

## **NOTE**

### UNSHACKLING THE DUE PROCESS RIGHTS OF ASYLUM-SEEKERS

*Sara DeStefano\**

*The focus of this Note is the government's excessive use of GPS monitoring ankle bracelets on asylum-seekers through the Intensive Supervision Appearance Program ("ISAP")—an alternative-to-detention program used by Immigration and Customs Enforcement to supervise certain noncitizens in removal proceedings. This Note explores how the ISAP enrollment process violates the due process rights of asylum-seekers and how these violations have facilitated the excessive use of ankle monitors on these individuals.*

*The first part of this Note explores ISAP's initial purpose and the program's failure to meet it. ISAP originated as a cost-saving, more humane option than detention for certain high-risk noncitizens already detained. Because detaining noncitizens is expensive, ISAP was intended to alleviate some of the financial burden of the detention system by releasing certain detainees from physical detention with GPS monitoring ankle bracelets and supervision. However, ISAP has shifted from its initial focus of removing noncitizens from detention to targeting low-risk asylum-seeking individuals who otherwise would not have been detained. As a result, ISAP has failed to decrease detention costs and failed its initial purpose as an alternative option for noncitizens already detained.*

*The second part of this Note argues that the excessive enrollment of asylum-seekers in ISAP GPS monitoring is facilitated through due*

---

\* J.D., University of Virginia School of Law, 2019. I would first and foremost like to thank Corie O'Rourke and the immigration legal team at the Fairfax office of Ayuda for teaching me much of what I know about immigration law and demonstrating what excellent immigration advocacy looks like in practice. I would also like to thank Professors A. Sprightley Ryan and Josh Bowers for their input on this Note. A special thanks as well to my Notes Advisor, Victoria Granda, for all of her helpful feedback throughout this process and to the *Virginia Law Review* Editorial Board for their diligence and hard work in making this piece the best version of itself.

*process violations. In particular, this Note argues that the enrollment process violates asylum-seekers' due process rights by contravening substantive due process, procedural due process, and fundamental fairness requirements. Finally, the Note proposes solutions to the constitutional deficiencies and advocates for returning ISAP to its initial purpose as a true alternative to detention.*

I. INTRODUCTION .....	1669
II. ISAP OVERVIEW .....	1673
A. Detention and the Use of Alternatives .....	1673
B. Creation of ISAP .....	1675
C. Enrollment in ISAP .....	1676
1. Initial Enrollment Process .....	1676
2. Challenging Enrollment in ISAP .....	1678
D. The Failure of ISAP as an Alternative to Detention .....	1682
1. ISAP Has Not Decreased Detention Costs .....	1682
2. ISAP Is Not a Humane Alternative to Detention .....	1685
III. CONSTITUTIONAL OBJECTIONS TO THE ENROLLMENT OF ASYLUM-SEEKERS IN ISAP .....	1687
A. ISAP Enrollment in GPS Monitoring Violates Substantive Due Process .....	1688
1. The Zadvydas Approach Versus the Demore Approach ...	1690
2. The Zadvydas Approach Is Better Suited for Asylum-Seekers Enrolled in ISAP .....	1693
3. Applying the Zadvydas Approach .....	1696
B. ISAP Enrollment in GPS Monitoring Violates Procedural Due Process .....	1697
1. The Asylum-Seeker's Private Liberty Interest .....	1699
2. The Current Procedure .....	1700
a. Risk of Erroneous Deprivation .....	1701
b. Estimated Value of Substitute Procedures .....	1705
3. The Governmental Burden of Enhancing Current Procedure .....	1706
4. Analysis of the Three Factors .....	1708
C. ISAP Enrollment in GPS Monitoring Violates Fundamental Fairness .....	1708
1. Framing ISAP as a Voluntary Program Enables Procedural Deficiencies .....	1710
2. Fundamental Fairness Would Not Permit ISAP Participation to Be Voluntary .....	1711

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1669

IV. CONCLUSION..... 1715

I. INTRODUCTION

Maria couldn't take it anymore.<sup>1</sup> She no longer wanted to live in fear of gang violence. Her oldest son had been receiving threatening phone calls and was attacked at school. She notified the police, and the police did nothing. She could not sit idly by and watch one or both of her sons killed—a common fate for boys that refuse to join the gang or otherwise find themselves targeted. Maria left her home country of Honduras to seek asylum in the United States with her sons.

The journey to the United States was difficult. It took nearly 1,400 miles of travel, mostly on foot, to reach the Mexican border. Maria and her sons witnessed many instances of violence and were even kidnapped at one point. They were able to cross the border into the United States through the Rio Grande but were picked up by Immigration and Customs Enforcement (“ICE”) in Texas and detained. After a few days in detention, Maria and her sons were released with instructions to continue to their intended destination in Virginia, where Maria had some contacts. Maria boarded a bus with her sons, a handful of paperwork from ICE primarily written in English—a language she does not speak—and a non-removable ankle bracelet monitoring her location.

Shortly after reaching Virginia, Maria sought legal help. In a free consultation with an attorney she learned that the path to winning her asylum claim would be long, challenging, and perhaps fruitless. The moment that brought her to tears, however, was when she asked the attorney how she could remove the painful ankle bracelet, and she learned that the attorney did not know. The attorney informed Maria that only ICE could make the decision to remove the bracelet, and it was unlikely to do so until she obtained lawful immigration status, even if that process took years. If she applied for asylum, she learned, the bracelet would likely remain on for the duration of her pending claim regardless of the time it would take for her case to be finalized.

Maria's story is not unique. In fact, it has become commonplace for ICE to release asylum-seekers from detention with GPS monitoring

---

<sup>1</sup> This is a true story of an asylum-seeker that the Author met through an immigration nonprofit where she was interning. The noncitizen's name and identifying information have been changed or omitted for confidentiality purposes.

bracelets. These ankle bracelets, referred to as “grillete” or “shackles”<sup>2</sup> by Spanish-speaking asylum-seekers, are part of the Intensive Supervision Appearance Program (“ISAP”).<sup>3</sup> ISAP is an alternative-to-detention program initially meant as a more humane and cost-effective option than confining high-risk<sup>4</sup> noncitizens to detention centers. In recent years, however, the focus of ISAP has shifted from providing an alternative to detention for high-risk noncitizens to exposing low-risk noncitizens to a form of government custody<sup>5</sup> when they otherwise would not have been

---

<sup>2</sup> Grillete, WordReference, <http://www.wordreference.com/es/en/translation.asp?spen=grillete> (last visited Aug. 23, 2019) (translating “grillete” in Spanish to “shackles” in English).

<sup>3</sup> Kyle Barron & Cynthia S. Briones, No Alternative: Ankle Monitors Expand the Reach of Immigration Detention, *NACLA* (Jan. 6, 2015), <https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention> [<https://perma.cc/3459-HS-DW>].

<sup>4</sup> High-risk, when used to describe noncitizens that are currently in removal proceedings, refers to individuals who present either a flight risk or a potential for dangerousness and that ICE, therefore, justifiably may continue to detain after initial apprehension even if detention is not mandatory under the Immigration and Nationality Act (“INA”). See 8 C.F.R. § 1003.19(h)(3) (2019). Low-risk noncitizens are, therefore, noncitizens that pose neither a flight risk nor potential for dangerousness and as a result should be permitted to seek release from initial detention on bond. See *id.* Many asylum-seekers, as people fleeing violence in their home countries and seeking safety within the United States, are low-risk. See Letter from Eleni Wolfe-Roubatis, Centro Legal de La Raza, to Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep’t of Homeland Sec., and John Roth, Inspector Gen., Dep’t of Homeland Sec., Violations of Due Process and Liberty Rights of Asylum-Seekers by U.S. Immigration and Customs Enforcement Through the Use of the Intensive Supervision and Appearance Program (ISAP) 23 (Apr. 20, 2016), [<https://perma.cc/66TU-EUEG>] (“[Asylum-seekers] neither represent a danger to society nor a flight risk . . .”); see also Barron & Briones, *supra* note 3 (describing the story of asylum-seeking women with children and the fact that they do not pose a risk of flight or danger).

<sup>5</sup> This phenomenon, known as net widening, has also been observed with the introduction of alternatives to incarceration in the context of the criminal justice system. Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 *N.Y.U. Rev. L. & Soc. Change* 235, 239 (2009) (“[Alternatives to incarceration] are not without some drawbacks however, particularly relating to concerns about net widening. Net widening refers to the use of alternative-to-incarceration programs to extend social control mechanisms to individuals who would not otherwise have been subject to criminal justice system sanctions. The result . . . is to increase the overall number of people subject to some form of criminal justice system control.”); see Natasha Alladina, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical yet Incomplete Alternative to Incarceration*, 28 *Alaska L. Rev.* 125, 145 (2011) (explaining that when electronic monitoring was introduced into the Alaska criminal justice system as an alternative to incarceration, offenders who would have been successfully supervised without electronic monitoring were subjected to it because of its existence).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1671

detained.<sup>6</sup> The change in ISAP enrollees is the result of incomplete due process protections in the ISAP enrollment process.

Inadequate due process protections during enrollment in the GPS monitoring component of ISAP have created an unconstitutional expansion of government custody among asylum-seekers and a mass deprivation of liberty without the required adherence to due process of law. The GPS monitoring ankle bracelets used on noncitizens through ISAP inhibit liberty, implicating required due process protections under the Fifth Amendment.<sup>7</sup> The current ISAP protections are deficient and fail to protect substantive due process rights, procedural due process rights, and fundamental fairness rights as the Fifth Amendment demands.

This Note will explore how these constitutional violations have contributed to the improper expansion of GPS monitoring among low-risk

---

<sup>6</sup>“Detained,” here, refers to detention beyond the initial apprehension and detention by ICE. All noncitizens that are apprehended by ICE are held for at least a brief period before ICE determines whether to release them or keep them in detention. See 8 U.S.C. § 1226(a) (2012).

