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**INS / NIJ / Vera Initiative**  
**Appearance Assistance Program**  
**Final Planning Report**

Submitted to the National Institute of Justice  
by the Vera Institute of Justice

October 1996

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## Research Design for An Appearance Assistance Program Demonstration

At the request of the Immigration and Naturalization Service (INS), the Vera Institute of Justice has designed a demonstration project to improve the effectiveness and efficiency of detention and release procedures for individuals charged with violating immigration law. This document describes the research design and evaluation methodology for the demonstration. It begins with a description of the program and its expected outcomes, then describes in detail each of the four elements of the evaluation: process evaluation, impact evaluation, cost evaluation, and program integration.

**Program Description** The INS has the task of removing people who have no legal right to be in the United States. While a majority of these people have no case for relief from deportation and/or leave voluntarily, a large number (approximately 100,000 annually) challenge their removal and seek relief before an immigration judge. The INS releases many individuals while they are waiting to have their cases heard before the immigration court -- some are bonded, some are released on recognizance. Sometimes, lack of bed space forces the release of persons without legal remedies who ultimately abscond. At the same time, persons with legal remedies who ultimately win their cases may be held in detention for long periods.

Vera has designed an Appearance Assistance Program (AAP), a supervised release program that will address the problems of noncompliance by persons who are not detained and inefficient use of available detention space. Vera proposes to test this program in a three-year demonstration project in the New York area. The demonstration will be a controlled experiment: Vera will assess program impact by comparing program participants' experience with the experience of a similarly situated control group.

Appearance Assistance Program staff will identify candidates who meet predetermined criteria, including eligibility to seek relief from deportation or exclusion and amenability to and suitability for supervision. A portion of the candidates deemed appropriate for supervision will be randomly assigned to a control group and will be subject to the INS's normal procedures. For candidates not assigned to the control group, the program will recommend their release<sup>1</sup> initially without bond (bond will be added for groups found to be uncompliant without it) and, if the INS releases them, will supervise them while they pursue relief. Supervision will involve a combination of incentives and reporting requirements to encourage voluntary appearance and compliance with the hearing process. A field operations component will track down individuals who fail to report to the program or who

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<sup>1</sup>The INS intends to follow the program's recommendations in most cases.

fail to appear at an immigration court hearing. Supervision will end when a person receives the immigration court's decision, and individuals who lose will be referred to INS enforcement personnel to be returned to INS custody immediately. (However, affirmative asylum seekers, who are not initially detained by INS, will not be taken into custody.) The program will recommend that the INS re-release those who appeal if the appeal is colorable and the person is still suitable for the program.

This is designed to allow the INS to conserve its detention space for people with no claim to relief (who typically stay in detention only briefly before they are removed from the United States), people who are denied relief and can make no further claim, and people who are not eligible for or who violate the program's requirements.

### **Program Goals**

- To increase appearance rates of people who are not detained at scheduled immigration proceedings.
- To increase compliance by persons ordered to leave the U.S. who are not detained prior to the court's order.
- To conserve space in INS detention facilities to permit the detention of mandatory detainees and other persons not appropriate for release.

### **Program Activities**

- Development and implementation of an intake screen that will: a) identify individuals likely to appear at immigration court hearings if released under supervision, and b) provide more consistent and fair criteria for release of detained persons.
- Establishment of a Reporting and Assistance Center (RAC) to carry out supervision, offer useful resource references, and reinforce incentives to appear at court hearings for individuals participating in the AAP.
- Development and implementation of procedures that will facilitate the INS's enforcement of removal orders for participants ordered removed.

**Populations to be Served** The demonstration plan currently calls for supervising four groups of people. This plan will test the effectiveness of the AAP for different kinds of relief-seeking

persons. Vera's original design assumed the demonstration would supervise nearly equal groups of non-citizens being deported for a crime and people arriving at airports without valid documents seeking political asylum. The Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 combined to decrease the number of non-citizens with criminal convictions eligible for supervised release under the AAP. The smaller population of people subject to deportation on the basis of criminal convictions will still be studied, but the plan has expanded to include two additional categories: undocumented workers, and people who entered the U.S. legally or illegally who are seeking asylum voluntarily and are not subject to detention.

**1. Defensive asylum seekers** - people arriving at airports who are determined to have a "credible fear of persecution" based on race, religion, nationality, membership in a particular social group, or political opinion.<sup>2</sup> Screening is proposed to begin at the detention facility to be opened in the Fall in Elizabeth, NJ.

**2. Detained "criminal aliens"** - a term used by the INS to describe persons who come to INS detention from prisons and jails who are in deportation proceedings. The AAP would target those who are eligible to apply for relief from deportation and for release on bond. Screening is proposed to begin at the Varick Street detention center in Manhattan.

**3. Undocumented workers** - individuals who are apprehended at their workplaces in special INS investigative operations. The proposed screening site is 26 Federal Plaza where those people apprehended are taken for initial processing.

**4. Affirmative asylum seekers** - individuals who entered the U.S. legally or illegally and are now seeking asylum voluntarily. These persons are not usually detained unless they have committed violations other than lacking a valid visa. Possible screening sites include affirmative asylum offices in Lyndhurst, N.J. and Rosedale, N.Y.<sup>3</sup>

### **Program Outcome Hypotheses**

<sup>2</sup> Effective in April, 1997, INS officers will make this determination at the airport as required by the Anti-Terrorism Act and subsequent legislation. Individuals who do not meet this test will be immediately returned to their countries without a hearing before an immigration judge. Those who pass will be scheduled for a hearing and screened for eligibility for release until then, the AAP will identify and screen out individuals with frivolous claims who merely seek to gain entry to the country and have no intention to pursue the claim.

<sup>3</sup> This group will not be included in the initial phase of the demonstration, but the procedures are formulated to cover the contingency of adding this group in the future.

- Appearance rates at scheduled hearings for AAP participants will be greater than the rates for those in the control group who were released by the INS without supervision. The rates will also be greater for participants than for those found ineligible for AAP participation but released by INS.
- The relative number of absconders will be lower among AAP participants ordered deported than among the released members of the control group or among released ineligible persons.
- AAP participants will be more likely to achieve favorable disposition of their cases than members of the control group, whether released or not, or released non-participants.
- The number of bed-days at the detention facility per removal will be lower for AAP participants than for the control group or for ineligible persons who are released by INS.
- Average time spent in detention will be lower for AAP participants than for the released control group members and even lower relative to the released ineligible group.

**Evaluation Methodology** Vera will conduct a formative evaluation of the program to identify its strengths, its weaknesses, and ways in which it might be augmented, modified, or improved to meet its primary goals. Additionally, the program's impact on the outcomes mentioned above will be assessed beginning at the end of the pilot or formative stage and continuing to the end of the demonstration. The components and objectives of the evaluation are:

- **Process Evaluation** - To monitor and assess the operational demonstration's effectiveness in implementing the program design, including the process of guiding the program's evolution based on early experience and unforeseen complications and events.
- **Impact Evaluation** - To assess, in quantitative terms, the net contribution of the AAP model of supervised release to the achievement of program goals set out above.
- **Cost Evaluation** - To investigate the resource implications of the AAP for the INS.
- **Program Integration** - To assess the techniques used to integrate the demonstration with the current work of the INS, EOIR (Executive Office for Immigration Review) and various state and local agencies.

**Process Evaluation** The evaluators will assess the program plan, implementation, and outcomes with respect to the project's three main components: *screening*, *supervision*, and *field operations*. Vera researchers will gather detailed information about these program components through interviews with key INS and EOIR staff, the national coordinator of the AAP, and other AAP staff; reviews of INS, EOIR and other relevant agencies' data bases; and observation of program activities. Participants will also be interviewed to determine their perceptions of the program. Evaluators will document the critical features of the mature program and alternative ways to implement its main components. This descriptive and analytical work would serve to guide efforts to replicate the AAP model. The evaluation will address questions about the program overall and about each of its components, including the following:

#### **General Questions**

- Where was the program implemented? What was the basis for selecting these sites?
- How do these sites differ from other locales?
- What are the main characteristics of the population at the program's sites? What is the demographic makeup of the population served by the program (e.g. age, education, ethnicity, marital status, number of children, employment status etc.)? From what states, regions, communities, and countries have program participants come?
- What is the program staff's composition and size?
- How are staff recruited and selected?
- What is the staff training's content? What are its unique features?
- How is training conducted? What procedures, techniques, and materials are used?
- What are the staff's qualifications and responsibilities? Which staff members are bilingual? What languages do they speak?
- Is there on-going evaluation of staff performance? How is this done?

- How does the program's staffing model work? What assumptions were made about workloads in developing the staffing plan? Were these assumptions correct?
- What is the organizational structure of each program component? Are staff roles and job descriptions clearly defined? Are they written down? Is there a manual of policies and procedures?
- How are staff activities linked, and what are the lines of communication among staff across each program component? How are the components' purposes, functions, and operations coordinated?
- Are program components operating with different priorities? Do those priorities conflict? Do communication problems exist between components?

#### **Screening Activities**

- How many people does the project plan to screen per day? What plans does the program have to screen new arrivals in the event of an unexpected influx on a given day?
- What plans does the program have to monitor the volume and flow of individuals at intake sites (airports, detention centers)? How do these plans affect staffing and scheduling of staff at these sites?
- What criteria must be met for program eligibility and what characteristics eliminate potential participants? Do intake staff understand the intake system?
- What types of personal history and information are taken at the face-to-face interview? How is this information verified? Are provisions made for confidentiality?
- Does the program have access to information gathered by INS before screening?
- What, if any, checks were made on the intake instruments' validity, reliability and appropriateness?
- Are uniform procedures practiced at intake? Is there a clearly defined procedure following the intake outcome? If so, what is it?
- Is there a procedure for adjusting intake criteria? If so what is it?



