HOME DETENTION FOR IMMIGRATION DETAINEES

Would it Be Useful, Legal, and Effective?

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Introduction

As a result of recent Congressional mandates, the Immigration and Naturalization Service (INS) is facing escalating pressure to detain increasing numbers of deportable criminal aliens. Since the need for immigration detention beds currently exceeds the capacity, it is incumbent upon the agency to consider how it may meet its obligations beyond simply building or renting more detention beds. Consequently, the INS asked the Vera Institute of Justice to investigate home detention as an alternative for detaining persons required by the Immigration and Nationality Act (INA)[1] to remain in custody. This report provides a description of how home detention programs typically operate, it discusses the uses of home detention programs in the criminal justice system, and it analyzes the potential for the application of a home detention scheme in the immigration system. The report also considers the legal framework necessary to implement a home detention program for criminal aliens and discusses the most logical application of a home detention program to assist the INS to alleviate its detention pressures.

Background

In order to remove a non-citizen from the United States, the INS must institute deportation or exclusion proceedings before the Executive Office for Immigration Review (EOIR), a separate agency of the U.S. Department of Justice. These proceedings typically take several months or more to complete from the time the INS files a charging document until the court issues a final order of deportation or exclusion for execution by the INS. As of July 1, 1996, the INS had approximately #### detention beds available to detain non-citizens facing removal from the United States for violating U.S. immigration laws. At the same time, there were over 800,000 deportation and exclusion cases in process. Approximately half of the persons who are removed face deportation or exclusion because they have been convicted for criminal violations while in the United States.[2]

Currently, the Immigration and Nationality Act as modified by the Anti-Terrorism and Effective Death Penalty Act of 1996[3] (the Anti-Terrorism Act) requires that:

> The Attorney General *shall take into custody* any alien convicted of [certain criminal acts[4]]. Notwithstanding paragraph (1) or subsections (c) and (d), the Attorney General *shall not release such felon from custody.* [5] (Emphasis added.)

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[1] 8 U.S.C. 1101 *et seq.*

[2] This percentage is based upon fiscal year 1996 numbers through June 30, 1996 provided by the INS Statistics Office.

[3] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Prior to the enactment of the Anti-Terrorism Act, the Attorney General was only required to detain only certain aggravated felons,[6] and before 1990 the INS had the discretion to determine whether to detain persons with serious criminal offenses or release them pending conclusion of the removal proceedings.[7]

By expanding the categories of persons for whom detention is mandatory with the enactment of the Anti-Terrorism Act, Congress has created a situation whereby the INS must detain more criminal aliens than the agency has beds to hold in its own or contract facilities. As a result, it is critical to consider whether there are alternatives to custodial detention in an INS-operated or INS-contract facility for criminal aliens. Any alternative considered must meet the INS's need to fulfill its statutory obligations with respect to this criminal alien population. One option is home detention, an alternative relatively widely utilized in the criminal justice context but not yet used in immigration enforcement.

What is Home Detention?

In its most basic form, home detention requires a detainee to remain at home except for authorized time at work, school, or treatment programs. The court or other legal authority decides if the participant is allowed to leave home and, if so, when, for what purposes, and on what schedule. All decisions beyond these conditions, such as the degree of monitoring, are made by the agency that operates or supervises the program. For violations, detainees face increased supervision and the threat of more serious sanctions, including return to institutional incarceration.

The goals of home detention programs are to relieve jail or prison overcrowding and to reduce costs. At the same time, home detention may insure appearance at trial, protect the public, and provide a sanction less severe than jail.[8] Post-conviction home detention provides courts

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[4]The criminal offenses covered by the detention requirement include all aggravated felonies, controlled substances violations other than possession of 30 grams or less of marijuana, certain firearms offenses, miscellaneous crimes, and two or more crimes involving moral turpitude where one of those crimes is a felony. Anti-Terrorism Act § 441(c)(1)B).

[5]INA 242(a)(2), as amended by Section 441(c)(B) of the Anti-Terrorism Act (emphasis added).

[6]Before the adoption of the Anti-Terrorism Act, INA § 242(a)(2) authorized the Attorney General to release from custody an alien convicted of an aggravated felony if the Attorney General was satisfied that the alien (1) was not a threat to the community, and (2) was likely to appear before any scheduled hearings. Aggravated felonies include serious crimes such as included murder, drug trafficking, firearms offenses, money laundering theft, burglary, and certain other crimes of violence in which the sentence imposed is at least five years. INA 101(a)(43).

[7]Immigration Act of 1990, Pub. L. No. 101-649 (1990) (codified in scattered sections of 8 U.S.C.)

[8]Michael G. Maxfield & Terry L. Baumer, *Final Report: Evaluation of Pretrial Home Detention with Electronic Monitoring* 7 (1991); *see* Marc Renzema, *The Electronic Monitoring Primer* 1 (1992); *see also* Terry L. Baumer et al., *A Comparative Analysis of Three Electronically Monitored Home Detention Programs*, 10 Justice Quarterly 121 (1993).

with an alternative sanction that may focus on rehabilitation and/or punishment, depending on the court's intent.

Although home detention is commonly associated with electronic monitoring, electronic monitoring is only one method of monitoring compliance, and a program never relies on electronic monitoring exclusively.[9] Compliance may be monitored manually through field visits, surveillance, curfew checks, and random telephone calls.[10] Home detention programs may also include alcohol and drug treatment, employment and education assistance, mental health treatment, and other services.