<sup>7</sup> U.S. Const. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

asylum-seekers<sup>8</sup> in the United States.<sup>9</sup> The first part of this Note will begin with information on immigration detention and alternatives to detention generally. It will then provide an overview of ISAP, describing the

---

<sup>8</sup> “Asylum-seekers,” for the purposes of this Note, refers to individuals who have entered the United States because they are fleeing their home country for reasons that would enable them to file a bona fide asylum claim. A noncitizen may file a bona fide asylum claim when he or she has experienced or fears that he or she will experience persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. §§ 1101(a)(42), 1158(b)(B)(i) (2012). Membership in a particular social group is an umbrella category and many immigration attorneys advocate that it can apply to various types of violence, including certain types of gang violence or domestic violence. See Katelyn Masetta-Alvarez, Note, Tearing Down the Wall Between Refuge and Gang-Based Asylum Seekers: Why the United States Should Reconsider Its Stance on Central American Gang-Based Asylum Claims, 50 Case W. Res. J. Int’l L. 377, 379–80, 384 (2018). These cases are very fact specific, however, and claims that gang-based and gender-based violence qualify for classification as a particular social group often fail. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. 579, 590 (B.I.A. 2008) (holding that respondents who refused gang recruitment did not constitute a particular social group); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 596 (B.I.A. 2008) (holding that respondents who were incorrectly perceived as gang members were not classified as members of a particular social group for asylum determinations); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 223 (B.I.A. 2014) (“Deportees are too broad and diverse a group to satisfy the particularity requirement for a particular social group . . .”). “Bona fide” does not indicate that the asylum-seeker would likely win, only that his or her asylum claim would not be frivolous. The current administration has applied stricter interpretations to the particular-social-group ground, but there still is room for bona fide asylum claims involving domestic violence and gang violence. See *Matter of A-B-*, 27 I. & N. Dec. 316, 320 (U.S. Att’y Gen. 2018) (refusing to decide that non-government-inflicted violence may never serve as the basis for asylum but reversing, through an opinion by the Attorney General, the Board of Immigration Appeals precedent *Matter of A-R-C-G-*, 26 I. & N. Dec. 338 (B.I.A. 2014), which recognized married Guatemalan women unable to leave their relationship as a particular social group for the purposes of an asylum claim); Nat’l Immigrant Justice Ctr., Asylum Practice Advisory: Applying for Asylum After *Matter of A-B-*, at 8 (2018), [https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-09/Matter%20of%20A-B-%20Practice-%20Advisory%20-%20Final%20-%2006.18\\_2.pdf](https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-09/Matter%20of%20A-B-%20Practice-%20Advisory%20-%20Final%20-%2006.18_2.pdf) [<https://perma.cc/15N2-QTE8>] (explaining that particular social groups, including those based on domestic violence or gang violence, are still viable after *Matter of A-B-*); U.S. Citizenship & Imm. Servs., Asylum, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> [<https://perma.cc/4CLC-SESY>] (last updated Aug. 29, 2019) (describing the requirements to apply for asylum).

<sup>9</sup> This Note focuses on asylum-seekers that have been apprehended by ICE within the interior of the United States and that have been placed in removal proceedings but do not have final removal orders. This is an important distinction because noncitizens at the border seeking entry into the United States have fewer due process protections than noncitizens already within the country even if those individuals entered unlawfully. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing . . .” (citations omitted)).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1673

program's creation, enrollment procedures, and how it has failed to function as an alternative to detention.

The second part of this Note will address the way in which the enrollment procedures for ISAP GPS monitoring violate substantive due process, procedural due process, and fundamental fairness rights of asylum-seekers. This Note will argue that these violations have contributed to the inappropriate expansion of ISAP GPS monitoring to low-risk asylum-seekers and suggest solutions to the procedural deficiencies. If procedural deficiencies are corrected, ISAP GPS monitoring will return to its original purpose of providing an alternative to detention for high-risk noncitizens, contributing to a more efficient allocation of detention resources in the United States.

## II. ISAP OVERVIEW

### *A. Detention and the Use of Alternatives*

In order to see how ISAP has veered from its initial function as an alternative to detention, it is important to understand how and why alternatives to detention were first introduced. The immigration detention system is expansive and costly, which has pushed the government to seek alternative, cost-effective ways to ensure noncitizen compliance with immigration removal proceedings.

Immigration detention has expanded rapidly in the last twenty-five years: between 1994 and 2013, the average daily detained population increased more than five times in size, growing from 6,785 to 34,260.<sup>10</sup> In 2018, ICE recorded 396,448 initial detention book-ins for noncitizens.<sup>11</sup> The practice of detaining noncitizens is not only widespread, but also expensive. Detention of a single immigrant costs \$158 per day on average,<sup>12</sup> and the immigration detention system as a

---

<sup>10</sup> Migration & Refugee Servs., U.S. Conference of Catholic Bishops & Ctr. for Migration Studies, *Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System*, 3 J. Migration & Hum. Security 159, 162 (2015).

<sup>11</sup> U.S. Imm. & Customs Enf't, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report 8* (2019), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/NAQ5-9RZP>].

<sup>12</sup> U.S. Gov't Accountability Office, *GAO-18-701T, Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program* (2018) [hereinafter *GAO, Immigration*].

whole costs over \$2 billion per year.<sup>13</sup> In response to these costs, the government began to introduce alternatives to detention, with average costs ranging between \$0.70 and \$17.00 daily per enrollee.<sup>14</sup> The government intended these alternatives to reduce detention costs and provide a more humane option than physical detention while still maintaining high attendance rates for noncitizens at removal proceedings.<sup>15</sup>

The movement toward alternatives to detention began with the Appearance Assistance Program (“AAP”) run by the Vera Institute of Justice between 1997 and 2000 at the request of the Immigration and Naturalization Service (“INS”).<sup>16</sup> The AAP was a first attempt at an effective and cost-efficient alternative-to-detention program using community supervision for people in immigration removal proceedings. This program was very successful, especially for individuals released to the intensive supervision program, which included participants released from detention and enrolled in AAP. Of this group, ninety-one percent of participants attended all required hearings.<sup>17</sup> The requirements for participants in the intensive group involved regularly reporting to AAP supervision officers in person and by phone.<sup>18</sup> Additionally, through the implementation of AAP, the government saved significant money, as the costs of supervision were fifteen percent less than the costs of detaining

---

<sup>13</sup> Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, Ctr. for Am. Progress (June 9, 2017, 11:00 AM), <https://www.americanprogress.org/issues/immigration/news/2017/06/09/433975/alternatives-detention-profit-immigration-system/> [<https://perma.cc/FUC3-4GW6>].

<sup>14</sup> *Id.*

<sup>15</sup> Immigrant Rights Clinic, Rutgers Sch. of Law-Newark & Am. Friends Serv. Comm., *Freed but Not Free: A Report Examining the Current Use of Alternatives to Immigration Detention 3* (2012), <https://www.afsc.org/sites/default/files/documents/Freed-but-not-Free.-pdf> [<https://perma.cc/TC82-PJUL>] [hereinafter *IRC, Freed but Not Free*]; Eileen Sullivan et al., Vera Inst. of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program 1* (2000), [https://www.vera.org/downloads/Publications/-testing-community-supervision-for-the-ins-an-evaluation-of-the-appearance-assistance-program/legacy\\_downloads/INS\\_finalreport.pdf](https://www.vera.org/downloads/Publications/-testing-community-supervision-for-the-ins-an-evaluation-of-the-appearance-assistance-program/legacy_downloads/INS_finalreport.pdf) [<https://perma.cc/4LKE-LW2U>].

<sup>16</sup> Sullivan et al., *supra* note 15, at 1–2. The INS preceded the Department of Homeland Security (“DHS”). U.S. Citizenship and Imm. Servs., *Overview of INS History 11* (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf> [<https://perma.cc/9CQA-VSJM>]. When DHS replaced the INS, all of the INS functions were distributed among the three agencies—ICE, Citizenship and Immigration Services (“USCIS”), and Customs and Border Protection (“CBP”)—within DHS. *Id.*

<sup>17</sup> Sullivan et al., *supra* note 15, at 3.

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

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1675

criminal noncitizens and fifty-five percent less than the costs of detaining asylum-seekers.<sup>19</sup>

Despite the high efficacy of community supervision displayed by AAP, the government quickly abandoned the program model.<sup>20</sup> After September 11, 2001, the government shifted toward developing a new program with a stronger emphasis on enforcement and homeland security.<sup>21</sup> A few years later, ICE introduced ISAP.<sup>22</sup>

### *B. Creation of ISAP*

In 2004, ICE rolled out ISAP as a pilot program in ten cities across the United States.<sup>23</sup> ICE intended ISAP to be a cost-effective alternative to detention for high-risk individuals that would otherwise remain detained.<sup>24</sup> By 2009, ISAP became a national program and the default alternative to detention.<sup>25</sup> However, ISAP never truly functioned as the alternative to detention ICE intended it to be.<sup>26</sup>

When ISAP first expanded nationwide, the program focused on high-risk individuals.<sup>27</sup> The intent of ISAP at that point was to ensure the compliance of these high-risk noncitizens with release conditions, appearances at removal proceedings, and final removal orders.<sup>28</sup> Over time, however, participation in ISAP has expanded largely to low-risk

---

<sup>19</sup> *Id.* at iii.

<sup>20</sup> IRC, *Freed but Not Free*, *supra* note 15, at 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Office of Inspector Gen., Dep't of Homeland Sec., OIG-15-22, U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised) 3 (2015) [hereinafter OIG, *Alternatives to Detention*].

<sup>24</sup> *Id.* at 4.

<sup>25</sup> Fernandes, *supra* note 13 (“ISAP now dominates alternatives to detention to such an extent that it’s become synonymous with the phrase.”); see also GAO, *Immigration*, *supra* note 12, at 12–15 (referencing ISAP exclusively in the discussion surrounding alternatives to detention).