- Is supporting documentation on potential participants readily available at intake? What is the procedure for handling missing files?
- Does the intake process appear to create discomfort or discontent among potential participants? What are the procedures for handling disruptions at intake?
- Do program participants understand the program and its requirements? Do participants understand the role and purpose of the AAP interview?
- Are any non-AAP staff present at intake? If yes, who are they? If no, are potential participants aware that only AAP staff are present?
- How does the AAP program screening process/criteria differ from that already undertaken by INS? How does screening differ across intake sites (e.g. J.F.K., Newark, Varick St., Federal Plaza)?
- How much, if any, follow-up screening is done the after initial screening?
- Who in INS signs off on release decisions? What is the release process? How will transportation of participants to the New York-based RAC be organized?
- What, if any, modifications were made in the intake process for asylum applicants?
- How does the screening process/criteria differ for the different groups screened?
- Do any of the participants have legal counsel? If so, is counsel allowed to be present at interviews? What issues have arisen relating to the presence of counsel?
- How does the screening/criteria for asylum seekers differ from the Asylum Pre-screening Officer's (APSO) evaluation of asylum seekers?
- What procedures and resources does the program have to verify information given by potential participants? What procedures and resources does the program have for the provision of guarantors for participants?

### **Supervision Activities**

- What are the scope and content of supervision activities?
- Which staff members direct these activities?
- What specific procedures do program staff follow?
- How are staff assigned to individual cases?
- Is the number of scheduled face-to-face meetings at the RAC sufficient to monitor cases? (too many, too little?) Does the program vary the level of intensity of supervision as the participants' court hearings near?
- Do the RAC's operating hours adequately accommodate participants' schedules?
- Are the RAC facilities easily accessible to the participants? Is there ample space which is fully utilized? What are the security provisions? Is there clean, safe, and attractive maintenance of facilities?
- Is there adequate staff coverage, including emergency assistance, during all hours of operation?
- What incentives does the program use to promote compliance with supervision requirements? How successful are they?
- How does the program keep track of participants?
- What materials does the program make available to participants? Which materials have participants requested most often? Seldom used? Never used?
- What other resources does the program make available to participants?
- Does the program refer participants to other agencies or services? If yes, which agencies and what services are they? How many of the referrals actually result in the participant's receiving services? How useful are the services to participants?

- What mechanisms or characteristics does the program use to detect early warning of potential violations and signs that someone is heading for trouble?
- How does the program deal with violations of program requirements?

#### **Field Activities**

- What is the capacity of the field operations component? Does it include collaboration with other law enforcement agencies, courts, and social service agencies?
- What is the program's geographic jurisdiction?
- What methods and protocols does the program use to carry out its field activities?
- How is absconding operationally defined? What level of effort and time is expended in locating an individual who has absconded? What is the process after an individual is apprehended?
- How many field visits do field officers make per day? Per week? Who do they visit?
- What measures are taken to ensure the field staff's security?
- Does the program attempt to identify and utilize other community resources to carry out its field activities? If yes, what links have been established with the community?
- Are there program reports submitted to the immigration court? If so, what is their purpose? Who prepares them? What is expected to result from these reports?
- What is the role of INS in AAP field operations?
- Does the program have the authority to receive notice of immigration court decisions? If no, how does the program deal with the possibility of the participant absconding after an adverse decision where the participant is not immediately detained?

#### **Program Perceptions**

- What are RAC staff and participant perceptions of the program? Are there conflicting perceptions of the staff's roles? Are there conflicting expectations of program benefits among program participants?
- What are INS and EOIR staff (who are involved with the program) perceptions of the program? Are there conflicting perceptions and expectations of program process and outcomes?

#### **Data Management Activities**

- What are the program computer system's primary functions? What operations and types of activities does the system track?
- What types of software and hardware were developed for data management? Who designed the software and hardware? How did the program select the system designer?
- Did the project test the system prior to start-up? What problems did it encounter? How were they resolved?
- How did the computer system perform during the project's pilot phase? Did it support each function properly and in an integrated fashion? How did staff deal with system failures?

**Impact evaluation** The Appearance Assistance Program incorporates an experimental design intended to provide valid estimates of the program's impact on several performance measures in the hearing and removal process for persons in deportation or exclusion proceedings. For members of groups subject to detention during their proceedings, the program will screen for eligibility to participate in the program and assign eligible persons to either a participant group or a control group. Those ineligible and those in the control group will be accorded standard INS procedures which may offer release (with or without bond) during some or all of their hearing process. The participants will enter the AAP for the duration of their legal proceedings in immigration court.

From the affirmative asylum applicants, who are not generally detained, the program will not choose participants on the basis of eligibility. If this group is included, a screen-like interview will be administered to those whose initial asylum applications have been denied and who have consequently been placed in deportation proceedings and are seeking relief in court (a sample might be used if the numbers are too great). A randomly selected group of those interviewed will

be offered participation in the AAP, and a control group will not be given the same offer. Those offered participation may accept or refuse the offer.

#### **Specification of Groups Relevant for Analytical Comparison<sup>4</sup>:**

Defensive asylum seekers apprehended at airport entry who meet the credible fear threshold:

Ap= those screened eligible, assigned to participate, consented.

Ac= those screened eligible, assigned to control, plus non-consenting.

An= those screened ineligible.

Ar= non-participants released from detention by INS.

Acr= control group persons released by INS.

Criminal aliens eligible for relief and not in categories mandated to detention:<sup>5</sup>

Cp= those screened eligible, assigned to participate, consented.

Cc= those screened eligible, assigned to control, plus non-consenting.

Cn= those screened ineligible.

Cr= non-participants released from detention by INS.

Ccr= control group persons released by INS.

Undocumented workers:<sup>6</sup>

Wp= those screened eligible, assigned to participate, consented

Wc= those screened eligible, assigned to control, plus non-consenting

Wn= those screened ineligible.

Wr= non-participants released from detention by INS

Wcr= control group persons released by INS

Wu= those not screened.

#### **Affirmative Asylum seekers:<sup>7</sup>**

<sup>4</sup> These groups are not mutually exclusive--Acr is a subgroup of both Ac and Ar for example.

<sup>5</sup> The new legislation cited above has mandated detention for additional groups of criminal aliens--those in such groups will not be screened.

<sup>6</sup> Undocumented workers are likely to have substantial and current associations in the community, and for the most part their only law violation is of immigration law. They share these characteristics with the Affirmative Asylum group who are not subject to detention. Comparisons between Wp and Rp would give some evidence on the incremental effect of the detention sanction on compliance behavior.

<sup>7</sup> Affirmative Asylum seekers are not detained during their relief proceedings (unless they have law violations in addition to immigration law). Consequently all non-participants who have been interviewed will be considered as a control group--comparable to the unsupervised released categories in the other groups. An important difference

Ro= those interviewed and offered participation.  
 Rp= those interviewed, offered participation, accepted.  
 Rn= those interviewed, offered participation, refused.  
 Rc= those interviewed, not offered participation.  
 Ru= those not interviewed.

**Measures to be Analyzed for Impact of the AAP** The AAP's impact may be observed in a number of dimensions. Two general variable types can be used to capture the AAP's main effects on the program's objectives and some closely related items. One is the amount of time between the beginning of a proceeding and intermediate or final events. Duration analysis methods are available for measuring the effect of the program on the following, more specific measures:

- Duration from service of Order to Show Cause (OSC) to Failure to Appear (FTA) (for released persons who fail to appear )
- Duration from OSC to decision on case for relief
- Duration from OSC to removal (for those who are removed)
- Duration in detention from initial custody to final decision on immigration case
- Duration in detention from final order to removal (for those who are removed)

The other type is the probability or likelihood of an event occurring which can be analyzed using probit or logit analysis to isolate the separate effect of AAP participation on the chance that an event will occur. Such measures are:

- Probability of an FTA (for persons released prior to final hearing)
- Probability of grant of relief (for persons who appear at final hearing)
- Probability of denial of relief (for persons who appear at final hearing)
- Probability of removal (for persons receiving final order or denial of relief)
- Probability of appeal (for persons denied relief at hearing)

**Analytic Contrasts Provided by the Design** Among the defensive asylum seekers there are several useful contrasts that can be studied. Comparison of Ap with Ac is the primary contrast for measuring the net difference between the performance of persons in the AAP and those subject to prevailing INS practices. This comparison will be based on the classic random assignment method for assuring comparability of persons in each group. The comparison will,

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is that return to detention is not an available sanction for this group. The size of the affirmative asylum group may exceed interviewing capacity, but could still be followed in the official records.

however, use statistical methods that can "hold constant" a number of demographic and other performance related variables. These methods can both add to the measured precision of the impact estimates and provide corrections for any inter-group differences that may remain after randomization.

A second comparison can be made between the selected and supervised participant group, Ap, and the members of the control group who are released from detention by INS. This analysis aims to measure the net impact of AAP supervision compared to the unsupervised, but possibly bonded, releasees. A related analysis could compare the Ap and Ar groups using the screening score(s) to adjust for the mixture of eligible and ineligible persons in Ar.

Comparisons between the control group, Ac, and the ineligible group, An, may be of interest in terms of the amount of time spent in detention. This would indicate the degree to which INS selects persons to be kept in detention on a basis similar to the AAP screen.

The same comparisons will be possible for the criminal alien category, but the sizes and overlaps among the groups may be different. Specifically, it is possible that INS will be pressed to use most of its detention capacity for the mandatorily detained group, and will release, perhaps under bond, most of the group eligible for release by statute but screened out as ineligible for AAP, as well as those assigned to the control group. This would mean that Ccr could include all those in Cc. Comparisons between Cc and Cp will provide a clear measure of the difference between supervised and unsupervised release. Cr might include virtually all of Cn and Cc, comparison of this group with Cp would provide a supplemental impact measurement if there are enough measures of the differences between the groups to adjust for their different AAP screening outcomes.

Because of uncertainty about at the number of criminal aliens that can be legally released, a supplemental comparison group for the criminal alien participants will be sought in the records of similar persons in other jurisdictions. We will endeavor to establish event histories and associate these histories with basic demographic and other variables to form a "quasi-experimental" comparison group that can be contrasted with the directly observed participant group, Cp. Both past and concurrent rates of appearance for scheduled hearings in other jurisdictions can be useful in developing this analysis.