Currently, on any given day, 50,000 to 70,000 people in the U.S. are under criminal justice supervision which includes electronic monitoring.[11] Home detention is being used in pretrial and post-conviction contexts, such as supervised pretrial release, probation, parole and parole-like contexts. Most programs collect monthly supervision fees from participants on a flat fee or sliding scale basis ranging from $15 to $50 a month for programs that do not employ electronic monitoring and about $200 a month or programs that do.[12]

How a Home Detention Program Operates: An Illustration

The following program description and design, based on a composite of programs, reflects a typical program that leases electronic monitoring equipment and contracts with the leasing company to provide monitoring. The hypothetical program uses constantly monitored electronic bracelets so that if participants move beyond a certain distance from the monitoring units, the units register and record the events. The leasing company informs staff of any violations. Each supervision team carries a caseload of 25 participants, and there are a hundred participants total in the program at its commencement.

After initial screening for automatic disqualifiers such as violent criminal history or repeated failures to appear, a candidate is referred to the home detention program staff. The program intake staff interview the candidate and screen for previous supervision history, current legal status, and criminal record. If the candidate's record indicates that he or she may present too high a risk of danger, not show for hearings, not comply with the basic requirements of supervision, or if he or she does not give informed consent to the program, then the candidate is not accepted.

A participant must have a residence and a telephone. The telephone cannot be a pay-phone, must be a kind that can handle electronic signals transmitted by the monitoring system, and must not be used to such an extent that the monitoring equipment cannot communicate with the central

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[9]*See* Richard Will, *Intensive Supervision Probation*, Intermediate Sanctions in Overcrowded Times 89 (1995).
[10]Terry L. Baumer & Michael Maxfield, *Electronically Monitored Home Detention*, Intermediate Sanctions in Overcrowded Times 104-111 (1995).
[11]*Id.* at 113.
[12]Joan Petersilla, *Exploring the Option of House Arrest* 50, 54; Kuplinski, *supra* at 5.

monitoring station. The address and telephone information provided by the participant are confirmed by verification of participant information and a visit to the residence prior to the participant's release. All other members of the household must be aware that field staff will visit the residence on a regular basis and that they cannot be refused entry to check on either the participant or the equipment.

Once a candidate is approved, he or she cannot leave detention until the home detention staff meets with the candidate and explain both the technical and non-technical procedures. The staff places a bracelet on the participant's leg, accompanies the participant home, and connects the equipment to the residential phone. The participant is then asked to move about the residence to set the system's limits and to identify places in the residence that may interfere with the signal. The participant's schedule is set and listed in the central monitoring computer so that the computer immediately identifies whether or not an absence is within the permitted time. Any time a participant is out of range (off schedule) for more than 15 minutes, the monitoring service immediately notifies the program staff. The program also receives daily monitoring information reports on each participant from the monitoring service. Supervision staff reviews each report to ensure that participants are in compliance. Staff informs the monitoring service (via fax or e-mail) about schedule changes for each participant as necessary.

The supervisory staff visits the participant at his or her residence on a weekly basis. Supervision and field personnel have access to each participant's case record which includes the electronic monitoring data as a part of the electronic file. Supervision team members work closely with any surety agent, guarantor, or guarantor organization that is responsible for the participant. Staff are assisted by technical aids to confirm all outside appointments. For example, if the participant is at a doctor's office or in a class, staff can confirm his or her location by going to a location within a certain distance of the participant with equipment that verifies the participant's presence. This allows the staff to confirm the information without intruding directly into the participant's activities.

The field staff share "on-call" duties for off-duty hours when the monitoring company notifies the program that a participant is out of range for longer than 15 minutes. The supervision staff's first response is to call the residence to ensure that the report is not an error. Because a violation cannot be punished on electronic evidence alone (in part because the system can produce false positives), a human monitor must confirm each violation by visiting the detainee's home. If the violation is confirmed, the person is returned to institutional incarceration or intermediate sanctions are imposed. These may include an increase in the conditions of supervision, a decrease in permitted outside activities, or an increase in the number of home visits by field staff.

Supervisory and field staff remind participants about court dates and other requirements, both in person as well as by phone and letter. Participants also are required to report to a supervision

center on a regular basis. Those participants who are allowed to be employed are encouraged to seek work. If any of the participants are subject to other criminal justice supervision, such as probation or parole, the supervisory staff coordinates their supervision.

What Makes a Home Detention Program Effective?

Despite the fact that home detention has been employed for over 20 years and electronic monitoring has been used for more than 12, most of the research describes individual programs rather than providing evaluation of home detention's effectiveness as an alternative to incarceration.[13] Most of the reports concur in their assessments that selective admission and significant human supervision are essential to a program's success and that, if incorporated within an appropriate array of responses, electronic monitoring should reduce, to some extent, prison and jail overcrowding.[14]

Selective Participant Screening. In order to most effectively reduce overcrowding, two basic principles should be employed in the participant screening process. First, only persons who otherwise would have been incarcerated should be accepted into home detention.[15] This criteria insures that each individual placed in the program directly frees a detention bed.[16] Second, if too many people are returned to incarceration, the prison or jail will remain overcrowded even though the number of persons directly sentenced there is below the maximum population. Therefore, populations should be excluded if they are so likely to abscond that the return rate to incarceration

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[13]It is difficult to make strong assertions of electronic monitoring's effectiveness for the following reasons: programs with the same name vary significantly between jurisdictions; efforts to isolate effects of specific policy changes are complicated by other factors that impact that change; most program administrators like their programs, and conventional but untested wisdom carries persuasive force; with exceptions, much of the existing research is badly flawed and cannot be used as a foundation to draw conclusions. Annesley K. Schmidt, *An Overview of Intermediate Sanctions in the United States*, Alternatives to Imprisonment in Comparative Perspective 353 (1995) [quoting Tonry & Will, Intermediate Sanctions, Unpublished draft report (1988)].