<sup>26</sup> See IRC, *Freed but Not Free*, *supra* note 15, at 8 (explaining that, unlike how participants were enrolled in AAP from detention, the first individuals enrolled in ISAP were not taken from detention but were selected for participation based in part on their proximity to an ISAP office); see also Detention Watch Network, *Alternatives to Detention*, <https://www.detentionwatchnetwork.org/issues/alternatives> [https://perma.cc/FQ45-BC2H] (last visited Dec. 19, 2018) (“As a basic litmus test for whether or not they are being used correctly, alternatives must always decrease the number of people in detention.”).

<sup>27</sup> OIG, *Alternatives to Detention*, *supra* note 23, at 4.

<sup>28</sup> *Id.* at 3.

individuals in removal proceedings who would not have been selected for detention traditionally.<sup>29</sup>

ISAP is run through a privately contracted company called BI Incorporated (“BI”).<sup>30</sup> The program offers two different supervision methods: the technology-only option and the full-service option.<sup>31</sup> Whether a noncitizen is placed in the full-service option or the technology-only option is determined by an ICE officer during enrollment.<sup>32</sup> Participation in either program can involve GPS monitoring.<sup>33</sup> This Note focuses specifically on the GPS-monitoring component of ISAP and how the lack of adequate procedures during enrollment has enabled the dramatic increase in the use of ankle bracelets on low-risk asylum-seekers.

### *C. Enrollment in ISAP*

#### *1. Initial Enrollment Process*

ISAP enrollment begins with the custody determination process, which occurs after ICE initially has apprehended and detained a noncitizen.<sup>34</sup> During custody determination, an ICE officer can decide to detain or release the noncitizen.<sup>35</sup> If the determination is to release the noncitizen, then the ICE officer must also determine what conditions or bond will be imposed with the release.<sup>36</sup> One common condition of release is

---

<sup>29</sup> Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 *Cardozo L. Rev.* 2141, 2164 (2017).

<sup>30</sup> BI Inc., *Immigration Services*, <https://bi.com/immigration-services/> [<https://perma.cc/8MKJ-6DJD>] (last visited Jan. 27, 2019).

<sup>31</sup> For those enrolled in the full-service option with location monitoring, participation involves wearing a GPS monitoring ankle bracelet in addition to intensive case management, supervision, and individual service plans. *Id.* The additional requirements of the full-service program include mandatory ISAP office visits and unscheduled home visits. GAO, *Immigration*, *supra* note 12, at 2; BI Inc., *supra* note 30.

<sup>32</sup> U.S. Gov’t Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 10 (2014) [hereinafter GAO, *Improved Data Collection*].

<sup>33</sup> BI Inc., *supra* note 30.

<sup>34</sup> GAO, *Improved Data Collection*, *supra* note 32, at 6–7.

<sup>35</sup> For all aliens taken into custody within the United States who are not subjected to mandatory detention provisions, ICE has the authority to decide whether to continue to detain or release the individual. *Id.* at 6. The authority is delegated to ICE by the Attorney General, Dep’t of Homeland Sec., Deleg. No. 7030.2, *Delegation of Authority to the Assistant Secretary of U.S. Immigration and Customs Enforcement* § 2(T) (2004).

<sup>36</sup> 8 U.S.C. § 1226(a)(2) (2012).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1677

participation in ISAP, and an individual ICE officer decides whether to enroll a noncitizen in the program and to what extent they will be monitored if enrolled.<sup>37</sup>

To help with these custody determinations, ICE implemented the Risk Classification Assessment (“RCA”) in January 2013.<sup>38</sup> The RCA is a tool that generates standardized recommendations for noncitizens regarding the detention or release of the individual, the appropriate bond amount for the given circumstances, and the required community supervision level for noncitizens enrolled in ISAP.<sup>39</sup> The RCA forms its recommendations by assessing each individual noncitizen’s flight risk and dangerousness.<sup>40</sup>

The RCA, though intended to better assist ICE officers, has failed to enhance the quality of release decisions.<sup>41</sup> In 18.4 percent of cases, the RCA made no recommendation.<sup>42</sup> When this occurs, the ICE officer makes the custody determination on his or her own.<sup>43</sup> When the RCA does make a recommendation, it is not binding, and ICE officers override the recommendation routinely.<sup>44</sup> For complex cases, the RCA often fails to assess the situation adequately, and it frequently overlooks ISAP as an option for apprehended noncitizens.<sup>45</sup> This means that enrollment in ISAP and whether a noncitizen is placed in GPS monitoring is often a decision made at the discretion of an ICE officer acting without the guidance of the RCA.<sup>46</sup> ICE officers are not required to provide any documentation or explanation justifying an individual’s enrollment in ISAP or GPS monitoring.<sup>47</sup> As a result, asylum-seekers and their attorneys do not know of what ISAP enrollment standards consist or why certain individual asylum-seekers are enrolled in GPS monitoring.<sup>48</sup>

Another source of confusion related to the initial enrollment of asylum-seekers in ISAP’s GPS monitoring is that ICE and ISAP portray the

---

<sup>37</sup> GAO, *Improved Data Collection*, supra note 32, at 10–11.

<sup>38</sup> OIG, *Alternatives to Detention*, supra note 23, at 4.

<sup>39</sup> *Id.* at 5.

<sup>40</sup> GAO, *Improved Data Collection*, supra note 32, at 8.

<sup>41</sup> OIG, *Alternatives to Detention*, supra note 23, at 11.

<sup>42</sup> *Id.*

<sup>43</sup> Marouf, supra note 29, at 2145; see also IRC, *Freed but Not Free*, supra note 15, at 13 (describing the broad discretion ICE officers wield when enrolling individuals in ISAP and the “enormous potential for abuse of discretion”).

<sup>44</sup> OIG, *Alternatives to Detention*, supra note 23, at 11.

<sup>45</sup> *Id.* at 12.

<sup>46</sup> See *id.*

<sup>47</sup> Letter from Wolfe-Roubatis, supra note 4, at 3.

<sup>48</sup> See *id.* at 5.

program as voluntary on paper, despite the fact that ISAP enrollment lies exclusively within ICE's authority.<sup>49</sup> Therefore, some ISAP participants have paperwork indicating their "voluntary" participation in GPS monitoring.<sup>50</sup> Because attorneys are not involved in the custody determination process and asylum-seekers do not always understand what is happening—often due to cultural and language barriers—the full extent of ICE's decision-making for enrolling asylum-seekers in GPS monitoring remains unknown.

## 2. Challenging Enrollment in ISAP

If a noncitizen enrolled in ISAP seeks to challenge his or her placement in ISAP's GPS monitoring, he or she may do so by requesting amelioration of the terms of release that were set by ICE in its initial custody determination.<sup>51</sup> According to 8 C.F.R. § 1236.1(d) (or "the Regulation")—the regulation that governs this part of the process—a noncitizen may request that an immigration judge review and revise his or her terms of release at any time so long as he or she has not been released from custody and has not received a final order of removal.<sup>52</sup> Unfortunately, ISAP enrollees are not able to seek release from GPS monitoring in immigration court at any time that they desire due to the interpretation of "custody" by the Board of Immigration Appeals ("BIA") in *Matter of Aguilar-Aquino*.<sup>53</sup>

In *Matter of Aguilar-Aquino*, the BIA held that enrollment in ISAP with GPS monitoring does not constitute custody within the meaning of

---

<sup>49</sup> Paperwork from BI Inc., Acuerdo del Participante para Tomar Parte Voluntariamente en el Programa del Monitoreo Electrónico (GPS) de ISAP [Agreement to Participate Voluntarily in the Electronic Monitoring Program (GPS) of ISAP] (Feb. 7, 2018) (on file with the Virginia Law Review Association); see also IRC, Freed but Not Free, supra note 15, at 13 (noting that ICE may require individuals to participate in ISAP despite the fact that documents given to noncitizens state that ISAP is voluntary); Barron & Briones, supra note 3 (describing that almost 20,000 immigrants were required to wear shackles throughout their deportation proceedings); Nicolás Medina Mora, In America's Broken Immigration System, the Best Business to Be in Is GPS Trackers, BuzzFeed News (Nov. 24, 2014, 6:01 PM), <https://www.buzzfeednews.com/article/nicolamedinamora/in-americas-broken-immigration-system-the-best-b> [<https://perma.cc/5ZDD-GL52>] (discussing how companies profit off of selling surveillance technology like ankle monitors to the U.S. government).

<sup>50</sup> See IRC, Freed but Not Free, supra note 15, at 14; Barron & Briones, supra note 3; Paperwork from BI Inc., supra note 49.

<sup>51</sup> 8 C.F.R. § 1236.1(d) (2019).

<sup>52</sup> Id.

<sup>53</sup> 24 I. & N. Dec. 747, 753 (B.I.A. 2009).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1679

8 C.F.R. § 1236.1(d).<sup>54</sup> The BIA concluded that custody within the meaning of the Regulation is narrower than the definition of custody for federal habeas petitions.<sup>55</sup> As a result of this holding, noncitizens enrolled in ISAP's GPS monitoring are considered to be in custody for habeas petitions, but not for the purpose of seeking an individualized assessment of their enrollment in ISAP from an immigration judge at any time they desire.<sup>56</sup> Instead, only enrollees that file for amelioration of the terms of their release within seven days of being enrolled in ISAP may appear before an immigration judge for review of their placement in the program.<sup>57</sup> For ISAP enrollees that seek review after the seven-day window has closed, the only available option, besides filing a habeas

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 752–53.

<sup>56</sup> *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (holding that the writ of habeas corpus extends to parole and other instances in which the government places wrongful restraints upon liberty); see also *Xiaoyuan Ma v. Holder*, 860 F. Supp. 2d 1048, 1054 (N.D. Cal. 2012) (holding that “Petitioner [who is enrolled in ISAP] falls within the ambit of 28 U.S.C. § 2241(c),” the statute that sets forth requirements for extending the writ of habeas corpus to a prisoner, including that the individual be in the custody of the U.S. government); *Urbina v. Godfrey*, No. CV 06-538-ST, 2006 WL 2474881, at \*3 (D. Or. Aug. 22, 2006) (finding that “[ISAP’s] restraints on petitioner’s liberty place him squarely within the habeas corpus ‘custody’ requirement”); *Nguyen v. B.I. Inc.*, 435 F. Supp. 2d 1109 (D. Or. 2006) (implicitly finding ISAP constitutes custody for habeas purposes by hearing entire habeas claim dedicated to challenging noncitizens’ enrollment in ISAP). But see *Diawara v. Sec’y of DHS*, No. AW-09-2512, 2010 WL 4225562, at \*1 (D. Md. Oct. 25, 2010) (dismissing habeas petition because noncitizen was considered released from custody when enrolled in GPS monitoring after filing for habeas relief).