Undocumented workers represent a group that generally has not been held in detention after apprehension in the past, but there is an expectation that this practice will change in the future. Because this group has been largely ignored, relatively little is known about its composition or the prevalence of relief possibilities among its members. If substantial numbers will be detained and have grounds for relief from removal, the analysis will be parallel with the defensive asylum seekers. There will be interesting contrasts between the workers and asylum seekers that could be attributed to their differing levels of association with other members of the community and

relative levels of familiarity with the language, customary behavior, and public services and facilities.

If very few undocumented workers have relief options, the AAP will consider the alternative of incorporating those without relief into the program. If the INS detains most such persons until deportation, the analysis will be focused on the comparison (in terms of both compliance and cost) between detention and supervised release. If INS releases most of these people, the comparison will be between supervised and unsupervised release from detention.

The affirmative asylum seekers provide a measure of the effect of a reminder/notification program without the potential sanction of detention. The participants are, in addition, a self-selected group from those offered participation. Comparisons between the Ro and Rc groups again provide the classic randomized control group analysis, with supplementary adjustment from covariates, but the difference must be attributed to the *offer* of participation. If nearly all persons offered accept, the interpretation can be translated to the effect of participation. If a substantial fraction refuse the offer, a secondary analysis of the self-selection process would be needed in order to understand the AAP's impact on this group. Comparison of the Rp and Rn groups will indicate the combined effect of AAP participation and group differences that are related to the Rn group's refusal. Clearly there will be no analysis of duration in detention unless INS chooses to detain members of this group when they are denied relief.

There is a possibility that the flow of affirmative asylees or illegal workers will swamp the interviewing capacity at times. If this happens, the program plans to keep track of such persons and record their official outcomes from EOIR records. Since these groups, Wu and Ru, will not have any direct contact with the demonstration, it will be interesting to compare their outcomes with the Wc, Rc, and Rn groups. Differences might be evidence of some "Hawthorn effect" coming from the interview or other exposure to the AAP activity.

**Sources of Data on Outcomes and Collateral Variables** Data on procedural events and outcomes will be derived from official records of release, scheduled hearings, appearances made or missed, court decisions (including in absentia deportation or exclusion orders) and removals. Essentially a comprehensive "event history" for each screened person entering relief proceedings and continuing through final disposition will be needed. It is anticipated that these data can be identified and secured without contact with the individual.

Data on the characteristics and situation of the research subjects will come from subjects' "A-files," and from their responses in the screening interview. Basic demographic information -- age, gender, race/ethnicity, and family responsibilities in the U.S. or abroad -- will be needed in addition to data on any conviction, incarceration and parole/probation experience. For asylum seekers, the nature of their claims and particulars of their entries may also be useful to explain



their responses to supervision. Finally, the score in the screen which determines eligibility should be highly related to performance, and analysis of that relation can be used to inform modifications of that test.

**Timing and Process of Random Assignment** It is important that the random and impartial nature of detained persons' assignment to participate in the AAP or the control group be apparent to all concerned. A possibility of manipulation of the assignment by either the program staff or by agency officials could undermine the credibility of the research results based on the comparison of control and treatment groups. This possibility suggests that each entrant into a screening process be assigned a random number at the outset which corresponds to a numbered envelope that contains the random number on which assignment will depend if the person satisfies the eligibility threshold. (This does not preclude different assignment rates for different groups or the possibility of mid-demonstration adjustments.)

A computerized screening interview will produce an eligibility decision automatically, and the random assignment can be made at the screen's conclusion. In the standard case eligibility will include verification of a guarantor and a residence. The person being screened should not be informed of the eligibility outcome if they are assigned to the control group. The eligibility of individuals selected to participate is obvious, but neither the person nor the INS should know whether non-participants are ineligible or members of the control group. The aim is to preserve the possibility that the eligibility outcome will not alter subsequent treatment of non-participants.

It is expected that many, if not most, of the defensive asylum seekers will not have well established local contacts or pre-arranged residences at the time they are screened. Plans call for seeking guarantors and help in finding residences among voluntary agencies having interest in refugees or specific nationality or ethnic groups. This process will take additional time, and it would be awkward to inform an agency that their efforts were wasted on a case assigned to the control group. In these cases the random assignment will be made among those screened and evaluated as conditionally eligible. Only those conditionally eligible will be referred to possible guarantor agencies, and only those succeeding in getting a guarantor and a residence will be admitted as participants in the program. This variation from the standard randomization will dilute the impact comparisons between control and "non-control" groups, since both will include persons who could not secure guarantors or residences. Unfortunately there is no promising alternative in this case, and it will be possible to estimate bounds on the extent of the dilution.

For the non-detained groups there is no question of eligibility to be suppressed since there be no eligibility screening for these groups, but the impartiality of the random offer of participation must be carefully maintained.

**Issues of Informed Consent** Consent to participate in the demonstration and related research will be obtained in two steps -- a verbal consent to the screening interview and a signed written consent for those selected to participate. Persons having a potential claim for relief from deportation or exclusion will be given a brief description of the AAP and its purposes and asked to engage in an interview that will be used for selecting participants. They will be told that if they are selected, a detailed program description and consent form will be offered for their endorsement. At this point they will be asked if they are interested and wish to continue with the interview. Those who decline will be asked why, and be assured that their reason will not be disclosed to INS.

The screening interview will be administered as a computer assisted personal interview (CAPI) which will be programmed to evaluate the answers (and previously entered data from official records) to determine eligibility. For those who are eligible, a random assignment will be made to either participate in the AAP or remain subject to prevailing INS rules and procedures (the control group). Those assigned to participate will be given a description of the supervision program and a consent form which includes a pledge of confidentiality for all information collected for research purposes only (not including data required to administer the program as distinct from the evaluation research). Persons screened as not eligible, those assigned to the control group and those refusing to complete the screen or sign the written consent form will not be separately identified to INS. All will simply be returned as non-participants.

The protocols and consent forms will be reviewed by Vera's Institutional Review Board and revised as needed to assure compliance with standards for protection of human research subjects.

It is assumed that consent is not needed for access to A-files or official records of scheduled hearings, decisions, bond setting, detention, etc. (Protection of the confidentiality of ordinarily confidential information is assumed to be assured apart from any consent.) It is very hard to see how a credible experiment or other analysis can be done if such consent is needed.

In the case of detained groups released to AAP supervision, withdrawal of consent should be understood as immediate forfeit of release and consequent surrender to detention pending alternative arrangements. For the affirmative asylum seekers who are not usually detained, it may be useful to notify INS that the person has withdrawn voluntary participation in the AAP.

**Allocation of Subjects Between Participant and Control Groups** The proportions of eligible subjects allocated to the participant and control groups directly affects the precision of impact and level estimates. For any given total, the precision of impact estimates, i.e. the difference between "treatment" and "control," is maximized when equal numbers are allocated to each group. Moderate departures from equality lead to relatively minor reductions in precision, but moving

beyond 2/3:1/3 increases the minimum detectable difference by over 10%. On the other hand, if there is a disproportionate interest in the precision of estimates of the *levels* of the performance measures for the "treatment" group relative to the "controls" (perhaps because of a need to extrapolate their performance to a wider application of the treatment), then it makes sense to have more treatment than control cases. It will be important to keep both kinds of precision in mind and to arrive at an allocation that balances the two.

### **Cost Evaluation**

Researchers will conduct a cost-effectiveness analysis of the AAP program by comparing the program participants' outcomes with the outcomes of those who did not participate in the supervision program. Cost-effectiveness will be considered from the INS's point of view and not that of program participants or other groups. Thus costs and benefits will include only those incurred by the INS. The following cost categories will be considered: 1) detention costs -- including the use of bed space; 2) AAP costs of operating screening facilities, Reporting and Assistance Centers, and field activities; and 3) INS costs associated with released persons. Benefits will be measured in terms of compliance with hearing appointments, favorable relief decisions, and completion of removals in cases where relief is denied. Program cost-effectiveness will be assessed by comparing the cost per fully compliant proceeding, favorable decision, or completed removal for the experimental and the control groups. The cost evaluation will address several aspects of program costs including the following:

- What is the added cost of the compliance that can be secured by full detention during relief proceedings relative to the AAP?
- Are there substantial differences in the cost-effectiveness of AAP among the different populations of persons included in this demonstration?
- What would be the cost, level of compliance, relief decisions, and removal rates if the AAP were fully implemented in the NY district?

**Program Integration** To assess the integration of the program's three main components -- screening, supervision and field operations -- with the current practices of INS and EOIR and other relevant state and local agencies, the evaluation will focus on the following questions:

- How is the program intake screening process coordinated and integrated with INS and EOIR procedures, databases and staff? What arrangements have been made with respect to data sharing?
- What adjustments, if any, did INS and EOIR make to their operating procedures to accommodate the AAP?
- Which staff members are responsible for communicating release requests to the INS District Director? How are requests communicated? How are requests handled in the absence of the District Director?
- What arrangements have been made with parole or probation agencies for joint supervision of participants?
- What are the procedures for taking an individual back into INS custody?
- At what point will INS be informed of an individual who has absconded? What is the role of INS, if any, in locating an individual who absconds?
- What is the procedure for informing an individual of an adverse decision? What arrangements have been made with EOIR to take an individual into custody after an adverse decision is received?
- Does the program attempt to identify and utilize various community resources?

TIME LINE FOR THE EVALUATION OF THE PILOT PHASE OF THE PROGRAM

TIMELINE FOR THE EVALUATION OF THE PILOT PHASE OF THE PROPOSED													
Evaluation Activity	Dates												
	1996-1997												
	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan	Feb	Mar	Apr.	May	June
-1- Draft Evaluation Plan	X	X	X	X									
-2- Develop Interview, survey, observation instruments					X	X PILOT PHASE BEGINS							
-3- Establish interview, survey, observation schedules							X						
-4- Conduct Interviews, Observations (Two Weeks)								X					
-5- Clean, Collate, Analyze Observation, Interview and Program Statistical Data (two Weeks)									X				
-6- Draft Report on Progress of Pilot Phase Operation (two weeks)									X				
-7- Disseminate for Comments/Corrections (One Week)										X Pilot Phase Ends			



## **Home Detention for Immigration Detainees: Would it Be Useful, Legal, and Effective?**

### **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)<sup>1</sup> 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 mid-1996, the INS had approximately 8000 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 pending. 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.<sup>2</sup>

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

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<sup>1</sup>8 U.S.C. 1101 *et seq.*

<sup>2</sup> This percentage is based upon fiscal year 1996 numbers through June 30, 1996 provided by the INS Statistics Office.