[14]*But see* Baumer & Maxfield, *Electronically Monitored Home Detention*, Intermediate Sanctions in Overcrowded Times 106 (1995) (arguing that although electronic monitoring programs may in theory relieve overcrowding, there is little evidence this goal has been achieved); J. Robert Lilly, *Electronic Monitoring: Another Fatal Remedy?*, Correctional Theory and Practice 97, 101 (1992) (stating, "house arrest and electronic monitoring have not yet reduced the nationwide jail and prison overcrowding problem, and they may not"); John R. Kuplinski, *Electronic Offender Monitoring in Virginia: Evaluation Report*, Department of Criminal Justice Services 59-60 (November 1, 1990) (concluding that while home detention can impact jail overcrowding and the cost of incarceration without significant risk to public safety, electronic monitoring alone cannot significantly reduce a locality's jail population, even by ten percent).

[15]Renzema, *supra* at 3. Both editing assistance and funding for Renzema's article were provided by a vendor of electronic monitoring. However, the author has tracked and written about electronic monitoring since its use became widespread.

[16]Maxfield & Baumer, *Final Report: Evaluation of Pretrial Home Detention with Electronic Monitoring* 3 (1991).

would counterbalance the savings from persons who successfully complete the program.[17] Other populations that should be excluded from a program include: persons who pose a risk to public safety; those who, if they repeated their offense, would jeopardize the program with particularly damaging publicity; persons with a history of recidivism; and persons with active drug problems unless they also participate in a serious treatment program as a condition of supervision (since the success of home detention depends on a rational actor and a person under the influence of alcohol or drugs is rationally impaired, treatment is crucial).[18]

Programs that are unable to select participants based on these criteria have higher failure rates as a result. For example, an evaluation of six successful programs in Virginia found a significant difference between the success rates of participants who were court-ordered (16.4% failure rate) and those who were selected by the home detention screening process (5.2% failure rate). These data support the conclusion that a careful and formalized screening process is crucial, although this failure rate differential may imply a conservative participant selection process by the home detention program screening staff.[19]

Electronic Monitoring. The use of home detention has increased substantially since its experimental beginnings in 1964 due to a number of factors including jail and prison overcrowding, the ability to employ electronic monitoring equipment to replace labor-intensive manual monitoring, and, at least some researchers suggest, aggressive marketing by equipment vendors.[20] The two basic types of electronic monitoring systems which are used are programmed contact and radio frequency (or continuously signaling device). Hybrid systems are also available.

Programmed contact systems monitor the participant through telephone contacts randomly generated by a computer. When the participant answers the phone, he or she is directed to perform certain acts designed to verify his or her presence. The computer then compares the actual with the expected results and generates a report.[21] Radio frequency systems use a bracelet containing a transmitter. The participant wears this bracelet on an ankle or wrist at all times while under supervision. The bracelet emits a signal to a unit hooked to a telephone in the participant's residence. The telephone dials automatically and sends the time and date of every instance that the participant goes beyond or enters the field covered by the monitor directly to the reporting center computer.

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[17]Renzema, *supra* at 3.
[18]*Id.*
[19]Kuplinski, *supra.*
[20]Kuplinski, *supra* at 3; Baumer et al., *supra* at 122-123.
[21]Baumer & Maxfield, *Electronically Monitored Home Detention*, Intermediate Sanctions in Overcrowded Times 105 (1995).

Electronic monitoring is most effective only for limited periods of time, after which violations increase significantly. The exact ideal time is not clear and case studies make recommendations that range from 90 days to six months.[22]

Electronic monitoring is *not* able to stop a participant from leaving his or her residence, from going to any particular location which is off limits, or from using alcohol or illegal drugs. It does not stop or even record a participant committing a crime within the confines of the monitoring area. It simply lets staff monitor when participants are within the electronic field and the dates and times they are not.[23]

Electronic monitoring equipment is readily available and may be purchased or leased from a number of vendors. Monitoring may be performed by the government agency or contracted from a private company. If monitoring services are provided by a vendor, the vendor normally provides the equipment as well.[24]

Field Supervision. The acquisition of equipment alone is not sufficient to establish a home detention program.[25] Rather, electronic monitoring is "a program component which can accomplish nothing by itself but which can be a valuable asset when used intelligently in combination with other program elements in a well-developed policy context."[26] Each placement requires considerable staff resources for screening, home inspections to determine suitability, and ongoing personal contact to supplement the monitoring system and intervene when the computer detects a violation.[27] Programs that employ trained staff working directly with the participants demonstrate the most success in avoiding rearrest and absconders. However, it is important to note that while merely seeing the participant frequently may not noticeably affect recidivism, programs which utilize responses appropriate to the participants' needs and human corroboration of violations are able to decrease recidivism.[28]