<sup>57</sup> *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 96 (B.I.A. 2009).

petition in federal court,<sup>58</sup> is to request that ICE<sup>59</sup> release them from GPS monitoring.<sup>60</sup>

What standards, if any, ICE applies when considering a request for the removal of an ankle bracelet or to what extent such requests are approved are not available to the public. There are no regulations guiding this decision.<sup>61</sup> This undefined review process by an ICE officer is far from

---

<sup>58</sup> While habeas review is technically an option, a habeas claim has never been filed by an asylum-seeker enrolled in ISAP (the individuals in the cases cited *supra*, note 56, were not seeking asylum) and, therefore, will not be explored beyond this footnote. Habeas review, as a practical matter, is unlikely to be a feasible option due to the challenges that asylum-seekers already face in acquiring counsel generally and because, if counsel is acquired, the individual's asylum claim is likely to take precedence over a habeas petition. See Samantha Balaban, Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes, NPR (Feb. 25, 2018, 2:10 PM), <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes> [<https://perma.cc/834K-59UN>] (describing common barriers asylum-seekers face when searching for counsel in the United States).

<sup>59</sup> The specific language used in 8 C.F.R. § 1236.1(d)(2) (2019) is that the noncitizen may request that the “district director” review their terms of release. However, the term “district director” is also used within the same regulation at 8 C.F.R. § 1236.1(d)(1) (2019) to refer to the agent that makes the initial custody determination. Therefore, it is unclear whether this request for amelioration of the terms of the initial custody determination is going to the same ICE officer that made the initial custody determination or someone else within ICE's organizational structure. The definition of “district director” as provided in 8 C.F.R. § 1.2 encompasses many leadership roles, including field operations director, district director for interior enforcement, district director for services, field office director, service center director, special agent in charge, or any other official, including an official in an acting capacity within U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, or another component of the Department of Homeland Security who is delegated the function or authority above for a particular geographic district, region, or area.

<sup>60</sup> 8 C.F.R. § 1236.1(d)(2) (2019).

<sup>61</sup> Since there is no law to guide the decision, there are some steps that the Stanford Law School Immigrants' Rights Clinic has suggested in a guide the clinic created for individuals enrolled in ISAP with ankle monitors who are currently in removal proceedings on the expedited docket of the San Francisco Immigration Court. The guide states that, after sixty days, the government should conduct a review of whether an individual continues to require an ankle monitor. Immigrants' Rights Clinic, Stanford Law Sch., Guide: How to Request Removal of Your Ankle Monitor 2 (2016), <https://www.sfbar.org/forms/lawyerreferrals/-immigration/sfildc/isap-pro-se-guide-english.pdf> [<https://perma.cc/8GG3-2SE9>]. According to the guide, if the government does not conduct the review or the noncitizen is unsure, the immigrant can request the review and removal of the ankle bracelet at the sixty-day mark by taking a letter to ICE. *Id.* at 2–3. In the letter, the immigrant should ask for removal of the monitor and assure that he or she will show up to future court proceedings. *Id.* at 3. The guide also suggests following up and requesting again at the ninety-day mark if the first request is denied. *Id.* Factors that the guide describes as those ICE will consider when deciding whether to remove the ankle monitor include whether the immigrant has followed all of ISAP's rules, whether the immigrant has a reliable phone number, and whether the immigrant has a passport.

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1681

intuitive.<sup>62</sup> To make matters more confusing, ICE offices are located separately from ISAP offices.<sup>63</sup> Therefore, when a noncitizen wants to request removal of his or her ankle bracelet, he or she must travel to a separate location than the one where he or she regularly goes for check-ins that are part of the same supervision program requiring GPS monitoring.

Between the seven-day window for immigration judge review and the unclear ICE review route, advocating for the removal of an ankle monitor is no easy task.<sup>64</sup> From initial enrollment to seeking release, asylum-seekers are not guaranteed, or even likely to receive, a meaningful, individualized determination justifying their placement in ISAP. The lack of proper oversight combined with unstandardized and potentially arbitrary criteria for enrollment has sparked concern among immigrant advocates, especially regarding the impact on asylum-seekers.<sup>65</sup> The government has taken advantage of the flexible process to target asylum-seekers, enrolling large numbers of them in GPS monitoring since 2014.<sup>66</sup> Easy enrollment of asylum-seekers in ISAP has become especially problematic in the current administration, as President Trump has prioritized arrests of non-dangerous immigrants inside the United States, often including asylum-seekers.<sup>67</sup> Because the enrollment procedures in place do not require individualized assessments using standardized

---

*Id.* at 4. There is no legal authority for imposing these requirements although they seem to serve as proxies for a lack of flight risk. See *id.*

<sup>62</sup> This is especially the case because asylum-seekers, by definition, are fleeing their home country and therefore are likely unfamiliar with the U.S. legal system or even general administrative norms found in U.S. culture.

<sup>63</sup> See, e.g., Immigrants' Rights Clinic, Stanford Law Sch., *supra* note 61, at 2.

<sup>64</sup> The Regulation also purports to give the noncitizen a ten-day window to file an appeal to the BIA if ICE decides to keep the individual enrolled in GPS monitoring. 8 C.F.R. § 1236.1(d)(3)(ii) (2019). The Regulation states that this appeal takes place under 8 C.F.R. § 1236.1(d)(2)(i), but that section does not exist. In other words, appealing ICE's decision to the BIA does not seem viable.

<sup>65</sup> See, e.g., Letter from Wolfe-Roubatis, *supra* note 4, at 21–22 (requesting, in a letter directly to ICE, that clear standards be implemented both for initial ISAP enrollment of asylum-seekers and for removal of their ankle bracelets).

<sup>66</sup> *Id.* at 3–5 (explaining that, in 2014, the government began regularly enrolling released asylum-seekers into ISAP and, by 2015, the government had implemented a policy of categorical enrollment of asylum-seekers in GPS monitoring).

<sup>67</sup> H.R. Rep. No. 115-239, at 154–55 (2017) (“The Trump Administration has claimed that its more aggressive enforcement approach in the interior of the United States is critically important to the national security and public safety of the country. While there is certainly no disagreement we should be removing dangerous individuals, ICE is targeting the parents of unaccompanied children who cross the southern border to seek asylum.”).

criteria, asylum-seekers continue to be subjected to GPS monitoring on a large scale.

*D. The Failure of ISAP as an Alternative to Detention*

While successful in ensuring compliance among participants, ISAP's interaction with the physical detention system, or lack thereof, demonstrates a failure to fulfill its initial purpose of posing an alternative to detention for those already detained and other high-risk noncitizens that were categorized as target groups at the outset of the national program.<sup>68</sup> Instead, ISAP has become a tool for the Department of Homeland Security ("DHS") to increase government surveillance of low-risk noncitizens who have never been detained nor would typically be detained based on statutory requirements.<sup>69</sup> While ISAP is effective at ensuring noncitizen attendance at removal proceedings, its overuse has resulted in less economic efficiency than initially intended and the program no longer presents a humane alternative option to detention.

*1. ISAP Has Not Decreased Detention Costs*

According to the most recent available data on the effectiveness of ISAP, noncitizens enrolled in the full-service program attended over ninety-nine percent of their immigration court proceedings,<sup>70</sup> eight percentage points higher than the attendance rate at court hearings among participants in AAP.<sup>71</sup> Therefore, the full-service option within ISAP appears to be eight percent more effective in ensuring noncitizen compliance. However, the increase in noncitizen compliance through ISAP comes at the expense of a compromised vision for the program.

---

<sup>68</sup> OIG, *Alternatives to Detention*, supra note 23, at 4; IRC, *Freed but Not Free*, supra note 15, at 5.

<sup>69</sup> IRC, *Freed but Not Free*, supra note 15, at 5; Marouf, supra note 29, at 2164; Letter from Wolfe-Roubatis, supra note 4, at 3–5.

<sup>70</sup> GAO, *Immigration*, supra note 12, at 14. This number drops to ninety-five percent for final removal proceedings. *Id.* Enrollees in the technology-only option compose around forty percent of the total enrollment in ISAP, but no publicly available data exist on how frequently they attend removal proceedings. *Id.* ICE was initially in charge of tracking these data and then delegated the responsibility to BI Inc., which tracks the data for compliance in the full-service program. See IRC, *Freed but Not Free*, supra note 15, at 8. While BI Inc. reportedly is now tracking data for the technology-only program, no specific numbers were released in this testimony.

<sup>71</sup> Sullivan et al., supra note 15, at 3.

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1683

Despite the initial purpose of ISAP to partly relieve the financial burden of the detention system—through the relocation of select noncitizens from detention into the alternative-to-detention program—detention rates as well as ISAP enrollment rates have simultaneously escalated.<sup>72</sup> Between 2011 and 2013, the number of noncitizens enrolled in ISAP increased from 32,065 to 40,864.<sup>73</sup> Meanwhile, detention rates have continued to soar.<sup>74</sup> This could be justifiable as efficient if the United States were experiencing an increase in unauthorized immigration, resulting in a higher demand for both detention and the use of ISAP. The undocumented population in the United States, however, has largely been declining since 2010.<sup>75</sup> ISAP does not save the government costs when used in addition to detention as a supplemental program for low-risk noncitizens as opposed to an alternative to detention for high-risk noncitizens already detained.