<sup>3</sup>Pub. L. No. 104-132, 110 Stat. 1214 (1996).

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

Prior to the enactment of the Anti-Terrorism Act, the Attorney General was only required to detain only certain aggravated felons,<sup>6</sup> 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.<sup>7</sup>

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,

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<sup>4</sup>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).

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

<sup>6</sup>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).

<sup>7</sup>Immigration Act of 1990, Pub. L. No. 101-649 (1990) (codified in scattered sections of 8 U.S.C.)



and provide a sanction less severe than jail.<sup>8</sup> Post-conviction home detention provides courts 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.<sup>9</sup> Compliance may be monitored manually through field visits, surveillance, curfew checks, and random telephone calls.<sup>10</sup> 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.<sup>11</sup> 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 for programs that do.<sup>12</sup>

### **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

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<sup>8</sup>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).

<sup>9</sup>See Richard Will, *Intensive Supervision Probation*, *Intermediate Sanctions in Overcrowded Times* 89 (1995).

<sup>10</sup>Terry L. Baumer & Michael Maxfield, *Electronically Monitored Home Detention*, *Intermediate Sanctions in Overcrowded Times* 104-111 (1995).

<sup>11</sup>*Id.* at 113.

<sup>12</sup>Joan Petersilla, *Exploring the Option of House Arrest* 50, 54; Kuplinski, *supra* at 5.

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 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.<sup>13</sup> 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.<sup>14</sup>

**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.<sup>15</sup> This criteria

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<sup>13</sup>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)].

<sup>14</sup>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).

<sup>15</sup>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.

insures that each individual placed in the program directly frees a detention bed.<sup>16</sup> 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 would counterbalance the savings from persons who successfully complete the program.<sup>17</sup> 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).<sup>18</sup>

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.<sup>19</sup>

**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.<sup>20</sup> 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.<sup>21</sup> Radio frequency systems use a bracelet

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<sup>16</sup>Maxfield & Baumer, *Final Report: Evaluation of Pretrial Home Detention with Electronic Monitoring* 3 (1991).

<sup>17</sup>Renzema, *supra* at 3.

<sup>18</sup>*Id.*

<sup>19</sup>Kuplinski, *supra*.

<sup>20</sup>Kuplinski, *supra* at 3; Baumer et al., *supra* at 122-123.

<sup>21</sup>Baumer & Maxfield, *Electronically Monitored Home Detention, Intermediate Sanctions in Overcrowded Times* 105 (1995).

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.

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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

**Field Supervision.** The acquisition of equipment alone is not sufficient to establish a home detention program.<sup>25</sup> 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."<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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<sup>22</sup>Schmidt, *supra* at 373.

<sup>23</sup>Baumer, et al., *supra* at 139.

<sup>24</sup>Additional information about pricing and vendors is included in the appendix.

<sup>25</sup>*Id.*; Maxfield & Baumer, *supra*; Renzema, *supra*; Baumer, et al., *supra*.

<sup>26</sup>Renzema, *supra* at 1.

<sup>27</sup>Kuplinski, *supra* at 60-61.

<sup>28</sup>Renzema, *supra* at 16.

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.<sup>29</sup> In contrast, the New York City Home Detention 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.<sup>30</sup>

**Participants 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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."<sup>35</sup> The authors also note that the pretrial clients were charged with

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<sup>29</sup>However, as of July 1996, the average actual case load was 44 cases per officer.

<sup>30</sup>The New York City Probation Department recently suspended its electronic monitoring program.

<sup>31</sup>Baumer, et al., *supra* at 135.

<sup>32</sup>Maxfield & Baumer, *Final Report: Evaluation of Pretrial Home Detention with Electronic Monitoring* 24 (1991); Baumer, et al., *supra* at 136.

<sup>33</sup>Baumer, et al., *supra*.

<sup>34</sup>*Id.* at 128-131.

<sup>35</sup>*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).

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.

**Real Sanctions.** An electronic monitoring program cannot be effective without quick and immediate sanctions for violations.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

### **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.<sup>39</sup> New forms of surveillance are minimally visible or invisible, making it difficult to determine when one is being watched and by whom.<sup>40</sup> 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.<sup>41</sup> 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."<sup>42</sup> 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.<sup>43</sup> These concerns are minimized if the person faces certain incarceration as the only alternative to home detention.

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<sup>36</sup>Renzema, *supra*.

<sup>37</sup>Baumer, et al., *supra*.

<sup>38</sup>Tonry & Hamilton, *supra* at 87.

<sup>39</sup>Lilly, *supra* at 106-7.

<sup>40</sup>*Id.* at 107.

<sup>41</sup>*Id.* at 97.

<sup>42</sup>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).

<sup>43</sup>*Id.*

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.<sup>44</sup> 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 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

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<sup>44</sup>Bonnie Berry, *Electronic Jails: A New Criminal Justice Concern*, 2 Justice Quarterly 1, 8 (1985).



facilities and detained for Immigration Court hearings.<sup>45</sup> 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 well.<sup>46</sup> 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.<sup>47</sup>

***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.<sup>48</sup> 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

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<sup>45</sup>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).

<sup>46</sup>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)

<sup>47</sup>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.

<sup>48</sup>INA § 242A (8 U.S.C. 1252a).

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.
- 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.<sup>49</sup>

**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.

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.<sup>50</sup> According to case law interpretation, the imposition of home detention is one such permissible condition.<sup>51</sup> 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.<sup>52</sup> 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;<sup>53</sup> 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."<sup>54</sup> 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.<sup>55</sup> Home detention here substitutes for incarceration in a one-to-one relationship and fulfills minimum sentencing requirements.<sup>56</sup> 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.<sup>57</sup> Furthermore, the Federal Sentencing Guidelines determine only what a

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<sup>49</sup>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).

<sup>50</sup>18 U.S.C. § 3142(c)(B) (Supp. 1996).

<sup>51</sup>*United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); see *United States v. Tortora*, 922 F.2d 880 (1st Cir. 1990).

<sup>52</sup>18 U.S.C. § 3143(a)(1) (Supp. 1996).

<sup>53</sup>*Reno v. Koray*, 115 S.Ct. 2021 (1995).

<sup>54</sup>Fed. Sent. Guidelines § 5F1.2 (1995).

<sup>55</sup>*U.S. v. Miller*, 991 F.2d 552 (9th Cir. 1993).

<sup>56</sup>§ 5 C1.1 (e)(2)-(3).

<sup>57</sup>*U.S. v. Jalili*, 925 F.2d 889 (6th Cir. 1991).

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.<sup>58</sup>

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.<sup>59</sup> The statute authorizes the use of "home confinement" to fulfill this requirement.<sup>60</sup> Persons in home detention under this provision are considered to be in "custody," even though others under identical conditions may be considered "released."<sup>61</sup> 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.<sup>62</sup> 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,"<sup>63</sup> 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 its obligation to take into custody alien felons

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<sup>58</sup>925 F.2d at 893.

<sup>59</sup>§ 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").

<sup>60</sup>*Id.*

<sup>61</sup>*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 their sentences in identical circumstances were in "official detention").

<sup>62</sup>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).

<sup>63</sup>*De La Cruz*, 1991 BIA LEXIS 16 (1991).

released from state correctional facilities, relied on the Federal Sentencing Guidelines passed under the Sentencing Reform Act,<sup>64</sup> to interpret the provisions in INA § 242(a)(2).<sup>65</sup> 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."<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup> 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).<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> This resemblance suggests that

<sup>64</sup>28 U.S.C. § 994(a) (Supp. 1995).

<sup>65</sup>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)).

<sup>66</sup>*Id.* at 329.

<sup>67</sup>1991 BIA LEXIS 16 at \*11 (1991).

<sup>68</sup>*Id.* at \*9.

<sup>69</sup>*Id.* at \*13-35.

<sup>70</sup>*Id.* at \*12 n.5.

<sup>71</sup>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).

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).<sup>72</sup> The Anti-Terrorism Act then states that if the conditions in section 3142 are not met, "the alien shall *remain in custody*. . . ."<sup>73</sup> 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."<sup>74</sup> Bureau of Prison regulations specifically exclude most deportable aliens from pre-release custody, suggesting specific intent not to release the population under consideration here.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> If pretrial and post conviction release or home detention as

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<sup>72</sup>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 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."

<sup>73</sup>§ 506(b)(1) (emphasis added).

<sup>74</sup>18 U.S.C. § 3624(c).

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

<sup>76</sup>18 U.S.C. § 3624(c).

<sup>77</sup>*De La Cruz*, 1991 BIA LEXIS 16 (1991).

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.<sup>78</sup> 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 "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

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<sup>78</sup>See 18 U.S.C. § 3142(c)(B); 18 U.S.C. § 3143(a)(1); Fed. Sent. Guidelines § 5F1.2.

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

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### **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

## **Appearance Assistance Program Policy Governing Disclosure of Information**

In order to determine whether someone is eligible for supervision, an Appearance Assistance Program (AAP) will need to gather information about candidates' immigration status, criminal history, and living situation. During the supervision process, the program will learn a great deal about program participants and the people with whom they associate. The program will gather still other information that it will use only for research.

Many people and organizations will be interested in this information. Program staff may be approached by police officers, reporters, participants' relatives, participants' employers or even the INS and asked about a participant's whereabouts or legal status or activities. The ways in which program staff respond to these requests will determine how willing participants and other information sources are to entrust the program with information in the future. Vera planners have worked to develop a disclosure policy that encourages trust and free exchange of information by participants while allowing disclosure of information when it will serve program or other important interests.

Pretrial services agencies in the criminal justice system face the same questions. Some jurisdictions have statutes that limit how information obtained by pretrial services agencies can be used. Pretrial services agencies that are part of probation departments generally are covered by laws or rules governing probation. Some pretrial services agencies have formal agreements with the prosecutor's office limiting what information the prosecutor can ask for and how it can be used; some pretrial services agencies have informal agreements with prosecutor's offices or no agreements at all.

