, without interference from the DHS’s Office for Civil Rights and Civil Liberties or other federal agencies.
- **Increase** ICE resources, including reprogramming the funds from the CMPP and YACMP, to detain all illegal aliens as required by law, and ensure that those resources are used for that purpose.
- **Amend** the INA to make it a ground of removability for any alien enrolled in an ATD program who removes his GPS device or fails to comply with the terms of his supervision. Aliens committing such a violation should be prioritized for ICE arrest and expedited removal, pending which they should be in mandatory detention.

The DHS should:

- **Detain** all illegal aliens required by law until, after due process, they are either granted relief or removed per a judge’s order.
- **Enroll** every alien released from custody into an ATD that uses GPS tracking throughout the entire removal proceeding.

Conclusion

Immigration detention is a necessary means to protect public safety, prevent flight, and to ensure removal. ATDs can be a backup for detention when there is no other option, but they are only effective when properly implemented. This Administration is not applying ATDs with the objective to enforce immigration law. Congress needs to take back control from the administrative state, increase detention resources for ICE, and require the Biden Administration to fully use those resources. Congress should also rescind funds that have been siphoned off from ATD towards social services that do not result in increased compliance and end those benefit programs.

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Endnotes

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