Taking a deeper look at how detention and ISAP are funded provides further insight on the government's failure to implement ISAP as an alternative to detention. Since ISAP's inception, Congress has increased the program's budget dramatically.<sup>76</sup> In the 2019 proposed DHS Appropriations Bill alone, Congress provided funding for "19,000 more daily Alternatives to Detention . . . participants."<sup>77</sup> At the same time, Congress has been increasing the funding for detention. The proposed DHS Appropriations Bill for 2019 provides funding for 44,000 daily detention beds—an increase of 3,480 beds from 2018.<sup>78</sup>

When considering how financial incentives demonstrate ISAP's failure to function as an alternative to detention, it is important to note that Geo Group, the company that owns BI, is the second largest ICE contractor

---

<sup>72</sup> IRC, *Freed but Not Free*, supra note 15, at 5.

<sup>73</sup> GAO, *Immigration*, supra note 12. These numbers are the most recent publicly available statistics.

<sup>74</sup> Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 *Duke J. Const. L. & Pub. Pol'y* 77, 82 & n.24 (2017) (discussing how detention rates have risen by nearly twenty-five percent since 2009 and arguing that this is due, in part, to Congress tying detention funding to a mandatory minimum of detention beds).

<sup>75</sup> Robert Warren, *Ctr. for Migration Studies, The US Undocumented Population Fell Sharply During the Obama Era: Estimates for 2016* (2018), <https://cmsny.org/publications/warren-undocumented-2016/> [<https://perma.cc/D4W7-KX76>].

<sup>76</sup> Fernandes, supra note 13 ("ICE's budget for alternatives to detention grew from \$28 million in 2006 to more than \$114 million in 2016.").

<sup>77</sup> H.R. Rep. No. 115-948, at 28 (2018). In 2018, the budget provided for 79,000 participants in the program. H.R. Rep. No. 115-239, at 36 (2017). The 2019 funding, therefore, would support a total of 98,000 participants in the program. H.R. Rep. No. 115-948, at 28 (2018).

<sup>78</sup> *Id.*

for private immigration detention centers in the United States.<sup>79</sup> Consequently, if ISAP were truly functioning as an alternative to detention, two of Geo Group's revenue streams would be in competition with each other.<sup>80</sup> While increasing the use of ISAP on high-risk noncitizens would provide a cost-effective alternative to detention, ISAP's financial incentives indicate that the program is unlikely being used to reduce detention costs.

In addition to an expansion in the number of low-risk enrollees in ISAP during recent years, the length of time that noncitizens are being monitored through the program has increased.<sup>81</sup> While ISAP is more cost-effective than detention on a daily basis,<sup>82</sup> the longer a noncitizen is enrolled in ISAP, the less cost-efficient the program becomes.<sup>83</sup> If the government uses ISAP to monitor noncitizens for a significantly longer period of time than the noncitizens would remain in detention, it might not prove to be cost-effective overall.<sup>84</sup> This is especially pertinent because immigration judges prioritize adjudication involving detained noncitizens in removal proceedings.<sup>85</sup>

As a result, enrollees in ISAP spend much longer waiting for their removal proceedings to conclude than noncitizens in detention and, consequently, remain enrolled in GPS monitoring longer on average than noncitizens stay in detention.<sup>86</sup> In fact, in 2013, noncitizens in detention waited on average 82 days before receiving a final decision on their removal case while noncitizens released from detention waited 281 days

---

<sup>79</sup> IRC, *Freed but Not Free*, supra note 15, at 8; Bus. Wire, *The GEO Group Announces \$415 Million Acquisition of B.I. Incorporated* (Dec. 21, 2010, 8:14 AM), <https://www.businesswire.com/news/home/20101221005564/en/GEO-Group-Announces-415-Million-Acquisition-B.I.> [<https://perma.cc/G9RU-UHDF>]; Fernandes, supra note 13.

<sup>80</sup> Fernandes, supra note 13; see also *The GEO Group, Inc., 2017 Annual Report 1* (2017), <http://www.snl.com/Interactive/newlookandfeel/4144107/2017-GEO-Annual-Report.pdf> [<https://perma.cc/6PKE-AHHM>] (depicting that ICE is Geo Group's largest customer, responsible for nineteen percent of its revenue in 2017).

<sup>81</sup> The Government Accountability Office found that, during a period of two years, the number of noncitizens enrolled in ISAP increased by sixty percent for the full-service option. GAO, *Immigration*, supra note 12, at 12. For the technology-only option, noncitizens' average length of time in the program increased by eighty percent, climbing from ten months to eighteen months. *Id.* As the length of time noncitizens are enrolled in ISAP increases, the program becomes costlier and appears less humane.

<sup>82</sup> *Id.* at 12–13.

<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 13–14.

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1685

on average to have their first hearing and 770 days—over two years—to receive a final decision.<sup>87</sup>

## 2. *ISAP Is Not a Humane Alternative to Detention*

Maintaining enrollees in GPS monitoring for extensive periods of time not only potentially renders ISAP financially inefficient, it poses humanitarian concerns due to the prolonged duration and invasiveness of the program. Use of GPS monitoring devices on asylum-seekers for extended periods of time is especially concerning because of the health problems generated as a result of wearing the ankle bracelets.<sup>88</sup> ISAP's ankle bracelets cause asylum-seekers both physical and psychological harm,<sup>89</sup> demonstrating that ISAP as currently implemented is not a humane alternative to detention.<sup>90</sup>

Wearing GPS bracelets is a constant burden for asylum-seekers psychologically because of the stigmatization and humiliation that they experience due to society's association between ankle bracelets and the criminal justice system.<sup>91</sup> Ankle bracelets further cause psychological harm through the loss of dignity asylum-seekers experience while charging their devices.<sup>92</sup> Asylum-seekers are required to charge the ankle bracelets throughout the day; the process involves plugging the device into the wall for hours at a time while it remains on the body.<sup>93</sup> This process is not only dehumanizing, but it is also physically uncomfortable because the device emits heat as it charges.<sup>94</sup> As uncomfortable as the

---

<sup>87</sup> GAO, Improved Data Collection, *supra* note 32, at 18.

<sup>88</sup> IRC, Freed but Not Free, *supra* note 15, at 17–18; Letter from Wolfe-Roubatis, *supra* note 4, at 6–14.

<sup>89</sup> IRC, Freed but Not Free, *supra* note 15, at 17–18; Letter from Wolfe-Roubatis, *supra* note 4, at 6–14.

<sup>90</sup> Some advocates have argued that because of the invasiveness of ISAP's GPS monitoring and the program's negative consequences—such as loss of dignity and health problems—ISAP is better labeled as an alternate form of government custody or detention as opposed to an alternative to detention. Marouf, *supra* note 29, at 2164; Mora, *supra* note 49 (reporting that the co-director of Detention Watch Network—a national membership organization that brings together immigrant advocates in a collective effort to end immigration detention—stated, “We don't see [ISAP] as an alternative to detention. We see it as an alternative form of detention”).

<sup>91</sup> ISAP enrollees with GPS monitors report that, as a result of wearing the bracelet, people assume that they are criminals and treat them as such. IRC, Freed but Not Free, *supra* note 15, at 17. Because of the device's bulky shape and inconvenient placement, the ankle bracelet is difficult to hide with clothing. See Barron & Briones, *supra* note 3.

<sup>92</sup> Marouf, *supra* note 29, at 2163.

<sup>93</sup> *Id.*

<sup>94</sup> Barron & Briones, *supra* note 3.

charging process is,<sup>95</sup> asylum-seekers have little choice about charging the bracelet because, if the device runs out of battery, the individual could be returned to detention.<sup>96</sup>

Enrollment in ISAP not only poses psychological problems, but the ankle bracelets create other health problems, as well. Many new people to the GPS bracelets undergo an adjustment period during which the leg with the monitor cramps and hurts while walking.<sup>97</sup> Other problems include bone and joint pain around the foot and leg, skin irritation, discomfort from the device, and shooting pain.<sup>98</sup> On the more severe end of the spectrum, individuals wearing ISAP's GPS monitoring devices have experienced electrical shocks, hair loss, blotches, sores, bleeding of the foot, vision problems, headaches, chest pain, and difficulty breathing as a result of the ankle bracelet and its electrical currents.<sup>99</sup> The noncitizens who suffered these conditions had not suffered them prior to receiving ankle bracelets, and some of these conditions persisted even after the ankle bracelets were removed.<sup>100</sup>

ISAP not only fails to present a humane alternative due to psychological and physical health concerns, but heavy restrictions on individual liberty render the program's impact similar to that of detention. Regular check-ins at ISAP offices, unannounced home visits, and travel restrictions,<sup>101</sup> which can be as strict as limiting participants to certain counties, make it difficult to maintain a steady job or care for young kids.<sup>102</sup> These restrictions may also inhibit an asylum-seeker's ability to procure legal counsel for their immigration case—an indispensable resource for achieving immigration relief.<sup>103</sup> The extent to which

---

<sup>95</sup> In addition to being uncomfortable and psychologically harmful, charging the GPS bracelet is also time-consuming. Marouf, *supra* note 29, at 2163; Barron & Briones, *supra* note 3. As a result, it creates additional problems for parents with young children, women that are pregnant, and individuals with jobs. Marouf, *supra* note 29, at 2163.

<sup>96</sup> Paperwork from BI Inc., *supra* note 49.

<sup>97</sup> IRC, *Freed but Not Free*, *supra* note 15, at 18.

<sup>98</sup> Letter from Wolfe-Roubatis, *supra* note 4, at 13.

<sup>99</sup> *Id.* at 6–13.

<sup>100</sup> *Id.*

<sup>101</sup> Noncitizens have landed in detention for perceived infractions of these restrictions even at times when trips outside were approved by ISAP. Fernandes, *supra* note 13.

<sup>102</sup> *Id.*; Letter from Wolfe-Roubatis, *supra* note 4, at 7–14.