Disclosure of federal pretrial services information is governed by federal regulations, promulgated pursuant to a 1982 federal statute and revised most recently in 1992. These regulations provide that information obtained in the course of performing pretrial services functions is confidential and shall be used only for specific, delineated purposes. The objective of the confidentiality requirement, as stated in the regulations, is "to promote a candid and truthful relationship between the defendant and the pretrial services officer in order to obtain the most complete and accurate information possible for the judicial officer." The federal pretrial services regulations are comprehensive, governing disclosure not only to prosecutors but also to others who might be interested in the information.

Because the federal pretrial services agencies, which operate in a nationwide system governed by federal law, are most analogous to the proposed Appearance Assistance Program and because their disclosure rules are comprehensive, highly formalized and have been tested over a period of years and amended to reflect experience, Vera planners used these regulations as a model. The planners adapted them to reflect differences between the criminal justice and immigration systems--most notably that initial release decisions in the immigration system are made by the INS rather than by a judge.

The resulting policy, which follows, was reviewed by members of the Appearance Assistance Program's advisory board. Since the policy will not be codified in federal regulations, Vera entered into a formal agreement with the INS on what information Vera will provide the INS about participants in the demonstration Appearance Assistance Program. This agreement is part of the contract between the INS and Vera for the operation of the demonstration program. Vera planners will develop training based on the policy and on the agreement with the INS for Appearance Assistance Program staff.

## **Appearance Assistance Program Policy Governing Disclosure of Information**

### **Objective**

Confidentiality of information obtained or developed by an Appearance Assistance Program (AAP) employee in the course of performing the AAP's functions is preserved primarily to promote a candid relationship between the participant and the AAP employee in order to obtain the most complete and accurate information possible so the program may effectively screen and supervise persons in deportation and exclusion proceedings. In the asylum context, confidentiality may be required in order to protect the safety of participant's family and associates still living in the participant's home country. Disclosure of information other than for the purposes outlined below (particularly for purposes of making a case for deportation or exclusion) would deter participants from cooperating with the AAP.

AAP staff shall not disclose information about individuals screened or supervised by the Program obtained in the process of performing the AAP's functions (including screening and supervision), except in the following circumstances:

### **INS release decisions**

AAP staff will not disclose information obtained during the intake screening process except for the information justifying the release recommendation which will be transmitted to the INS District Director or his designee to be utilized to make the initial release determination. Such information will be limited to the potential participant's name, address, nationality, date of birth, the guarantor's name and address, and the AAP's assessment that the potential participant is not a public safety risk, that he or she has a potential remedy available in removal proceedings, and that he or she is amenable to supervision. This information will be provided in a format agreed to by the INS and the AAP.

If the AAP determines that a program participant must be returned to custody because of severe or repeated violations of conditions of release, AAP staff may disclose to the INS District Director or his designee the reasons for revocation of the conditional release and information necessary to locate the participant.

### **Risk of Harm/Public Safety Risk**

The AAP will disclose to the INS and other appropriate authorities any specific danger of physical harm that any participant may come to pose to any other person.

AAP staff will disclose to the INS any time there has been a judicial determination of probable cause that a program participant has committed a felony.

### **Guarantors and Family Members**

AAP staff may disclose information about a participant's conditions of supervision, the participant's compliance record, and past and future immigration court appearances to the participant's guarantor. The AAP Director may authorize disclosure of other information to the guarantor or to a family member only if, in the opinion of the Director, such information would be beneficial to the ongoing supervision of the participant and the participant authorizes such disclosure in writing. The Director shall not authorize any disclosure to family members if, in the Director's opinion, (1) the disclosure of such information would violate a promise of confidentiality to the source of the information, (2) the disclosure would result in harm to any person, or (3) the disclosure would compromise the objective of confidentiality as set out above.

### **Return to Custody**

If a program participant must be returned to INS custody, and there is an INS arrest warrant or other written revocation of release, AAP staff may disclose to INS officers responsible for effectuating the return to detention information that will help those officers find and/or apprehend the participant. That information shall be limited to the participant's address(es)/location, telephone number(s), and employment location(s); the guarantor's name, address, and telephone number; and information regarding other locations the participant has been known to frequent.

### **Law Enforcement**

The AAP will disclose relevant information to law enforcement agencies upon written request for purposes of investigation of a crime committed in the course of obtaining or maintaining prehearing release.

The AAP will disclose to a law enforcement agency upon written request to the Director of the AAP information necessary for protection of the participant, law enforcement personnel, prison officials, or other care providers in circumstances in which an arrest is contemplated, participant is to be confined, or other circumstances in which information, such as information relating to the participant's health status, must be disclosed to protect such persons or the public against any risk of harm presented by the participant or to protect or provide necessary care to the participant.

No other information except what is specifically set out in this policy statement shall be disclosed to any law enforcement or other government, including foreign government, authorities.

### **Hearings**

Upon written request by the Executive Office for Immigration Review, the INS or the participant, AAP personnel may disclose to the Executive Office for Immigration Review a participant's history of compliance with release conditions and the program's responses to violations.

### **Probation and Parole**

The AAP may provide information concerning a participant's conditions of supervision and compliance with those conditions as well as immigration court dates to criminal justice system agencies that are supervising the participant. AAP staff may not disclose other information about participants to these agencies.

### **Specific Information Regarding Asylum Claim**

None of the above exceptions to the AAP policy of non-disclosure shall be construed to authorize release to any person or government authority any information regarding the basis for a participant's claim for asylum or withholding of deportation protection, without the written authorization of the participant.

### **Research**

With respect to data obtained from program participants for research purposes only, AAP staff and Vera research staff will not disclose individualized information and will not disclose information such that particular individuals can be identified.

## **INS-Vera Institute Appearance Assistance Program Agreement on Access to Participant Information**

Confidentiality is essential to the free exchange of information between the participant and the AAP employee which is fundamental to an effective screening and supervision program. It is also essential to the integrity and usefulness of evaluation research.

The AAP will collect data from INS A-files and INS databases. Vera also will collect other information from and about participants. Of this additional information, Vera will provide the INS with the following information only:

1. Data collected from Vera intake screens that justifies a release recommendation. This information will consist of:
  - a. participant's name, address, nationality, and date of birth
  - b. the guarantor's name and address
  - c. the AAP's assessment that the potential participant is not a public safety risk
  - d. the AAP's assessment that the potential participant has a potential remedy available in removal proceedings
  - e. the AAP's assessment that the potential participant is amenable to supervision.
2. Information about any specific harm that any participant may pose to any other person.
3. Information that there has been a judicial determination of probable cause that a participant has committed a felony (e.g. an indictment).
4. The reasons for revocation of conditional release if the AAP recommends that a program participant be returned to custody.
5. Information that will aid in location and apprehension the participant if such revocation is recommended by AAP staff or if there is an INS arrest warrant or other written revocation of release. Such information will be limited to:
  - a. address(es)/location(s)
  - b. telephone number(s)
  - c. employment location(s)
  - d. guarantor's name, address, and telephone number



- e. information regarding other locations the participant frequents
- f. other information necessary to locate the participant.

Vera will not disclose in identifiable form (i.e. in a format in which individuals can be identified) data collected by research staff.

## Intake

The INS today faces the same challenges that New York's criminal justice system faced 30 years ago, when Vera began to look at the way bail and custody decisions were being made. The INS has insufficient bed space to detain everyone it places in deportation or exclusion proceedings, yet detention decisions are often based simply on the availability of beds. Release decisions are not standardized. About half of the individuals who are not held in detention do not show up for their immigration court appearances and only a small fraction complies with removal orders.

In designing an Appearance Assistance Program (AAP) for individuals in deportation and exclusion proceedings, Vera has looked for lessons in the criminal justice system. It has drawn on the experience of pretrial services agencies in developing and operating community supervision programs for pretrial defendants. The demonstration would test whether assumptions underlying release recommendations in the criminal justice system are applicable to the immigration system.

The vast majority of people awaiting trial in criminal courts are not incarcerated, yet most of those released show up in court. Building on two common components of pretrial programs -- the identification of defendants likely to appear in court, and the supervision of those defendants, including enforcement of conditions of release -- Vera plans to test a model of community supervision on a population that may be operating under a very different set of assumptions from those in the criminal justice system, but that, Vera believes, is likely to behave similarly with the right combination of hope as an incentive for compliance and fear of the consequences for noncompliance. The first step -- identification of those individuals -- is the challenge of the intake process.

## The Planning Process

Vera planners began the intake design process by consulting pretrial services and immigration experts, reviewing their literature, and observing the operations of local and federal pretrial services and community supervision agencies. Project planners also studied more than 40 screening instruments from pretrial services agencies across the country.

The planners found that pretrial services agencies vary in their institutional settings as well as their missions. Some are independent agencies, while others are part of probation departments

or the courts. Some, like New York City's Criminal Justice Agency (CJA), only make release recommendations based on interviews, verification, and risk assessment; others also supervise people who are released; at least one enforces warrants. Federal pretrial services is the most analogous to the program to be tested in the immigration system because it performs risk assessment and supervision functions within a national system governed by federal law. Federal pretrial services agencies interview almost everyone who is arrested and charged with a federal crime. In the Southern District of New York, pretrial services screens about 2,000 people each year.

Pretrial services agencies' risk assessment instruments vary considerably in scope. For example, CJA's release on recognizance questionnaire is brief and focused on community ties, while federal pretrial services agencies conduct long, detailed, in-depth interviews with their population. Point scales vary in complexity. Some presume inclusion, others exclusion. Many link scores to different levels of supervision. Of the 253 respondents to the National Association of Pretrial Services Agencies survey, 24% of state and local and 21% of federal programs used point scales -- the "objective" system. Almost 40% of state and local and almost 10% of federal programs used a combination of "objective" and "subjective" systems, where the interviewer's perceptions were also relied on.<sup>79</sup>

The two main criteria pretrial services agencies consider in release recommendations are whether defendants are likely to flee and whether they pose a threat to public safety. Pretrial services agencies take into account a wide variety of indicators in their release recommendations including: criminal history, warrant history, whether defendants live in the jurisdiction, how long they have lived there, whether they live with family, whether they have a phone, whether they have a car, their employment history, and drug use.