The degree of field supervision needed depends on the nature of the population being supervised and the supervising agency's goals. The workload measures for supervision staff should be based on the amount of supervision determined appropriate. For example, the Federal Pretrial Agency in New York City, which supervises predominately serious drug offenders who are awaiting trial with electronic monitoring, set its caseload at 25 cases per supervision officer with a minimum of weekly home visits.[29] In contrast, the New York City Home Detention

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[22]Schmidt, *supra* at 373.
[23]Baumer, et al., *supra* at 139.
[24]Additional information about pricing and vendors is included in the appendix.
[25]*Id.*; Maxfield & Baumer, *supra*; Renzema, *supra*; Baumer, et al., *supra*.
[26]Renzema, *supra* at 1.
[27]Kuplinski; *supra* at 60-61.
[28]Renzema, *supra* at 16.
[29]However, as of July 1996, the average actual case load was 44 cases per officer.

Program operated by the New York City Probation Department, which supervises state court-sentenced felons with electronic monitoring, has a maximum caseload of 15, resulting in more intensive supervision.[30]

Patricpants Ready to Comply. For home detention to work, participants must have some positive incentive to comply. In the criminal justice system, offenders on probation or parole typically have a strong incentive to comply in order to avoid incarceration and fail to receive credit for time served on electronic monitoring. This incentive increases as the release date approaches.[31] Persons detained pretrial have the incentive that cooperation allows them to remain free and, if they abscond, any police contact will result in their immediate rearrest. There is also research that indicates that pretrial cooperation with home detention may result in a more lenient sentence. However, this incentive may be weakened if the person anticipates conviction and inevitable incarceration. In this circumstance the incentive to "live it up" increases and the incentive to comply decreases as the "window of opportunity" to abscond closes.[32]

The effect of incentives to comply was illustrated by a comparative analysis of three electronic monitoring programs in the same jurisdiction, with the same equipment, and similar rules and restrictions.[33] The study compared the rates of absconding and rearrest for three groups of participants: adult pretrial detainees, adult probationers (post-conviction), and juveniles. The authors report that the adult pretrial population violated rules more often than adults on probation and were almost twice as likely to be arrested or abscond while being monitored.[34] The authors explain: "Absconding is more rational for someone who is at an early stage and who faces an uncertain future. For convicted adults nearing the end of home detention, absconding makes less sense."[35] The authors also note that the pretrial clients were charged with much more serious crimes than the probationers were convicted of, and less information was available to the program screeners about the pretrial population than the post-conviction population. Because the actual number of adults who absconded or were rearrested was small (e.g. three absconders and one rearrest), the use of percentages is problematic.

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[30]The New York City Probation Department recently suspended its electronic monitoring program.
[31]Baumer, et al., *supra* at 135.
[32]Maxfield & Baumer, *Final Report: Evaluation of Pretrial Home Detention with Electronic Monitoring* 24 (1991); Baumer, et al., *supra* at 136.
[33]Baumer, et al., *supra.*
[34]*Id.* at 128-131.
[35]*Id.* at 138. Similar results were found in a study of the Marion County, Indiana program. Maxfield & Baumer, *Final Report: Evaluation of Pretrial Home Detention with Electronic Monitoring* 23-24 (1991).

Real Sanctions. An electronic monitoring program cannot be effective without quick and immediate sanctions for violations.[36] This contention is supported by a comparative analysis which attributed decreased compliance by juveniles to the program's inability to return violators to overcrowded detention facilities.[37] However, requiring institutional bed spaces is in tension with removing persons from overcrowded facilities. Programs should, therefore, have penalties less severe than return to incarceration, such as increased monitoring requirements or other restrictions on movement and participant activities.[38]

Ethical Issues Surrounding Electronic Monitoring

New surveillance technology transcends traditional limitations of distance, visibility, and physical barriers on the government's ability to intrude into private life.[39] New forms of surveillance are minimally visible or invisible, making it difficult to determine when one is being watched and by whom.[40] Home detention technology, while still somewhat limited by traditional barriers, substantially intrudes on an individual's home and private life in order to insure compliance with the program and turns his or her home into a new place of incarceration.[41] Monitoring also affects not only the participant but also everyone living in the household. Although electronic monitoring is currently constitutionally permissible, it nevertheless "blurs the distinction between guaranteed constitutional rights people hold as citizens and those diminished rights afforded offenders."[42] Particularly when used for persons who would not otherwise be incarcerated, electronic monitoring raises issues of privacy and reasonable search and seizure that have not fully been resolved.[43] These concerns are minimized if the person faces certain incarceration as the only alternative to home detention.