<sup>103</sup> See Ramanujan Nadadur, *Beyond “Crimigration” and the Civil-Criminal Dichotomy—Applying Mathews v. Eldridge in the Immigration Context*, 16 *Yale Hum. Rts. & Dev. L.J.* 141, 143 (2013) (explaining that non-detained noncitizens in removal proceedings without counsel only succeed thirteen percent of the time compared to seventy-four percent of the time for non-detained noncitizens with counsel).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1687

participation in ISAP inhibits participants' ability to maintain work is especially concerning<sup>104</sup> for asylum-seekers because, as people fleeing violence, they rarely arrive in the United States with economic security.<sup>105</sup>

The psychological burden, negative health implications, and difficulty earning a living that afflict asylum-seekers enrolled in ISAP with GPS monitoring render the program inhumane. Using GPS monitors on asylum-seekers has failed to achieve the purpose behind the initial introduction of ISAP. ISAP is not functioning as an alternative to detention. The program is not reducing the costs of the detention system by removing high-risk detainees into GPS monitoring from detention centers. Instead, ISAP GPS monitoring is an alternate form of government custody that, due to inadequate procedural protections, ICE has excessively inflicted on low-risk asylum-seekers.

### III. CONSTITUTIONAL OBJECTIONS TO THE ENROLLMENT OF ASYLUM-SEEKERS IN ISAP

The current ISAP enrollment procedures are not only problematic because they facilitate excessive use of GPS monitoring bracelets on low-risk asylum-seekers, they also violate asylum-seekers' due process rights. This Part argues that the government is required to provide more due process protections to asylum-seekers during enrollment in ISAP than are currently in place. In order to satisfy the constitutional demands of due process, ICE must abide by the requirements of substantive due process, procedural due process, and fundamental fairness during the ISAP enrollment process. Providing constitutionally adequate safeguards would shift ISAP's function toward a true alternative to detention by preventing the excessive enrollment of low-risk individuals and refocusing the program's resources on high-risk individuals already detained.

In order to understand how ISAP infringes on the due process rights of asylum-seekers within the United States, it is important to review how the Supreme Court applies due process rights to noncitizens generally. The

---

<sup>104</sup> Another concerning aspect of limiting asylum-seekers' ability to maintain employment is that asylum-seekers are allowed to apply for work authorization in the United States after their asylum applications have been pending for at least 150 days. See U.S. Citizenship & Imm. Servs., *supra* note 8. In a way, ISAP's infringement on asylum-seekers' ability to successfully maintain employment goes against the expressed intent of Congress to allow them to apply for work authorization.

<sup>105</sup> Letter from Wolfe-Roubatis, *supra* note 4, at 5.

Court has held that due process protections apply to noncitizens inside the United States,<sup>106</sup> including in situations where the government intends to criminally punish a noncitizen<sup>107</sup> or where the government seeks to remove<sup>108</sup> the noncitizen from the United States.<sup>109</sup> As the following Section will explore, the Court has waffled on the extent to which due process protections must be afforded to noncitizens when the government places them in immigration detention.<sup>110</sup> Since ISAP is authorized by the same statute as detention,<sup>111</sup> the level of due process protection required before enrollment in ISAP remains undecided as well. This Part of the Note argues that Supreme Court precedent, properly applied to asylum-seekers inside the United States, requires the full extent of due process protections during enrollment in ISAP GPS monitoring.

*A. ISAP Enrollment in GPS Monitoring Violates Substantive  
Due Process*

The current practice of using GPS ankle monitors on asylum-seekers in removal proceedings violates their substantive due process rights.

---

<sup>106</sup> *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.”).

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

<sup>108</sup> After the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, deportation proceedings became known as removal proceedings. Therefore, “removal” or “remove” are synonymous with “deportation” or “deport” within the immigration context. Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-593 (1996) (codified as amended at 8 U.S.C. § 1229a).

<sup>109</sup> See *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that an executive officer may not take an alien into custody and deport him “without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States,” as such “arbitrary power” would violate the principles of due process of law); see also 8 U.S.C. §§ 1229–1229a (2012) (describing the present-day requirements of removal proceedings, including that aliens must be afforded an individual hearing in front of an immigration judge with notice and the opportunity to present evidence in their favor and confront witnesses against them).

<sup>110</sup> In the Supreme Court’s most recent case involving a due process claim raised by noncitizens in immigration detention, the Court remanded the issue to the Ninth Circuit while simultaneously stating that “‘due process is flexible’ . . . and it ‘calls for such procedural protections as the particular situation demands.’” *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>111</sup> 8 U.S.C. § 1226(a) (2012).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1689

Substantive due process protects rights deemed to be fundamental.<sup>112</sup> In recent years, the Court has discussed the extent to which a liberty right is fundamental<sup>113</sup> for noncitizens<sup>114</sup> with seemingly inconsistent results. More specifically, whether a liberty right is considered fundamental for a noncitizen depends on which of two different approaches—that of *Zadvydas v. Davis*<sup>115</sup> or *Demore v. Kim*<sup>116</sup>—the Court applies.<sup>117</sup>

This Section will first argue that the *Zadvydas* approach is more appropriate for assessing whether mandatory GPS monitoring infringes upon the substantive due process rights of asylum-seekers than the *Demore* approach. After demonstrating that the *Zadvydas* approach is better-suited for asylum-seekers, this Section will apply the *Zadvydas* framework, which considers noncitizen liberty rights to be fundamental.<sup>118</sup> Finally, because GPS monitoring bracelets infringe on asylum-seekers' liberty rights without the narrow tailoring required to serve a compelling government interest and surpass strict scrutiny review,<sup>119</sup> this Section will argue that the current use of ankle bracelets is

<sup>112</sup> Fundamental rights are those “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), overruled in part by *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

<sup>113</sup> Liberty, sometimes referred to by the Court as “freedom from physical restraint,” *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997), has long been considered by the Court to be a fundamental right. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (“Freedom from physical restraint [is] a fundamental right . . . .”); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (“We do not minimize the importance and fundamental nature of [the individual’s strong interest in liberty].”).

<sup>114</sup> Whether or not liberty is considered a fundamental right for noncitizens within the United States has not been definitively settled by the Court. The substantive due process protections of noncitizen liberty have been litigated in three main cases which will be discussed in this Section. The cases are *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003); and *Jennings*, 138 S. Ct. 830. All of these cases focus on the government’s ability to detain noncitizens without providing them the opportunity for a bond hearing. Bond hearings are supposed to ensure detained noncitizens the opportunity to be released from detention if they can show by clear and convincing evidence that they present neither a flight risk nor a risk of dangerousness. 8 C.F.R. § 1003.19(h)(3) (2019).

<sup>115</sup> 533 U.S. 678 (2001).

<sup>116</sup> 538 U.S. 510 (2003).

<sup>117</sup> While *Jennings* is a more recent decision involving constitutional challenges to immigration detention, the Court did not address the constitutional question of whether the detention at issue violates noncitizens’ substantive due process rights. 138 S. Ct. at 851.

<sup>118</sup> *Zadvydas*, 533 U.S. at 690.

<sup>119</sup> *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (“[T]he Fifth and Fourteenth Amendments’ guarantee of due process of law [includes] a substantive component, which forbids the government to infringe certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” (internal quotation marks omitted)). Substantive due process is a separate protection from

constitutionally deficient by substantive due process standards. In order to pass constitutional muster, enrollment in ISAP with GPS monitoring must be limited to asylum-seekers deemed a flight risk or danger to the community through a meaningful, individualized assessment.

### *1. The Zadvydas Approach Versus the Demore Approach*

In *Zadvydas*, the Court held that the Due Process Clause applies to noncitizens within the context of immigration detention where noncitizen detention is determined through the exercise of government discretion and has the potential to be indefinite.<sup>120</sup> Specifically, the Court applied a strict scrutiny analysis, holding that detention ordered without the protections of a criminal setting must be accompanied by certain special and narrow circumstances that justify infringing upon an “individual’s constitutionally protected interest in avoiding physical restraint.”<sup>121</sup> The Court clarified that such special and narrow circumstances in the context of immigration detention are either flight risk or dangerousness.<sup>122</sup> Applying substantive due process protections, the Court in *Zadvydas* held that the liberty interests<sup>123</sup> of noncitizens held in prolonged detention under Section 241(a)(6) of the Immigration and Nationality Act (“INA”)<sup>124</sup> are fundamental.<sup>125</sup>

A few years after *Zadvydas*, the Court approached the substantive due process analysis in the context of immigration detention from a different angle. In *Demore*, the Court held that the liberty interest of a deportable lawful permanent resident (“LPR”) noncitizen is not a fundamental right.<sup>126</sup> Applying rational basis review,<sup>127</sup> the Court upheld the

---

ensuring the fairness of the procedures involved in achieving the government action. See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990))).

<sup>120</sup> *Zadvydas*, 533 U.S. at 690, 692.

<sup>121</sup> *Id.* at 690 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

<sup>122</sup> *Id.*

<sup>123</sup> The Court defined the liberty interests at issue in *Zadvydas* as “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint.” *Id.*

<sup>124</sup> Immigration & Nationality Act (INA) § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2012).

<sup>125</sup> *Zadvydas*, 533 U.S. at 690, 692.

<sup>126</sup> *Demore v. Kim*, 538 U.S. 510, 528 (2003).

<sup>127</sup> *Id.* (“[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal. The evidence

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1691

constitutionality of the mandatory detention statute at issue, INA § 236(c),<sup>128</sup> which provides that a deportable, criminal noncitizen must be detained while removal proceedings are pending without an individualized determination of flight risk or dangerousness.<sup>129</sup> The Court concluded that detention has always been a constitutionally valid aspect of the deportation process and that it does not require the additional protections that substantive due process demands.<sup>130</sup>

To define the liberty right as not fundamental, the Court had to distinguish *Demore* from the earlier case, *Zadvydas*. The Court did so in two ways. First, the Court explained that the detention at issue in *Demore*, unlike that in *Zadvydas*, was serving its purpose.<sup>131</sup> The statute at issue in *Demore* existed to ensure that deportable, criminal noncitizens would not continue to commit crimes or avoid their immigration proceedings while their removal proceedings were pending so that they could be effectively deported upon an order of removal.<sup>132</sup> Since the noncitizen respondent in *Demore* conceded that he was deportable for criminal reasons, his

---

Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action.”)

