



AMERICAN **BAR** ASSOCIATION

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Commission on Immigration

## Electronic Monitoring of Migrants: Punitive not Prudent<sup>\*</sup>

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# Table of Contents

SUMMARY FINDINGS AND RECOMMENDATIONS .....	3
IMMIGRATION DETENTION AND ALTERNATIVES .....	6
WHO IS SUBJECT TO ELECTRONIC MONITORING? .....	9
WHAT ARE THE TYPES OF ELECTRONIC MONITORING? .....	10
WHAT ARE THE RELEVANT PRINCIPLES AND LEGAL STANDARDS? .....	12
Constitutional Standards .....	12
ABA Policy .....	13
Core Principles Regarding Supervision, including Electronic Monitoring .....	14
WHAT IS THE PROBLEM? .....	15
Electronic Monitoring Is Detention by Another Name.....	15
Electronic Monitoring Is an Invasion of Privacy.....	17
Electronic Monitoring Causes Physical and Mental Harm.....	18
Electronic Monitoring Is Profitable for The Monitoring Contractor but an Unnecessary Expense for Taxpayers .....	22
Electronic Monitoring Is Not Necessary for, or Effective at, Ensuring High Appearance Rates in Court .....	23
Individualized Determinations of the Need for Electronic Monitoring Are Not Made .....	27
CONCLUSION AND RECOMMENDATIONS .....	29
Resources on Electronic Monitoring.....	30

## SUMMARY FINDINGS AND RECOMMENDATIONS

Across the United States every day, hundreds of thousands of migrants<sup>1</sup> find themselves in de facto detention due to electronic monitoring.<sup>2</sup> A global positioning (GPS) device affixed to their ankle or a cellphone in their pocket with the SmartLINK application tracks their every move. For those required to use SmartLINK, the application directs them randomly at various times of the day and night to take and submit a photo of themselves or to call or message an agent of the Government.

Both Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), within the U.S. Department of Homeland Security (DHS), place migrants in electronic monitoring programs during their immigration proceedings as part of the Government's Alternatives to Detention (ATD) program, which is overseen by ICE. The ATD program is intended to allow some of those who would otherwise be

held in immigration detention centers to remain in or be released to the community instead.<sup>3</sup> The Government asserts that its use of electronic monitoring, as part of the ATD program, is a cost-effective alternative to detaining migrants to ensure that they attend all their Immigration Court hearings, report as required for immigration check-in appointments, and submit to removal from the country, if so ordered.<sup>4</sup>

Despite the name, however, electronic monitoring programs are not true alternatives to detention. They are an expansion of detention that imposes a significant financial cost on taxpayers and a considerable human toll on the participants and their family members.<sup>5</sup> The extensive use of electronic monitoring is also a solution in search of a problem. Most migrants present neither a flight risk nor a danger to the community to justify either detention or electronic monitoring.<sup>6</sup> Some have

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<sup>1</sup> This report uses the term "migrants" to refer to the broad range of non-citizens in, or seeking to enter, the U.S. The term encompasses asylum seekers seeking protection under Section 208 of the Immigration and Nationality Act as well as those seeking to remain in the U.S. temporarily or permanently for other purposes such as family reunification or employment. When referring to a particular category of migrant, the report uses the specific technical term that applies (e.g. asylum seeker or asylee).

<sup>2</sup> U.S. Immigration and Customs Enforcement, "Detention Management," *Detention Statistics*, FY 2023 Detention Statistics: ICE Alternatives to Detention Data, FY23, <https://www.ice.gov/detain/detention-management> (in fiscal year 2023, over 185,000 persons were monitored daily).

<sup>3</sup> U.S. Immigration and Customs Enforcement, *Alternatives to Detention*, <https://www.ice.gov/features/atd> (describing alternatives to detention programs).