There have been many studies on failure to appear predictors and studies on pretrial recidivism predictors. They are far from consistent. In fact, many contradict each other completely. In the absence of data demonstrating clear indicators of appearance risk or public safety risk, Vera's approach has been to start out with fairly simple criteria with the understanding that the screen would be modified and refined over time as the project learns from its own data and experience.

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<sup>79</sup> Segebarth, Kristen L., "Pretrial Services and Practices in the 1990s, Findings from the Enhanced Pretrial Services Project, Final Report," National Association of Pretrial Services Agencies, March 1991.

## The Intake Screen

The factors Vera proposes to consider in recommending whether a candidate is appropriate for supervision in the Appearance Assistance Program are: first, a realistic hope of success (incentive to appear); second, community ties, and a record of previous appearances and compliance with supervision (amenability to supervision); and third, a criminal history that does not include convictions for the most serious violent crimes (public safety).

The screen does not aim to pick out only "sure bets" -- people who would be extremely likely to comply even without a supervision program. To have a demonstrable impact on use of detention space and compliance rates, the program must release and supervise some people who otherwise would be released on bond or would not be released at all.

**Incentive to appear.** The AAP would initially supervise only people who are eligible to apply for relief from deportation; that is, people who have a legal ground for contesting or applying for a waiver of deportation before the immigration court and believe they can avoid deportation or exclusion. These people are often the ones who spend the longest time in detention contesting deportation, and would have the greatest incentive to appear for their hearings if released. The program would not assess the strength of the individuals' claims, only whether they meet the legal thresholds to apply for relief. For example, certain individuals who are lawful permanent residents (green-card holders) and who have resided in the U.S. for seven years may apply for a waiver of deportability under section 212(c) of the Immigration and Naturalization Act.<sup>80</sup> Although this approach contrasts with that of pretrial services programs which do not consider the facts or the strength of the defendant's case in their release recommendations, it makes sense for the INS to release those who have at least a chance of winning and staying in the U.S. and to reserve their bed space for those who have no chance of staying and who are ultimately bound to be deported.

Only for asylum applicants would this recommendation include an assessment of the claim's strength, since there are no similar prerequisites for applying for asylum. The purpose of

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<sup>80</sup> This provision was modified in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The new provision will go into effect on April 1, 1997.

the asylum screen is to identify and screen out individuals with frivolous claims who merely seek to gain entry to the country and have no intention to pursue the claim.<sup>81</sup>

The questions in the screen that are geared toward making a remedy determination attempt to capture the intricacies of the immigration law while accepting some inexactitude for feasibility's sake.

**Amenability to supervision.** This determination has two elements. First, for those who have criminal histories, the screen assesses the person's history of compliance with supervision. Those convicted of bail jumping would be disqualified. For those without bail jumping convictions, the screen considers the number of bench warrants in criminal cases as compared to the number of total cases and the number of probation or parole revocations as compared to the total number of terms. The point scale has been designed to balance successful appearance rates against failure-to-appear rates. The program would test whether failure-to-appear in criminal cases indicates likelihood of failure-to-appear in the immigration context.

Second, the screen requires that the person have ties to the New York City area. Specifically, it requires a verifiable address where the participants would be able to live during the proceeding, and a "guarantor" -- someone in their community who would take responsibility for keeping track of their whereabouts and their obligations to report for supervision and to appear at immigration hearings. The guarantor may be an individual or an organization and would be counted on for their powers of "moral suasion," although they would not be held legally responsible for the participant's failure to comply. The screen also considers whether the person has family in the New York City area or elsewhere in the U.S. For those who have no relatives or contacts in the New York City area, AAP staff would attempt to secure a guarantor, most likely a community group that has previously entered an agreement with the program to play this role.

These criteria are consistent with compliance indicators used in criminal justice systems, but they have been tailored to reflect the needs and issues of an immigration system population. Rather than examine past community ties, for example, AAP would consider future ties -- address and family -- a more appropriate approach for those who have no history of living in the United States, but who have a friend or relative they know they can stay with.

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<sup>81</sup> This assessment will be made as part of the program's asylum intake screen until relevant provisions of IIRIRA, the recent immigration law, go into effect on April 1, 1997. After that date, the INS will screen asylum applicants to determine whether they have legitimate claims. We will then use the INS's determination in our screen.

**Public safety risk.** Individuals with criminal records would be screened further to eliminate those who appear likely to pose a threat to public safety if released under supervision. The screen would eliminate anyone who has been convicted of a felony committed while on pre-trial release in the last five years, under the assumption that this factor would be a predictor of future behavior. The project would also screen out anyone who has been convicted of murder, torture<sup>82</sup>, rape (or attempts), or any other sexual offense. (These individuals are unlikely to be eligible for release anyway.)

The screen would be scored on a point scale to minimize discretion and enhance consistency. The initial point scale would be relatively simple. Each factor would be calculated separately. Compliance risk -- warrant history and supervised release history -- would be calculated in one score. Community ties -- including a verified residence, guarantor and location of family -- would be calculated in a separate score. And public safety would entail yet a third set of calculations. Each participant would have to pass each section of the screen, and be eligible for relief from deportation, in order to be eligible for a release recommendation.

### The Screening Process

Program staff would conduct screening using a specially designed questionnaire, with appropriate modifications for the different groups of potential participants, that assigns points to each factor. Staff would complete the questionnaire based on a review of the master INS file ("A-file"), which contains records of immigration and criminal history; a face-to-face interview; and a telephone verification procedure. The recording of information would be fully computerized and the eligibility criteria would be programmed into the computer to minimize staff discretion.

For those with qualifying scores, program staff would submit to the District Director or his designee a recommendation stating reasons why the person should be conditionally released to community supervision. The INS would then decide whether to release the person based on this recommendation and the other information available to it. For those who are not found initially to be eligible for the program, the screening process would be repeated at later stages if an individual's circumstances have changed.

The AAP would review the files of everyone who enters INS custody and screen all those who are not subject to mandatory detention and do not have final orders of deportation or

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<sup>82</sup> A torture conviction is a bar against a certain legal remedy.

exclusion. The demonstration plans to screen the following groups: 1) asylum seekers placed in exclusion proceedings at JFK and Newark airports; 2) unauthorized workers apprehended in work site raids; and 3) lawful permanent residents who arrive directly from prisons and jails, are in deportation proceedings based on their criminal convictions, and are detained at Varick St., New York City's INS detention facility. A fourth group will include those never slated for detention and therefore showing low rates of compliance, "referred asylum seekers," -- who having gained entry to the U.S. apply affirmatively for asylum but are not granted in the first instance by an asylum officer. Their cases are then referred to the immigration court. They would be offered participation in a voluntary notification/reminder program.

## Revised Intake Screens

Attached are preliminary drafts of the intake screens and point scale. After immigration and pretrial services experts reviewed the draft screens, Vera planners made a number of changes. Several comments raised issues that would be covered during the staff training period of the demonstration start-up. Suggested changes and training issues include:

- In the point scale, we reduced the period of time within which we would look at compliance history -- numbers of bench warrants and parole and probation revocations out of total number of cases and any bail jumping convictions -- from the last 12 years to the last 5 years. We understand that it may be difficult to get this information reliably from rap sheets, but we would learn as we implement the demonstration and adjust the criteria as necessary.
- We would allow for more flexibility and discretion in the initial stages of the demonstration as we test the point scale and screens and learn about the effectiveness of our criteria in identifying individuals on whom the supervision program will have the greatest effect.
- We would train intake screeners to ask certain questions and offer explanations that will help gain the confidence and trust of asylum seekers, who may be fearful and apprehensive.

Since submitting the interim planning report to the National Institute of Justice, Vera staff have refined plans for an Appearance Assistance Program for the population of undocumented workers detained in worksite raids. This group refers to individuals who are detained at their work places in special INS Investigations operations.

Those among this population without criminal convictions are generally taken to 26 Federal Plaza -- New York District central offices -- by INS Investigations, processed and released on bond. Those who do not face detention would be screened for eligibility to

participate voluntarily in the program, which would be slightly modified version of the full supervision program because it would not use detention as a sanction for non-compliance with the program. However, some of these undocumented workers may be detained if there is bed space for them. The original version of this screen would be used on those who face detention but are still eligible for release. If found eligible, they would be offered participation in the full supervision program. They would face detention for non-compliance with the program. The main difference in the screens is that those in the voluntary notification program would not be screened for public safety and compliance risk and would not be asked to provide a guarantor.

Vera plans to test these screens at the various sites before starting the Appearance Assistance Program demonstration. The screens would be reviewed by INS officials and immigration experts, as well as by program evaluators, who would gather data on appearance rates and provide frequent feedback to the staff to use to adjust operations as necessary.