<sup>128</sup> Codified at 8 U.S.C. § 1226(c) (2012).

<sup>129</sup> See *Demore*, 538 U.S. at 513–14, 517–18.

<sup>130</sup> *Id.* at 523.

<sup>131</sup> *Id.* at 527–28. The Court’s reasoning for applying rational basis review seems to ignore the language of *Zadvydas* indicating that the liberty interests of noncitizens inside the United States are fundamental. *Zadvydas v. Davis*, 533 U.S. 678, 690–92 (2001). In *Demore*, the noncitizen argued that his detention was unconstitutional under the *Zadvydas* precedent because the government neither ordered it through a criminal proceeding with constitutional protections nor determined him to be a flight or danger risk. *Demore*, 538 U.S. at 514. The government did not assess whether *Demore* was a flight or danger risk because he was being detained under INA § 236(c), a mandatory detention provision, which requires that noncitizens who are deportable for certain criminal reasons remain in detention without bond. INA § 236(c), 8 U.S.C. § 1226(c) (2012). The *Demore* Court held that the mandatory detention statute reflects a predetermination by Congress that these individuals are a flight or danger risk. *Demore*, 538 U.S. at 513 (“We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.”). Considering the *Zadvydas* precedent, it likely would have been more appropriate for the Court to hold that the noncitizen’s liberty interest in *Demore* was fundamental but ultimately uphold the detention as constitutional because the detention was the result of a narrowly tailored special circumstance of protecting public safety and ensuring the noncitizen would attend his removal proceedings. In other words, under the *Zadvydas* precedent properly applied, the noncitizen’s liberty interest should have still been considered fundamental, but the statute’s requirement of mandatory detention for certain criminal noncitizens would pass strict scrutiny review and remain in effect.

<sup>132</sup> *Demore*, 538 U.S. at 527–28.

detention, for the purpose of ensuring his deportation, was valid under the statute.<sup>133</sup>

On the other hand, the Court in *Zadvydas* found that the purpose of detention in that case was to ensure the noncitizen would not abscond from future removal obligations and to protect the community from the risk of danger.<sup>134</sup> However, the noncitizens detained under INA § 241(a)(6)<sup>135</sup>—the relevant statute—had already received final removal orders, had been detained longer than the statutorily designated ninety-day period to effectuate removal, and their removal was not reasonably foreseeable due to conditions in their countries of deportation.<sup>136</sup> As a result, the Court held that the detention was no longer authorized by statute.<sup>137</sup> Since the goal of detention was no longer “practically attainable,” prolonged detention was not justified beyond a period of six months.<sup>138</sup> In order to continue to detain the noncitizens in *Zadvydas*, the government would have needed to successfully argue for the existence of an individualized risk of dangerousness for each noncitizen at a bond hearing.<sup>139</sup>

The second distinction the Court made in *Demore* was that the duration of detention for deportable, criminal noncitizens with pending removal proceedings was finite, while the detention at issue in *Zadvydas* had the potential to be indefinite.<sup>140</sup> The *Demore* Court explained that, under INA § 236(c),<sup>141</sup> detention was inherently limited by the time it would take for removal proceedings to be completed.<sup>142</sup> In comparison, the detention at issue in *Zadvydas* under INA § 241(a)(6)<sup>143</sup> had no designated termination point.<sup>144</sup> When distinguishing *Demore* from *Zadvydas* according to the length of detention, the Court focused on how removal proceedings of deportable, criminal noncitizens lasted forty-seven days

---

<sup>133</sup> Id. at 531.

<sup>134</sup> 533 U.S. at 690–92.

<sup>135</sup> Codified at 8 U.S.C. § 1231 (2012).

<sup>136</sup> *Zadvydas*, 533 U.S. at 684–86.

<sup>137</sup> Id. at 699.

<sup>138</sup> Id. at 690, 701.

<sup>139</sup> Id. at 691.

<sup>140</sup> *Demore v. Kim*, 538 U.S. 510, 528–29 (2003).

<sup>141</sup> Codified at 8 U.S.C. § 1226(c) (2012).

<sup>142</sup> *Demore*, 538 U.S. at 529.

<sup>143</sup> Codified at 8 U.S.C. § 1231 (2012).

<sup>144</sup> *Demore*, 538 U.S. at 528–29.

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1693

on average—significantly less time than the six-month detention period considered presumptively valid in *Zadvydas*.<sup>145</sup>

## 2. *The Zadvydas Approach Is Better Suited for Asylum-Seekers Enrolled in ISAP*

Based on the two factors that the Court considered most important in distinguishing *Demore* from *Zadvydas*, asylum-seekers enrolled in ISAP GPS monitoring are most similar to the noncitizens detained in *Zadvydas*. Consequently, they are better suited for the *Zadvydas* approach. Starting with the first factor in *Demore*, the purpose of detention under the statute must be explored.

To begin, asylum-seekers are enrolled in GPS monitoring under the authority of INA § 236(a).<sup>146</sup> The purpose of detention under INA § 236(a) is to ensure that noncitizens do not abscond while their removal proceedings are pending and do not present a risk of danger to the community.<sup>147</sup> Therefore, if an asylum-seeker is detained under INA § 236(a) without an individualized determination of flight risk or dangerousness, their detention is not serving the purpose of the statute.<sup>148</sup> Applying that analysis to asylum-seekers enrolled in ISAP under the same statute, individualized and meaningful determinations of flight risk or

---

<sup>145</sup> *Id.* at 529.

<sup>146</sup> Asylum-seekers are enrolled in ISAP under the authority of INA § 236(a)(2), 8 U.S.C. § 1226(a)(2) (2012), which permits ICE to continue to detain the noncitizen or release them on conditional parole or a bond of at least \$1,500 with certain conditions. Asylum-seekers apprehended within the United States that are not subjected to mandatory detention fall under this provision of the INA for detention purposes. Rebecca Scholtz & Michelle Mendez, Catholic Legal Immigration Network, Inc., Practitioner's Guide: Obtaining Release from Immigration Detention 12–13 (2018), <https://cliniclegal.org/sites/default/files/A-Guide-to-Obtaining-Release-from-Immigration-Detention.pdf> [<https://perma.cc/J55Q-G4VD>]. Detention under this provision is known as discretionary detention because whether or not the noncitizen remains detained depends on ICE's exercise of discretion. *Id.*

<sup>147</sup> See 8 C.F.R. § 1003.19 (2019) (describing the requirement for bond eligibility under 8 U.S.C. § 1226(a) as a demonstration by clear and convincing evidence of a lack of flight risk and lack of dangerousness); see also GAO, Improved Data Collection, *supra* note 32, at 6 (explaining that ICE may exercise discretion to keep an alien detained under INA § 236(a) if it believes the alien to pose a flight risk or public safety risk).

<sup>148</sup> See Charlie Kazemzadeh, Commentary, Flight Risk or Danger to the Community? *Rodriguez* and the Protection of Civil Liberties in the U.S. Immigration System, 12 *Duke J. Const. L. & Pub. Pol'y Sidebar* 97, 112 (2017) (describing discretionary detention of noncitizens during removal proceedings without a determination of flight risk or dangerousness as “arbitrary and unnecessary” incarceration).

dangerousness before placement in GPS monitoring are required in order to serve the purpose of the statute.

The enrollment of asylum-seekers in ISAP is distinct from the detention in *Demore*, where the noncitizen conceded to being a deportable, criminal alien and, therefore, fell within the group Congress statutorily designated for detention.<sup>149</sup> Without a meaningful, individualized determination of flight risk or dangerousness, whether the asylum-seeker poses a real threat of flight risk or dangerousness remains unknown. Therefore, without such a determination, the restraint that GPS monitoring imposes on the liberty of asylum-seekers does not serve the purpose of the statute purported to authorize the monitoring. As a result, when assessing whether the infringement on liberty is serving the statutory purpose of INA § 236(a), asylum-seekers with GPS monitors are more similarly situated to the noncitizens in *Zadvydas*, because their detention is not demonstrably authorized by statute.

Turning to the second factor—whether detention has a definite termination point under the governing statute—asylum-seekers in ISAP with ankle bracelets appear more like the noncitizen in *Demore* at first blush. Like the statute at issue in *Demore*, INA § 236(a)<sup>150</sup> only authorizes detention for the period during which removal proceedings are pending. However, the average time a noncitizen remains in removal proceedings has drastically increased since the days when the Court decided *Demore*, prolonging even those detentions limited by the lifespan of removal proceedings.<sup>151</sup> Therefore, the fact that detention under INA § 236(a) is restricted to the length of removal proceedings does not ensure that detentions today are definite to the extent understood in *Demore*. In the cases of asylum-seekers, removal proceedings extend for a prolonged period of time, throughout which these individuals may remain enrolled in GPS monitoring, once more favoring the *Zadvydas* approach.<sup>152</sup>

---

<sup>149</sup> *Demore*, 538 U.S. at 513–14.

<sup>150</sup> Codified at 8 U.S.C. § 1226(a) (2012).

<sup>151</sup> GAO, Immigration, *supra* note 12, at 5–6.