A home detention program is particularly vulnerable to these concerns because it runs the risk of using electronic monitoring for persons who otherwise would and should be released.[44] Expansion of a home detention program to include persons who would otherwise be released increases a program's cost, diverts resources from persons appropriate for electronic monitoring, and unnecessarily curtails individuals' liberty unnecessarily. Unlike the case where electronic monitoring technology allows a participant to avoid detention, which is most invasive curtailment

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[36]Renzema, *supra*.
[37]Baumer, et al., *supra*.
[38]Tonry & Hamilton, *supra* at 87.
[39]Lilly, *supra* at 106-7.
[40]*Id.* at 107.
[41]*Id.* at 97.
[42]Alexander M. Esteves, *Changing of the Guard; The Future of Confinement Alternatives in Massachusetts*, 17 New Eng. J. on Crim. & Civ. Confinement 133, *176 (1991).
[43]*Id.*
[44]Bonnie Berry, *Electronic Jails: A New Criminal Justice Concern*, 2 Justice Quarterly 1, 8 (1985).

of rights, the imposition of home detention with electronic monitoring for a person who would not otherwise be detained results in the use of technology to invade privacy more than would have occurred if the technology never been used. As an illustration, the extension of a home detention program being utilized for detention of aggravated felon aliens to include persons who overstay student visas would be an example of inappropriate expansion.

How Home Detention Could Work in an Immigration Context

Home detention is being considered in the immigration enforcement system for persons subject to mandatory detention because the INS does not currently have adequate detention bed space available to house each mandatory detainee from the date deportability is charged until removal is executed. Home detention in this context would be used to simply create additional space and would not fulfill punitive or rehabilitative goals.

Potential Criminal Alien Populations for Home Detention. Home detention is cost effective only for persons who would otherwise be detained; other less expensive measures exist to insure the appearance of populations who have other incentives to appear in court. Therefore, home detention in the immigration system should be limited to persons who would not otherwise be released. A home detention program may be viable for the groups of persons discussed below who are subject to mandatory detention. Members of these groups, in some cases, may not otherwise be detained and removed due to a lack of detention bed spaces and other resources.

Criminal aliens held in local jails

The INS periodically screens persons held at some local jails who are serving non-felony sentences to identify alienage and potential deportability. For those persons who are identified as deportable, an INS detainer is issued. Due to lack of personnel, the INS may not actually pick up everyone who is being held on detainer; some are released after they complete their sentences. Those whom the INS picks up on detainer are brought to INS-operated or INS-contract detention facilities and detained for Immigration Court hearings.[45] These persons could be placed in home detention until they receive a final decision on their cases.

Persons who have received judicial orders of deportation

Judicial orders of deportation are issued only in federal court, although immigration bills pending in both the House and the Senate as of August 1996 would grant state judges this authority as

[45] *See "Historic" Florida Initiative Launched to Combat Illegal Immigration*, 73 Interpreter Releases 889, 905 (1996) (describing the Florida Immigration Plan which includes provisions to establish projects at several Florida jails to identify and remove aliens previously convicted of deportable offenses).

well.[46] Usually recipients are sentenced to time served and, in theory, can be taken from sentencing to the airport. In practice, they usually spend some time at INS-operated or INS-contact detention facilities.[47]

Mandatory detainees who receive sentences of probation

In most cases the INS does not screen criminal aliens who receive sentences of probation. If they are screened, mandatory detainees must be held in INS-operated or INS-contract detention facilities for deportation hearings in the Immigration Court or eventually, in the case of undocumented persons, for expedited administrative hearings.[48] During the hearing process they could be placed in home detention.

Mandatory Detainees' Incentives to Comply. The use of home detention for mandatory detainees would be unique in its employment for persons with limited incentive to cooperate. Mandatory detainees who comply with home detention face near certain deportation; only the small category of persons who might desire deportation and are waiting to be deported would find this an incentive. An aggravated felon's only option for avoiding deportation is to abscond. Like some pretrial detainees, an aggravated felon's incentive to abscond may increase as the program progresses. Therefore, people who want to stay in the United States but have no legal remedy to do so are poor risks for home detention. However, if persons receiving judicial orders of deportation were sentenced to time served and placed in home detention to await deportation but faced a full U.S. sentence for failure to comply, these persons would have a stronger incentive to comply.

Potential Screening Criteria for Candidates. Mandatory detainees who meet the following screening criteria may be more likely to comply with home detention:

- The candidate has a place to live with a telephone. The other occupants are cooperative with the conditions of home detention.
- The candidate has family members in his or her home country who can be contacted and agree to assist the candidate when he or she returns. This condition might make return more attractive to the participant.

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[46]H.R. 2202, 104th Cong., 2d Sess. (1996) (granting authority to issue judicial orders of deportation to state and local judges); S. 1664, 104th Cong., 2d Sess. (1996) (granting authority to issue judicial orders of deportation to district and state judges)

[47]The number of people who actually receive judicial deportation is small. According to one unofficial conversation with an EOIR official, the orders are frequently not done correctly and require that deportation proceedings be instituted to get a valid order. The recipients are usually people with serious organized crime related offenses.

[48]INA § 242A (8 U.S.C. 1252a).

- The candidate has some legal means to immigrate to the United States in the foreseeable future. This condition provides an additional incentive to comply in order to avoid jeopardizing the opportunity to return legally.
- The candidate has a good record of appearances in criminal court. This condition indicates that the person may be more likely to appear at immigration court.
- The candidate is non-violent. This condition protects the community in which the participant will be detained.
- The candidate is not addicted to drugs or alcohol. This condition insures that the participant will remain rationally able to comply with detention conditions.

Legal Authority Under the INA for Home Detention of Mandatory Detainees

Before the INS can attempt a home detention program for mandatory detainees, a central legal issue must be resolved: Is the INS permitted to use home detention for mandatory detainees under INA § 242(a)(2)? This provision mandates that:

> (t)he Attorney General shall *take into custody* any alien convicted of any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), upon release of the alien from incarceration . . . . [T]he Attorney General *shall not release such felon from custody.*" (emphasis added.)

