Confinement Without Walls: Challenging Immigrant E-Carceration in the United States

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Abstract

This colloquium paper examines how surveillance technologies have become central in criminalizing immigrants in the United States since 1996, specifically under ISAP's electronic monitoring provision. It aims to challenge the normalized characterization of ankle monitors as a positive alternative to detention. It argues that while few legal frameworks have been established to protect certain unauthorized migrants, those constitutional protections have not extended to the "e-carceration" sphere as electronic monitoring is not considered as custody. Hence, rather than serving as a purposeful "alternative" to detention, ankle monitoring is merely a condition of extended punishment that brings migrants back into communities shackled and shielded behind the false veneer of freedom.

How has this form of electronic surveillance, criticized as a practice in violation of domestic and international laws, come to be justified in the monitoring of migrants by the United States?

The Rise of E-Carceration

Electronic monitoring includes GPS monitoring through an ankle bracelet, smartphone applications, voice recognition telephone call-in systems, among other location monitoring

Most restrictive alternative to detention (ATD) program: Intensive Supervision Appearance Program (ISAP)

- Began in 2004
- Inspired by a pilot program run by the Vera Institute of Justice from 1997 to 2000
- First attempt at an effective and cost-efficient alternative-to-detention program using community supervision for people in immigration removal proceedings

There are currently 101,568 active participants enrolled in ISAP, which is a 283% increase over the 26,625 enrollees in FY2015
→ 46% of ISAP enrollees are electronically monitored

Constitutional Objections to Electronic Monitoring

Examined key legal precedents in immigration detention cases

- *Zadvydas v. Davis* (2001)
  - Court decided that the liberty interest is fundamental, citing that "freedom from imprisonment from government custody, detention, or other forms of physical restraint lies at the heart of the liberty that [the Due Process] Clause protects."
- *Demore v. Kim* (2003)
  - The liberty interest of a deportable lawfully permanent resident is *not* a fundamental right

→ Case study methodology enabled me to examine how the Supreme Court conducts substantive due process analysis
→ Address legal justifications for continued electronic monitoring

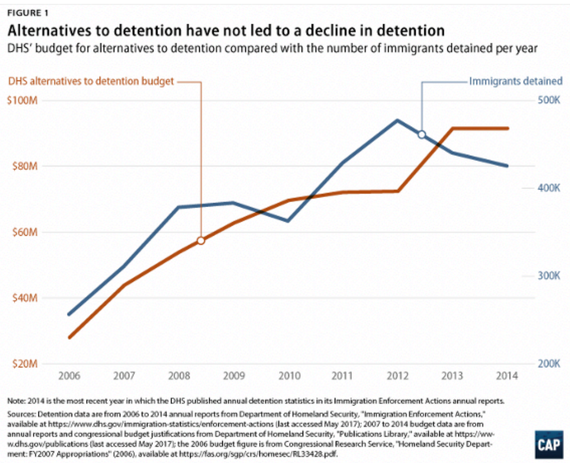

Table 2. The Average Daily Number of Individuals in ATD Programs, FY 2009-FY2013

2009	17,586
2010	16,532
2011	17,957
2012	23,034
2013	22,090

Source: DHS. 2014. *US Immigration and Customs Enforcement Salaries and Expenses: Congressional Justification Fiscal Year 2015*. Washington DC: DHS. http://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf.

Central Barrier: The Question of Custody

Though the *Zadvydas* approach appears as the most prescient legal precedent to challenge electronic monitoring, Courts have claimed that placement on an ankle monitor does not qualify as a form of custody or detention

Matter of Aguilar-Aquilo (2009)

- One of 150 workers at the Micro Solution Enterprises in Van Nuys, California caught during an ICE raid in February 2008
- Argued that ankle monitor presented clear constraint on his liberty
- The Court rejected his claim because he was released from physical detention, defining "custody" as "actual physical restraint or confinement within a given space"

Ahmed v. Tate (June 2020)

- Pakistani asylum seeker detained on ankle monitor for over a year, claims deprivation of liberty
- Presents *Zadvydas* claim, but it rendered moot by the Court as he was considered:
  - Considered released from custody
  - Liberty interests were not deemed fundamental as he was a noncitizen under an order of removal

These narrow restrictions that constrict "custody" solely to physical detention make it extremely difficult for migrants to legally argue constraints on liberty.

Conclusion

- Electronic monitoring is viewed neither as a form of custody, nor as a form of detention by legal institutions in the United States
- It is not a "just" or "humane" alternative; it is form of incarceration under a different name
- Release from custody onto an ankle monitor is not so much a release from detention as it is a transition from incarceration to "e-carceration"
- Reforms to ATD programs simply reify new forms of punishment and societal control → Migrants remain in a liminal space between incarceration and freedom
- We must move in a direction where electronic detention is no longer the exception, but migrant justice and freedom the norm

References

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