## Point Scale

### Compliance Risk

*(This screen seeks to assess prospective participants' history of compliance with pretrial or supervised release. It considers the number of bench warrants for failure to appear in criminal cases as compared to the number of cases without warrants and the number of probation or parole violations or revocations as compared to the number of successfully completed terms. In order to qualify, the number of bench warrants must be less than 50% of the number of total criminal cases. For example, scores that qualify are 2 bench warrants out of 5 total cases, 3 out of 7, 4 out of 9 and so on.)*

### Failure to Appear History

# of bench warrants in last 5 years \_\_\_\_\_

divided by

total # of criminal cases \_\_\_\_\_

score: \_\_\_\_\_

score of 50% or more of total cases, disqualified

convicted of bail jumping

YES NO

if YES, disqualified \_\_\_\_\_

### History of Compliance with Supervision

# of probation, parole revocations \_\_\_\_\_

divided by

total # of supervision terms \_\_\_\_\_

score: \_\_\_\_\_

score of 50% or more of total cases, disqualified

### Amenability Risk

*(This section requires that the person have ties to the New York City area. Specifically, it requires a verifiable address where the person will be able to live during the proceeding, and a "guarantor" — someone who will take moral but not legal responsibility for keeping track of*

*their whereabouts and their obligations to report for supervision and to appear at hearings. The guarantor may be an individual or an organization.*

*It also considers whether the person has family in the New York City area or elsewhere in the U.S. Those with immediate or extended family residing locally are assumed to be better risks for supervision in New York City than those with family elsewhere in the U.S. and not in the New York area, under the assumption that people will go to where their families live. Those with no family in the U.S. are not likely to be better or worse risks and will not gain or lose points.)*

verified available residence (+3) \_\_\_\_\_

verified guarantor (+3) \_\_\_\_\_

location of immediate or extended family:

immediate family in NYC (+2) \_\_\_\_\_

extended family in NYC (+1) \_\_\_\_\_

no family anywhere in U.S. (0) \_\_\_\_\_

family elsewhere in U.S. (-1) \_\_\_\_\_

number of years in residence in NYC<sup>83</sup> \_\_\_\_\_

score: \_\_\_\_\_

**score of 5 or less, disqualified**

## **Public Safety Risk**

convicted of felony committed while on pre-trial release  
in last 5 years YES NO

convicted of murder, torture, rape (or attempts),  
or any other sexual offense YES NO

score: \_\_\_\_\_  
(# of YES answers)

**YES to any, disqualified**

## **Remedy**

eligible to apply for a remedy YES NO

<sup>83</sup> We will keep track of this response without scoring it, until or unless our data shows that it is relevant.

if NO, disqualified

## **Airport Asylum Intake Screen**

*(This group refers to individuals who attempt to enter the U.S. without proper documents and are placed in exclusion proceedings after being stopped at the airport. Under the Anti-Terrorism and Effective Death Penalty Act of 1996 and subsequent legislation, beginning in April 1997, INS officers will screen all arrivals to determine whether they have a "credible fear of persecution" on grounds that would qualify them for asylum. Those who do not meet this threshold will be immediately returned to their country. Those who pass this screen will be entitled to a hearing to determine ultimate asylum eligibility. The AAP would screen all those who have met the INS asylum officers' credible fear standard, although the remedy screen section of the interview will be omitted.)*

### **I. Personal and immigration information (source: Inspections or A-file)**

*(All those identified by INS Inspections as potential asylum seekers will be screened by AAP staff. The information gathered in this first section will be obtained from the A-file that is created or other paperwork that may be provided by Inspections.)*

Name

Aliases

A#

Passport country and number

If no (or false) passport, other I.D. or travel document

Gender

Date of birth

Country of birth

Citizenship, if different

Date of entry into the U.S.

INS charges

Any indication that asylum seeker poses a danger to U.S. security?<sup>84</sup> (If so, ineligible.)

Immigration court master calendar date

## **II. Amenability (source: interview):**

*(The following will be obtained from an interview with the potential asylum seeker.)*

How well do you speak and understand English?

Do you need an interpreter?

If so, what language(s) do you speak?

Are you traveling with others?

If so, what are their names and relationships to you?

If released, where do you plan to live? Address.

If not NYC, would you be willing to stay in the NYC area?  
*(If not, ineligible for release to AAP)*

Will you live with someone?

If so, what is your relationship to that person?

What is his/her name?

What language(s) does s/he speak?

What is his/her telephone number: work/home?

Length of time known, if applicable

Immigration status, if known

Is there another person who can verify this address?

What is your relationship to that person?

What is his/her name?

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<sup>84</sup>We will rely on INS Inspections to make this determination.

What language(s) does s/he speak?

What is his/her telephone number: work/home?

Does s/he live at the address?

Do you have family elsewhere in the U.S.?

Is there a person (family or other long-term relationship) or organization (employer, social service, community group) who will take responsibility for keeping track of your whereabouts and your obligations to report for supervision and appear for hearings? S/he must be over age 21 and reside legally in this country.

Guarantor

Relationship

Name

Organization, if applicable

Address

Length of time known

Home phone/Work phone

Speaks English?

Residing legally in U.S.?

Over age 21?

*(AAP staff will follow a verification protocol, verifying the address and the guarantor. If the guarantor the candidate suggested is not suitable or if the candidate has no contact in the New York City area, staff will attempt to arrange another guarantor -- either another contact or an organization identified by AAP. If the prospective participant has no place to live, staff will identify an organization to be guarantor.)*

*(The following questions are for research purposes only.)*

Do you have a spouse or child in the U.S.?

Do you have a spouse or child outside the U.S.?

How many years of education did you complete?

What is your race/ethnicity?

### **III. Remedy screen, if necessary (source: interview)**

*(The program is considering how best to make the determination that a candidate has a viable claim in the absence of an INS "credible fear" determination. The purpose of this determination is to identify and screen out individuals with frivolous claims who merely seek to gain entry to the country and have no intention to pursue the claim. The following questions determine whether the candidate has made a prima facie showing of eligibility for asylum. The questions are meant to elicit the basic elements of the potential asylum seekers' claims. For each element, screeners will check a box indicating whether the legal requirements appear to be present, without evaluating the strength of the claim. Screeners will be trained to conduct these asylum interviews.)*

#### **1. Fear of harm:**

Are you afraid to go back to your country?

What do you think will happen to you if you go back to your country?

Have you ever been arrested? or others similarly situated (family, friends, neighbors, colleagues)

Have you ever been mistreated?       "                       "                       "                       "

Have you ever suffered other harm?   "                       "                       "                       "

Have you ever been threatened with arrest, mistreatment or other harm to self or others?

Who do you fear will harm you?

If not the government, can the government protect you?

(Does the prospective participant have a fear of harm?       Y / N)

#### **2. On account of:** Was the reason for the arrest/mistreatment/harm/threat...

Race?

Religion?

Nationality?    }(such as clan or tribe)

Social group? }(including profession)

Political opinion?

If not, what was the reason?

(Is the fear of harm on account of a statutory category? Y / N)

### **3. Resettlement:**

Did you live in any other countries after leaving yours and before coming to the U.S.?

If so, where?

Did you have the legal right to stay in that country to live and work?

Why did you leave? What kind of documents did you use to leave?

Could you return to that country?

(Was the prospective participant firmly resettled? Y / N)

### **4. Persecution of others:**

Have you ever assisted or participated in the persecution of others?

(Is the prospective participant a persecutor? Y / N)

### **5. Crimes:**

Have you ever been convicted of a crime?

If so, what? Where?

(Is there a statutory bar to eligibility on the basis of a crime? Y / N)

## **IV. Public safety (source: interview)**

*(This part of the screen will be included if a remedy screen is not done. The information in the following questions relating to criminal history will be obtained from the candidate's official criminal records.)*

Have you ever been convicted of a crime in the U.S.?

If so, what crime(s)?

Convicted of a felony committed while on pretrial release in the last 5 years?

Convicted of murder, torture, rape, or attempts, or any other sexual offense?

Is there an order of protection against you?<sup>85</sup>  
**Varick Street Intake Screen**

*(This group consists of lawful permanent residents who arrive directly from prisons and jails, are in deportation proceedings based on their criminal convictions, and are detained at Varick Street. The legal remedies currently available to this group will be in question until the courts issue definitive decisions on who exactly is eligible for certain types of relief following the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). However, it is clear that as of April 1, 1997, when most provisions of the IIRIRA go into effect, section 212(c) relief will no longer be available to this group, but a substitute remedy called "cancellation of removal" will be available to non-aggravated felons with five years permanent resident status and seven years continuous residence.)*

**I. All Detainees: personal and immigration information (source: A-file)**

*(Processing staff will enter the following information on all detainees. The A-file, INS's paper case-file on every immigrant to the U.S., will be the source of this information. The A-file includes rap sheets and incarceration history, as well as immigration history.)*

Name

Aliases

A#

Gender

Date of birth

Country of birth

Citizenship, if different

In deportation or exclusion proceedings

Final Order of Deportation or Exclusion?

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<sup>85</sup>We do not yet have a reliable way of answering this question, though we consider it to be important for a determination of public safety. While we explore sources for this information, we will track any responses we may obtain without scoring it as part of the public safety criteria.



Proceedings starting in prison or jail through Institutional Hearing Program?

Time and date of arrival at Varick

If not final order,

speaks and understands English?

needs an interpreter?

if so, what language(s)?

## **II. All Non-Final Order: remedy, public safety, amenability (source: A-file)**

*(This information, also based on a review of the A-file, will be recorded for all those detainees without final orders of deportation or exclusion -- unappealable court orders -- who may be eligible for release. The answers to the compliance and public safety risk screens will be automatically scored on a computer-programmed point scale. See attached point scale.)*

### **A. INS History**

Site arriving from

Date entered INS detention

Place entered INS detention

Current status UNDOC VISA OVERSTAY LPR REFUGEE / ASYLEE  
VIOLATED VISA

INS charges

If based on a crime, date of crime

Conviction date

Charged as an aggravated felon?

Date of entry into U.S.

Manner of entry

Green card

Non-immigrant visa

Without inspection

Parole

Other (specify)

Previously ordered deported or excluded?

Previously removed?

If so, date

Eligible for bond?

Has bond been set?

If yes, date set

Amount

### **B. Criminal History**

*(This section will help determine eligibility to apply for a legal remedy consistent with the new laws. The information will be obtained from the candidates' official criminal record.)*

### **C. Compliance Risk**

Convicted of bail jumping?

Number of bench warrants in last 5 years

Number of criminal cases without warrants in last 5 years

Number of probation, parole revocations

Number of probation and parole terms without revocations

### **D. Public Safety Risk**

Convicted of a felony committed while on pretrial release in the last 5 years?

Convicted of murder, torture, rape (or attempts) or any other sexual offense?

## **III. Screening Interview**

*(Those who pass the compliance and public safety screens will be interviewed to determine eligibility for release and amenability to supervision. These determinations will also be computed automatically. See point scale and relief worksheet.)*

### **A. Personal and other background**

Do you have a lawyer?

Lawyer's name

Address

Telephone number

Is there a restraining order against you?<sup>86</sup>

## **B. Remedy**

Do you have immediate relatives who are U.S. citizens (USC) or lawful permanent residents (LPR)?

Relationship

If yes, name

USC or LPR?

## **C. Amenability**

If released, where would you live?

Will you live with someone?

If so, what is your relationship to that person?

What is his/her name?