To place mandatory detainees in home detention, the word "custody" in the INA must be defined to include home detention. There is no definition of custody within the INA itself, and there has been no judicial or other definition of "custody" to include home detention so far.

The criminal justice system offers an analogy, though an imperfect one, since it uses home detention to punish while the immigration system would not. Nonetheless, criminal law definitions have been held to apply to the immigration system in at least two contexts: (1) the definition of "supervised release" and (2) the assigning of burden of proof.[49]

Statutory Authorization for Home Detention in the Criminal Justice System. Under federal criminal law, home detention generally is not considered detention. Criminal law authorizes home detention in four contexts: pretrial release; post-conviction release; probation or supervised release from incarceration; and pre-release custody.

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[49]*See De La Cruz*, No. 3155, 1991 BIA LEXIS 16 (1991) (analogizing post-conviction release procedure to release procedure in the INA to determine burden of proof); *Cuomo v. Barr*, 812 F. Supp. 324 (1993)(using the definition of "supervised release" in the Federal Sentencing Guidelines to define "supervised release" in the INA).

Title 18, Section 3142 of the United States Code authorizes the release of a person charged with an offense pending trial and permits the imposition of conditions that will protect the community and insure the person appears in court.[50] According to case law interpretation, the imposition of home detention is one such permissible condition.[51] Home detention is also permissible under Title 18, Section 3143 of the United States Code, which authorizes the conditional release of a person convicted of an offense pending sentencing or appeal in accordance with the pretrial release procedure set forth above.[52] Neither the Attorney General, the Bureau of Prisons, nor the U.S. Marshals Service has control over the participation, placement, or subsequent return to a more secure environment of persons in pretrial or post-conviction home detention;[53] these persons are not in custody.

The Federal Sentencing Guidelines, issued pursuant to Title 28, Section 994(a) of the United States Code, permit the use of home detention "as a condition of probation or supervised release, but only as a substitute for imprisonment."[54] Home detention in this context, unlike in the context of pretrial and post-conviction release, is used as a form of punishment, not merely as a condition of release.[55] Home detention here substitutes for incarceration in a one-to-one relationship and fulfills minimum sentencing requirements.[56] However, when a person is sentenced to home detention, he or she is considered "released" and not under the custody of the Bureau of Prisons.[57] Furthermore, the Federal Sentencing Guidelines determine only what a judge can do. Once a person is surrendered to the Bureau of Prisons' custody, the Federal Sentencing Guidelines cannot be used to authorize home detention for that person.[58]

Pre-release custody is the only context in which a person in home detention is considered to be "in custody" in the criminal justice system. Title 18, Section 3624(c) of the United States Code, which authorizes pre-release custody, requires the Bureau of Prisons to place prisoners in conditions that will prepare them to re-enter the community for a defined period at the end of their sentences.[59] The statute authorizes the use of "home confinement" to fulfill this

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[50] 18 U.S.C. § 3142(c)(B) (Supp. 1996).
[51] *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *see United States v. Tortora*, 922 F.2d 880 (1st Cir. 1990).
[52] 18 U.S.C. § 3143(a)(1) (Supp. 1996).
[53] *Reno v. Koray*, 115 S.Ct. 2021 (1995).
[54] Fed. Sent. Guidelines § 5F1.2 (1995).
[55] *U.S. v. Miller*, 991 F.2d 552 (9th Cir. 1993).
[56] § 5 C1.1 (e)(2)-(3).
[57] *U.S. v. Jalili*, 925 F.2d 889 (6th Cir. 1991).
[58] 925 F.2d at 893.
[59] § 3624(c) (requiring the Bureau of Prisons to: "assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community").

requirement.[60] Persons in home detention under this provision are considered to be in "custody," even though others under identical conditions may be considered "released."[61] However, this authorization extends only to a defined period of a sentence, and deportable aliens who fail to meet Bureau of Prisons criteria are not eligible for this pre-release custody.[62] There is, therefore, no analogous situation in the criminal justice context in which home detention is authorized as a form of custodial detention.

The Role of Criminal Law in Interpretation of the INA. The INA is ambiguous as to whether INS has the authority to implement a home detention program without any further changes in the law. The strongest case for authorization relies on analogy to the criminal context. While the "Government's custody authority over aliens in civil deportation proceedings is fundamentally different from its detention authority over individuals pending federal criminal prosecutions,"[63] the criminal law is the only authority that addresses the use of home detention. An analysis of the relevant case law, the INA, and the Anti-Terrorism Act shows that a strong argument can be made that relevant provisions of criminal law should be used to interpret the INA.

In *Cuomo v. Barr,* the U.S. District Court for the Northern District of New York, in addressing the question of whether the INS violated is obligation to take into custody alien felons released from state correctional facilities, relied on the Federal Sentencing Guidelines passed under the Sentencing Reform Act,[64] to interpret the provisions in INA § 242(a)(2).[65] In *Cuomo*, the court found that certain New York State work release and day reporting programs did not qualify as forms of supervised release under INA § 242(a)(2). The court held that although the INA failed to define "supervised release," Congress intended for the Federal Sentencing Guidelines' definition of the term to govern, as the term had been "added to the [INA] long after the Sentencing Guidelines' supervised release program became effective."[66]

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[60]*Id.*

[61]*See Koray*, 115 S.Ct. 2021 (holding that the time respondent spent at a treatment center while "released" on bail was not "official detention" within the meaning of 18 U.S.C. § 3585(b) even though others authorized by the Bureau of Prisons to spend the last part of there sentences in identical circumstances were in "official detention").