<sup>4</sup> See *id.*; U. S. Government Accountability Office, *ICE Needs to Better Oversee Its Multi-Billion Dollar Program for Monitoring Noncitizens in Immigration Court Proceedings*, 7-10 (Dec. 13, 2022), <https://www.gao.gov/assets/d22104529.pdf> (explaining that monitoring is generally used for persons who are released during pending Immigration Court removal proceedings).

<sup>5</sup> See Benjamin N. Cardozo School of Law Kathryn O. Greenberg Immigration Justice Clinic, et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, 11-28 (July 2021), <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/60ec661ec578326ec3032d52/1626105377079/Immigration+Cyber+Prisons+report.pdf> (documenting harms) [hereinafter *Cyber Prisons*]; J. Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587 (2020) (same).

<sup>6</sup> U.S. Immigration and Customs Enforcement, "Detention Management," *Detention Policies*, *supra* note 2 (explaining that release with conditions, such as monitoring, occurs only where ICE determines that the migrant is not a "public safety or flight risk"); American Immigration Council, *11 Years of Government Data Reveal That Immigrants Do Show Up for Court*, (Jan. 18, 2021), <https://www.americanimmigrationcouncil.org/news/11-years-government-data-reveal-immigrants-do-show-court>

lived in this country for decades and have strong ties to their community while others have recently arrived seeking safety for themselves and their families. They have the skills and motivation to appear as directed for all their hearings and appointments. The arrival of more asylum seekers at the southern border in recent years<sup>7</sup> does not justify the Government's increasing reliance on monitoring programs either, absent objective assessment showing that specific individuals present risk of flight that can only be managed by such monitoring.

As employed, electronic monitoring of migrants is punitive in nature because it is imposed

without objective assessment of either need or risk in a one-size-fits-all approach. Indeed, the current, and increasingly widespread, misuse of monitoring may violate constitutional standards guaranteeing liberty and due process.<sup>8</sup> It also runs counter to American Bar Association (ABA) policy urging limits on immigration detention and unnecessarily invasive alternatives.<sup>9</sup> Electronic monitoring, and technology employed at the border to register entrants such as Customs and Border Patrol's CBP One application, raise privacy concerns as well.<sup>10</sup>

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(documenting high appearance rates); Vera Institute of Justice, *Evidence Shows That Most Immigrants Appear for Immigration Court Hearings*, (Oct. 2020), <https://www.vera.org/publications/immigrant-court-appearance-fact-sheet> (same); Vera Institute of Justice, *Attaining Compliance with Immigration Laws Through Community Supervision* (1998), <https://www.vera.org/downloads/publications/aap.pdf> (same).

<sup>7</sup> American Bar Association Commission on Immigration, *Primer: Immigration Enforcement Mechanisms at the U.S. Border* (updated Oct. 2023), <https://www.americanbar.org/content/dam/aba/administrative/immigration/border-primer.pdf> (providing data regarding recent arrivals at the southern border and putting the numbers in context to show that the numbers are not unmanageably large) [hereinafter *Border Primer*]; see also Migration Policy Institute, *A Turning Point for the Unauthorized Immigrant Population in the United States*, (Sept. 2023), <https://www.migrationpolicy.org/news/turning-point-us-unauthorized-immigrant-population> (noting that the undocumented population in the United States has largely remained stable in recent years despite increased arrivals at the southern border).

<sup>8</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“freedom from imprisonment— from government custody, detention, or other forms of physical restraint— lies at the heart of the liberty that Clause protects” and deprivation requires “special justification”); *United States v. Torres*, 566 F. Supp. 2d 591, 596-99, 601 (W.D. Tex. 2008) (in the criminal context, establishing that the Constitution requires individualized review of need for supervision conditions including electronic monitoring).

<sup>9</sup> ABA Resolution, Report No. 107E (February 2006).

<sup>10</sup> See, e.g., *United States v. Jones*, 565 U.S. 400 (2012) (privacy concerns raised by GPS tracking).

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