What language does s/he speak?

What is his/her telephone number: work/home?

Is there another person who can verify this address?

What is your relationship to that person?

What is his/her name?

What language does s/he speak?

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<sup>86</sup>We do not yet have a reliable way of answering this question, though we consider it to be important for a determination of public safety. While we explore sources for this information, we will track any responses we may obtain without scoring it as part of the public safety criteria.

What is his/her telephone number: work/home?

Does s/he live at the address?

Is there a person (family or other long-term relationship) or organization (employer, social service, community group) who will take responsibility for keeping track of your whereabouts and your obligations to report for supervision and appear for hearings? S/he must be over age 21 and reside legally in this country.

Guarantor 1

Relationship

Name

Organization, if applicable

Address

Length of time known

Home phone/Work phone

Speaks English?

Residing legally in the U.S.?

Over age 21?

Is there another person who would play this role who we could call if we cannot verify the first guarantor you gave us?

Guarantor 2

Relationship

Name

Address

Organization, if applicable

Length of time known

Home phone/Work phone

Speaks English?

Residing legally in the U.S.?

Over age 21?

*(AAP staff will follow a verification protocol, verifying the address and the guarantor. If the guarantor the candidate suggested is not suitable, staff will attempt to arrange another guarantor — either another contact or an organization identified by AAP. If the prospective participant has no place to live, staff will identify an organization to be guarantor.)*

How long have you lived in the NYC area?

Do you have immediate family in the NYC area?

Do you have extended family in the NYC area?

Do you have immediate or extended family elsewhere in the U.S.?

*(The following questions are for research purposes only.)*

Do you have a spouse or child in the U.S.?

Do you have a spouse or child outside the U.S.?

How many years of education did you complete?

Race

### **Eligibility for AAP:**

*(The computer will be programmed to complete this section. "Yes" to all three establishes eligibility.)*

Local residence and guarantor have been verified Y / N

No public safety disqualification Y / N

No compliance risk disqualification Y / N

Eligible to apply for remedy Y / N

## **Work Site intake**

*(This group refers to individuals who are detained at their work places in special INS Investigations operations. Most are likely to have entered without inspection, meaning they did not go through INS inspection at the border. These people are referred to as EWIs. Under the Anti-Terrorism Act, EWIs will be placed in exclusion rather than deportation proceedings. For those who are eligible, remedies now include asylum, suspension, and adjustment of status. They may also be eligible for voluntary departure. There may be people with criminal convictions in this group. People without criminal convictions are generally taken to 26 Federal Plaza by INS Investigations, processed and released on bond, though they may also be detained if there is bed space.*

*This screen will be used on those who face detention. If found eligible, they will be offered participation in the full supervision program. Those who do not face detention, will not be screened for public safety and compliance risk and will not be asked to provide a guarantor. Eligible participants will voluntarily enroll in the AAP and will be given notices and information rather than the full supervision program.)*

### **I. Personal and immigration information (source: INS Investigations or A-file)**

*(All those encountered by INS Investigations in work site raids will be screened for eligibility for the AAP. Any mandatory-detained people with criminal convictions who may be identified among them will be ineligible. The information gathered in this first section will be obtained from the A-file that is created or other paperwork that may be provided by Investigations.)*

Name

Aliases

A#

Passport country and number

If no (or false) passport, other I.D. or travel document

Gender

Date of birth

Country of birth

Citizenship, if different

Date of entry

Manner of entry

Green card

Non-immigrant visa

Without inspection

Parole

Other (specify)

In deportation or exclusion proceedings

INS charges

Immigration Court master calendar date

Work site

Date entered INS custody

Place entered INS custody

## **II. Remedy (source: interview and criminal record)**

*(The answers to the remedy screen will be calculated by the computer which will be programmed to determine eligibility for adjustment of status, asylum, suspension of deportation, voluntary departure, and 212(c) and 212(h) waivers.)*

Do you speak and understand English?

Do you need an interpreter?

If so, what language(s) do you speak?

Do you have a green card?

Do you have a U.S. citizen spouse or child over age 21?

Do you have an approved current, or near current, visa petition?

If so, when was it filed (what is priority date)?

Are you afraid to return to your country?  
(If yes, go to asylum screen.)

Have you lived in the U.S. for seven years or more?

Do you have or could you arrange to get enough money to buy a ticket to go back to your country?

*(The information in the following questions relating to criminal history will be obtained from the candidate's official criminal records.)*

Convicted of a crime in the U.S.?

If so, what crime(s)?

Was the conviction at least 10 years ago?

### **III. Public safety and compliance (source: investigations and criminal record)**

*(Those with no criminal convictions will be asked only the order of protection question and no compliance questions.)*

#### Public Safety

Convicted of a felony committed while on pretrial release in the last 5 years?

Convicted of murder, torture, rape (or attempts) or any other sexual offense?

Is there a restraining order against you?<sup>87</sup>

#### Compliance

Convicted of bail jumping?

Number of bench warrants in last 5 years

Number of criminal cases without warrants in last 5 years

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<sup>87</sup>We do not yet have a reliable way of answering this question, though we consider it to be important for a determination of public safety. While we explore sources for this information, we will track any responses we may obtain without scoring it as part of the public safety criteria.



Number of probation, parole revocations

Number of probation and parole terms without revocations

#### **IV. Amenability (source: interview)**

If released, where would you live? Address.

Will you live with someone?

If so, what is your relationship to that person?

What is his/her name?

What language(s) does s/he speak?

What is his/her telephone number: work/home?

Is there another person who can verify this address?

What is your relationship to that person?

What is his/her name?

What language(s) does s/he speak?

What is his/her telephone number: work/home?

Does s/he live at the address?

Is there a person (family or other long-term relationship) or organization (employer, social service, community group) who will take responsibility for keeping track of your whereabouts and your obligations to report for supervision and appear for hearings? S/he must be over age 21 and reside legally in this country.

Guarantor 1

Relationship

Name

Organization, if applicable

Address

Length of time known

Home phone/Work phone

Speaks English?

Residing legally in U.S.?

Over age 21?

Is there another person who would play this role who we could call if we cannot verify the first guarantor you gave us?

Guarantor 2

Relationship

Name

Address

Organization, if applicable

Length of time known

Home phone/Work phone

Speaks English?

Residing legally in U.S.?

Over age 21?

How long have you lived in the NYC area?

Do you have immediate family in the NYC area?

Do you have extended family in the NYC area?

Do you have immediate or extended family elsewhere in the U.S.?

*(The following questions are for research purposes only.)*

Do you have a spouse or child in the U.S.?

Do you have a spouse or child outside the U.S.?

How many years of education did you complete?

What is your race?

*(AAP staff will follow a verification protocol, verifying the address and the guarantor. If the guarantor the candidate suggested is not suitable, staff will attempt to arrange another guarantor -- either another contact or an organization identified by AAP. If the prospective participant has no place to live, staff will identify an organization to be guarantor.)*

**Eligibility for AAP:**

*(The computer will be programmed to complete this section. "Yes" to all three establishes eligibility.)*

Local residence and guarantor have been verified Y / N

No public safety disqualification Y / N

No compliance risk disqualification Y / N

Eligible to apply for remedy Y / N

## **Affirmative Asylum Intake Screen**

*(This group will not be included in the initial program, but may eventually be added at the request of the INS. In this group, all have potential asylum claims and none are currently detained. Most are visa overstays, a few may have temporary legal status, and others entered without inspection (EWIs). We would supervise those whose claims were not granted in the first instance by an asylum officer. Their cases are then referred to the immigration court. Under affirmative asylum procedures, the INS has 150 days from the application filing date to decide a case, after which the applicant is entitled to work authorization.)*

### **I. Personal and immigration information (source: A-file or asylum office file)**

*(The AAP will interview once a week all those affirmative asylum seekers issued a charging document placing them in deportation or exclusion proceedings at the INS asylum office either in Rosedale, NY or Lyndhurst, NJ. The AAP will interview these people at the time they pick up the decision in their asylum case. (If that decision is negative they are issued a charging document at the same time.) The information gathered in this first section will be based on a review of the A (or asylum office) file. Eligible participants will voluntarily enroll in the AAP notification program, rather than the supervision program. They will receive reminders of court appearance dates and will have access to the Reporting and Assistance Center.)*

Name

Aliases

A#

Passport country and number

If no (or false) passport, other I.D. or travel document

Gender

Race

Date of birth

Country of birth

Citizenship, if different

Date of entry

Manner of entry

Non-immigrant visa

Without inspection

Parole

Other (specify)

In deportation or exclusion proceedings

INS charges

Immigration Court master calendar date

Speaks and understands English?

Needs an interpreter?

If so, what language(s)?

## **II. Remedy (source: interview)**

*(This information will be obtained for the purpose of insuring an incentive to appear in the Immigration Court and a means of contacting the participant.)*

Do you plan to apply for asylum again before the Immigration Judge?

(If no, not eligible for notification program.)

## **III. Contact information (source: interview)**

What is your address?

Do you live with someone?

If so, what is your relationship to that person?

What is his/her name?

What language(s) does s/he speak?

What is his/her telephone number: work/home?

If none, is there a telephone number where a message can be left for you?

Do you have a family member who is a US citizen or lawful permanent resident. We will tell this person when you are supposed to go to court?

If yes, what is your relationship to that person?

What is his/her name?

What language(s) does s/he speak?

What is her/his address?

What is her/his telephone number: work/home?

Is there another person who usually knows where you can be reached who we could call if we needed to notify you of a hearing date?

If so, what is your relationship to that person?

What is his/her name

What language(s) does s/he speak?

What is her/his address?

What is her/his telephone number: work/home?

Do you have a lawyer?

Lawyer's name

Lawyer's address

Lawyer's telephone number

*(The following questions are for research purposes only.)*

Do you have a spouse or child in the U.S.?

Do you have a spouse or child outside the U.S.?

How many years of education have you completed?

What is your race?

**Eligibility for AAP:**

*(The computer will be programmed to complete this section. A "yes" answer establishes eligibility.)*

Plans to renew asylum application Y / N

Gave his/her address and a telephone number  
where s/he can be contacted Y / N

**Declined to participate** Y / N