[62]Federal Bureau of Prisons regulations stipulate that deportable aliens are automatically ineligible for the benefit of 18 U.S.C. § 3624 unless: (1) the alien demonstrates verified strong family/community ties in the U.S., verified history of domicile in the U.S. (five or more years), and verified stable employment in the U.S.; (2) the I.N.S. determines that deportation proceedings will not be initiated; or (3) the Regional Director of the Bureau of Prisons waives the requirement. *Federal Bureau of Prisons Program Statement 5100.04: Security Designation and Custody Classification Manual*, Chapters 2-9 (June 15, 1992).

[63]*De La Cruz*, 1991 BIA LEXIS 16 (1991).

[64]28 U.S.C. § 994(a) (Supp. 1995).

[65]812 F. Supp. 324 (1993) (citing *Gozlon-Peretz v. United States,* 498 U.S. 395 (1991), *appeal dismissed*, 7 F.3d 17 (2d Cir. 1993).

[66]*Id.* at 329.

In *De La Cruz*, the Board of Immigration Appeals, interpreting the INA before its modification by the Anti-Terrorism Act, held that an alien deportable for an aggravated felony who did not demonstrate that he was not a threat to the community nor that he was likely to appear for scheduled hearings was improperly released on bond by the immigration judge.[67] The court found that the statutory scheme and language of INA § 242(a)(2) created a presumption against the release of any alien convicted of an aggravated felony and placed upon the alien the burden to prove he meets the requirements for release on bond or parole.[68] The dissent argued that because pretrial release provisions of 18 U.S.C. § 3142 are analogous to those in INA § 242(a)(2) and because those provisions place the burden of proof on the government, the government should also bear the burden under INA § 242(a)(2).[69] While the majority recognized that civil deportation hearings are fundamentally different from criminal prosecutions, they nonetheless found the post conviction release procedure of 18 U.S.C. § 3143, which places the burden of proof on the alien, sufficiently analogous to INA § 242(a)(2) to provide support for their decision.[70]

That the language of the INA § 242(a) prior to amendment by the Anti-Terrorism Act is very similar to the language of 18 U.S.C. § 3143 suggests that Congress intended their meanings to be similar. Both require persons convicted of particular crimes to be detained unless they do not threaten community safety and are likely to appear in court.[71] This resemblance suggests that the prevailing interpretation of the criminal statutes' language should at least provide persuasive authority for interpreting INA § 242(a)(2) as amended. Additionally, the fact that Congress subsequently deleted the section permitting release of a convicted alien on bond or parole indicates its intent not to release convicted felons.

Elsewhere in the Anti-Terrorism Act, Congress explicitly provided that section 3142 of Title 18 is to govern the permissible conditions for release of a class of aliens other than the mandatory detainees described in section 242(a).[72] The Anti-Terrorism Act then states that if the conditions

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[67]1991 BIA LEXIS 16 at *11 (1991).

[68]*Id.* at *9.

[69]*Id.* at *13-35.

[70]*Id* at *12 n.5.

[71]INA § 242(a)(2) stated: "[t]he Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony . . . unless the alien demonstrates . . . that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." By comparison, 18 U.S.C. § 3143(a) states, "[t]he judicial officer shall order that a person who has been found guilty of an offense. . . be detained, unless the judicial officer finds by clear and convincing evidence that such person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ." *See also* 18 U.S.C. § 3142(b) (imposing same criteria for release).

[72]Sections 3142 of Title 18 is to govern the permissible conditions for release of aliens against whom the government filed applications for removal for alien terrorism which the judge denied and which the government is appealing. Section 506(b)(1) of the Anti-Terrorism Act provides in relevant part that "the judge shall release the

in section 3142 are not met, "the alien shall *remain in custody*. . . ."[73] This provision indicates that Congress saw no conflict between criminal definitions of release and custody and those in the INA.

Conclusion: Authorization under the INA. If the use of home detention in immigration is most analogous to pre-release custody, then criminal aliens in home detention might be considered to be in the Attorney General's custody. However, this authority is not clear cut. 18 U.S.C. 3624(c) calls upon the probation system, a supervision program for released persons, to "offer assistance to a prisoner during such pre-release custody."[74] Bureau of Prison regulations specifically exclude most deportable aliens from pre-release custody, suggesting specific intent not to release the population under consideration here.[75] Furthermore, the uses of home detention in immigration and in pre-release custody are fairly distinct. Pre-release custody only authorizes the use of home detention for a defined portion of a sentence with a maximum limit at six months with the intent of integrating the participant back into community life.[76] The INS would need to use home detention after a person's criminal sentence is already served, while the person is in deportation proceedings or awaiting deportation, with the ultimate goal of removing that person from the community.

Although the majority and the dissent in *De La Cruz* conflict about which is most analogous, both find aggravated felons in deportation proceedings most like persons seeking pretrial or post-conviction release.[77] If pretrial and post conviction release or home detention as used by the Federal Sentencing Guidelines are most like the use of home detention in the immigration context, the immigration statutory scheme may preclude the use of home detention except as a release condition.[78] Significantly, home detention in each of these contexts is permissible only as a condition to release on parole, probation, supervised release, or under bond, all of which constitute a release from custody.

On the whole, it seems that the institution of a home detention program for criminal aliens subject to mandatory detention is probably not authorized under the language of INA 242(a)(2). While the relevant authorities do not specifically define the parameters of custody, those most analogous to home detention as it would be used in the immigration context strongly indicate that

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alien from custody subject to the least restrictive condition, or combination of conditions, of release described in section 3142(b) and . . . section 3142(c)(1)(B) [governing pretrial release] of Title 18, United States Code."

[73]§ 506(b)(1) (emphasis added).

[74]18 U.S.C. § 3624(c).

[75]*Federal Bureau of Prisons Program Statement 5100.04: Security Designation and Custody Classification Manual*, Chapters 2-9 (June 15, 1992).

[76]18 U.S.C. § 3624(c).

[77]*De La Cruz*, 1991 BIA LEXIS 16 (1991).

[78]*See* 18 U.S.C. § 3142(c)(B); 18 U.S.C. § 3143(a)(1); Fed. Sent. Guidelines § 5F1.2.

"custody," as used in § 242(a)(2), refers to physical detention in a government facility, thereby requiring statutory authorization for the institution of a home detention program in the immigration context for criminal aliens subject to mandatory detention. Furthermore, as discussed above, the language of the INA as amended by the Anti-Terrorism Act explicitly distinguishes between custody and release on parole or under bond.

While immigration law offers very little insight on whether home detention constitutes a form of custody or a condition of release, the criminal justice system has treated home detention as a type of release for much of its use. Because courts have looked to the criminal justice system to interpret immigration statutes, and given the common language shared by the INA and various criminal statutes, the fact that home detention does not usually constitute a form of custody under criminal law suggests that legislative authority would be needed before implementation of such a program would be allowed in the immigration context.

Conclusion

If home detention could be legally considered to constitute detention within the meaning of INA 242(a)(2) or if appropriate legislative authorization could be obtained, a home detention program could be an option for a small number of the people the INS is required to detain. It is clear that the INS has an inadequate number of detention beds to fulfill its rapidly expanding statutory obligation to detain criminal aliens. This lack of detention resources results in the inability to apprehend all criminal aliens mandated for detention in the categories described above. The level of financial expenditures necessary to run a home detention program is clearly lower than the costs of additional detention beds, even assuming that it is possible to create or identify enough beds to fulfill the statutory obligation. In addition, the start-up time for implementation of a home detention program is much shorter than that necessary to build detention facilities, although the time frame for bed space creation may be reduced if the INS is able to contract with other law enforcement agencies for the use of already existing detention beds.

On the other hand, is not clear that home detention can legally meet the mandatory detention requirements of the INA. Furthermore, implementation of a home detention scheme is not cost or difficulty free and requires a commitment to careful participant selection and considerable resources for field supervision. Because few mandatory detainees would have a meaningful incentive to comply, a home detention program could be used for only limited numbers of people. In conclusion, the overall utility of home detention for the INS depends upon a resolution of its legality for persons required to be detained and further analysis of the question of incentive as it relates to supervision of deportable aliens.

APPENDIX A

Costs of Utilization of Electronic Monitoring Equipment

The following equipment is necessary to operate an electronic monitoring system:

- A central computerized monitoring system
- A home unit to be attached to each participant's residential telephone.
- A bracelet to be attached to each participant
- A "drive by" device that allows staff to identify a client's presence in a physical location different from his/her home.

There are three basic alternatives for acquiring the equipment for a home detention program that includes electronic monitoring:

- Purchasing the equipment and staffing an in-house centralized monitoring station.
- Leasing the equipment and staffing an in-house centralized monitoring station.
- Leasing the equipment and contracting with the vendor to provide the centralized monitoring services.

Vendors charge for leasing by the number of participants that are being monitored on any given day. For full service (leasing equipment and central services), the costs essentially range from four to six dollars per day per participant. This cost does not include any local staffing except service to malfunctioning equipment. The price range varies with the vendor, which equipment mix is chosen, and the number of units being used. Generally, there is a volume discount. For example, a leading company, BI Inc., based in Boulder Colorado, offers equipment and services for four dollars per client per day for all equipment leasing and full monitoring services. For a hundred person program the cost would be $182,500 per year, not including any local staff or operating costs.

Another vendor, Vorec Corporation of Millwood, NY, only sells equipment. The cost of the equipment ranges from $115,000 to 185,000, and does not include monitoring services. The average lifetime of the equipment is approximately two to three years. An additional two to five full-time employees would be needed to monitor the equipment, and approximately one-third of the equipment must be replaced each year after the first year.

Sample Vendors

BI, Incorporated.
Contact: *Pat Foose*
303-530-2911
6400 Lookout Road
Suite 101
Boulder, Colorado 80301

Digital Products Corporation
Contact: *Derek Bodden*
800-832-3550
800 NW 33rd Street
Pompano Beach, FL 33064

Tracking Systems Corporation
Contact: *Sales and Marketing*
717-671-8700
2404 Park Drive, Commerce Park
Harrisburg, Pennsylvania

Vorec Corporation
914-762-4008
Contact: *Sales and Marketing*
358 Saw Mill River Road
Millwood, New York, 10546