<sup>152</sup> One might argue that asylum-seekers are more similar to the noncitizen in *Demore* than the noncitizens in *Zadvydas* because those in *Zadvydas* had been ordered removed while the noncitizen in *Demore* still had removal proceedings pending. This distinction, however, is not important because it had no bearing on the majority's decision in *Demore*. In fact, the majority found the noncitizen in *Demore* to have conceded deportability and therefore treated him as though he were a deportable alien, like the noncitizens in *Zadvydas*. *Demore*, 538 U.S. at 513–14. Justice Breyer, concurring in part and dissenting in part, even stated that “an alien’s concession that he is deportable seems to me the rough equivalent of the entry of an order of

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1695

In *Demore*, the Court justified its distinction from *Zadvydas* in part due to the short length of detention that deportable, criminal noncitizens were serving at the time.<sup>153</sup> When emphasizing the short length of removal proceedings for criminal noncitizens detained under INA § 236(c), the Court stated that, in the majority of cases, detention lasted for less time than the detention period considered presumptively valid in *Zadvydas*.<sup>154</sup> The Court in *Demore* did not address the constitutionality of detention pending removal where removal proceedings lasted longer than the presumptively valid six-month detention period discussed in *Zadvydas*. Such a scenario, however, was recently discussed in the case *Jennings v. Rodriguez*.<sup>155</sup>

In *Jennings*, the majority of the Court did not answer the constitutional question of whether detaining noncitizens pending removal proceedings for longer than the six-month period approved in *Zadvydas* (without an individualized determination of flight risk or dangerousness) violates noncitizens' substantive due process rights.<sup>156</sup> Instead, the majority opted to remand the question to the Ninth Circuit.<sup>157</sup> The dissent, on the other hand, addressed the due process dilemma head-on.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, discussed how detention pending removal proceedings without an opportunity for bond violates due process rights of noncitizens.<sup>158</sup> Rejecting the substantive due process analysis in *Demore* in favor of the *Zadvydas* approach, the dissent specifically cited the difference between the facts presented in *Jennings* and those presented in *Demore* regarding how long noncitizens remained in detention without bond while removal proceedings pended.<sup>159</sup> According to the dissent, indefinite detention is not required for a constitutional violation to occur.<sup>160</sup> In Justice Breyer's view, the amount of time noncitizens in *Jennings* were detained without

---

removal.” *Id.* at 576–77 (Breyer, J., concurring in part and dissenting in part). He dissented in part because he did not agree that the noncitizen had conceded deportability. *Id.* at 577.

<sup>153</sup> *Demore*, 538 U.S. at 529.

<sup>154</sup> *Id.*

<sup>155</sup> 138 S. Ct. 830 (2018).

<sup>156</sup> *Id.* at 851.

<sup>157</sup> *Id.* at 852.

<sup>158</sup> *Id.* at 861 (Breyer, J., dissenting).

<sup>159</sup> *Id.* at 868–69.

<sup>160</sup> *Id.* at 868 (“It is immaterial that detention here is not literally indefinite, because while the respondents’ removal proceedings must end eventually, they last an indeterminate period of at least six months and a year on average, thereby implicating the same constitutional right against prolonged arbitrary detention that we recognized in *Zadvydas*.”).

bond as their removal proceedings pended—longer than the six-month period described in *Zadvydas*—was long enough to violate substantive due process.<sup>161</sup>

Considering the recent discussion in *Jennings* and the elongated average lifespan of removal proceedings, asylum-seekers detained under INA § 236(a) should be able to invoke the protections of substantive due process. In the cases of asylum-seekers enrolled in GPS monitoring under the authority of INA § 236(a), the average time spent in the program is well over the six-month window found to be presumptively constitutional in *Zadvydas*.<sup>162</sup> While enrollment in GPS monitoring for asylum-seekers may not be indefinite, it is prolonged and lacks a definite termination point as was understood in *Demore*, where removal proceedings only lasted forty-seven days on average. Therefore, when assessing the second *Demore* factor, asylum-seekers enrolled in GPS monitoring warrant the protections afforded by substantive due process under *Zadvydas*. After analyzing both *Demore* factors, the *Zadvydas* approach appears best suited to assess the sufficiency of substantive due process protections afforded to asylum-seekers enrolled in GPS monitoring through ISAP.

### 3. Applying the *Zadvydas* Approach

According to the *Zadvydas* approach, the liberty interests of noncitizens are fundamental, and any restrictions upon them must be narrowly tailored.<sup>163</sup> Liberty interests under the *Zadvydas* approach refer not only to the liberty restricted by physical detention but also that infringed upon by “government custody” and “other forms of physical restraint.”<sup>164</sup> GPS monitoring ankle bracelets act as a form of physical restraint by limiting asylum-seekers’ movement<sup>165</sup> and, therefore, infringe upon their fundamental liberty interests. Consequently, the use of GPS monitoring ankle bracelets on asylum-seekers must be narrowly tailored in order to satisfy substantive due process demands.<sup>166</sup>

Since the liberty restraint imposed on noncitizens through GPS monitoring is intended to be nonpunitive as part of a civil—as opposed to

---

<sup>161</sup> *Id.*

<sup>162</sup> GAO, Immigration, *supra* note 12, at 5–6.

<sup>163</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>164</sup> *Id.* (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects.”).

<sup>165</sup> IRC, *Freed but Not Free*, *supra* note 15, at 18.

<sup>166</sup> See *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1697

criminal—process, it must only be imposed in narrow circumstances with a special justification.<sup>167</sup> For detained asylum-seekers in removal proceedings, the special justification is an individualized determination of flight risk or dangerousness often conducted through the process of a bond hearing.<sup>168</sup> Asylum-seekers enrolled in GPS monitoring under the same statutory authority require a similar individualized determination of flight risk or dangerousness. Since the process through which asylum-seekers are enrolled in ISAP’s GPS monitoring component lacks a meaningful, individualized determination of flight risk or dangerousness, the enrollment process is not narrowly tailored and violates the substantive due process rights of participants.

While the enrollment process does include a time-limited option to seek review of flight risk or dangerousness through a hearing with an immigration judge, the seven-day filing window renders the option virtually unattainable for asylum-seekers.<sup>169</sup> This is especially true for enrollees without counsel.<sup>170</sup> Substantive due process demands more when fundamental liberty interests are at stake. At the very least, a meaningful, individualized determination of flight risk or dangerousness is required by substantive due process to justify enrollment of asylum-seekers in GPS monitoring.

*B. ISAP Enrollment in GPS Monitoring Violates Procedural Due Process*

The Fifth Amendment secures the right of people within the United States to procedural due process, a protection that imposes certain restraints on governmental decisions to deprive individuals of liberty.<sup>171</sup> At the very least, procedural due process requires that an individual at risk of losing his or her liberty through a governmental decision be provided notice and an opportunity to be heard in response to the case against him or her.<sup>172</sup> Such a right includes the opportunity to be heard “at a

---

<sup>167</sup> *Zadvydas*, 533 U.S. at 690.

<sup>168</sup> *Id.* at 690–91; *Jennings v. Rodriguez*, 138 S. Ct. 830, 864–65 (2018) (Breyer, J., dissenting).

<sup>169</sup> See *infra* note 202.

<sup>170</sup> *Nadadur*, *supra* note 103, at 143.

<sup>171</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>172</sup> *Id.* at 348–49.

meaningful time and in a meaningful manner” before the deprivation occurs.<sup>173</sup>

The way asylum-seekers are enrolled in ISAP’s GPS monitoring is unconstitutional under the standards required by procedural due process. Subjecting asylum-seekers to GPS monitoring bracelets involves a deprivation of liberty.<sup>174</sup> The process through which asylum-seekers are enrolled in GPS monitoring, however, provides little opportunity for the asylum-seeker to be heard regarding whether he or she should be monitored with an ankle bracelet. The custody determination and amelioration procedures currently in force are constitutionally deficient under the requirements of procedural due process.

The amount of process required by procedural due process and the form that it takes depend on the situation at hand.<sup>175</sup> There are three factors that the Court analyzes when evaluating how much process is necessary in a given situation<sup>176</sup>: The first factor is the private interest that the government action will affect.<sup>177</sup> Second, the Court looks at “the risk of an erroneous deprivation of” the private interest “through the procedures used, and the probable value . . . of additional or substitute procedural safeguards.”<sup>178</sup> The third factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute” procedures would generate.<sup>179</sup> Considering the importance of asylum-seekers’ liberty interests, the risk of the government improperly enrolling asylum-seekers in GPS monitoring, and the minimal government burden caused by affording sufficient procedures, procedural due process demands more protection than currently exists before enrolling asylum-seekers in the GPS monitoring component of ISAP.

---

<sup>173</sup> *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>174</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (describing freedom from physical restraint as part of the liberty protected by the Due Process Clause).

<sup>175</sup> *Mathews*, 424 U.S. at 334.

<sup>176</sup> *Id.* at 335. The three-factor analysis has been applied in cases involving potential deprivation of liberty. See *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011) (applying the three-factor analysis to determine whether an individual was provided sufficient procedural due process protection in a civil contempt proceeding where the individual was facing imprisonment for failure to pay child support).

<sup>177</sup> *Mathews*, 424 U.S. at 335.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1699*1. The Asylum-Seeker's Private Liberty Interest*

The private interest at stake with inadequate enrollment procedures for GPS monitoring is the liberty of asylum-seekers. Liberty is explicitly listed among the protections of the Due Process Clause and emphasized as fundamental by the Court.<sup>180</sup> In analyzing the significance of an individual's private interest, the Court has discussed and considered three elements: (1) degree of the deprivation, (2) length of a wrongful deprivation, and (3) hardship to the individual if erroneously deprived of the private interest.<sup>181</sup>

For asylum-seekers enrolled in ISAP, the degree of the liberty deprivation is serious. While travel restrictions, mandatory appointments, unannounced drop-ins, and a GPS ankle bracelet do not deprive an individual of liberty to the same extent as physical detention, the deprivation is still significant. In fact, the Court has required more rigorous procedures before the deprivation of certain government benefits than those which are required in anticipation of ISAP enrollment.<sup>182</sup>

Moving on to the second element, the length of a wrongful deprivation for those enrolled in ISAP who do not, in fact, pose a flight or danger risk, is impressive. For those able to seek amelioration of the terms of their release within the seven-day window and present a case in front of an immigration judge, the length of a wrongful deprivation may be short.<sup>183</sup> However, many asylum-seekers will not be able to seek review. For those individuals who do not pose a flight or danger risk, wrongful enrollment in the program could last until the conclusion of their removal proceedings—two years or even more.<sup>184</sup> While there are no publicly available data from the current administration regarding the amount of time asylum-seekers are enrolled in ISAP, data from 2015 cited an average of eighteen months for noncitizens enrolled in the program with GPS monitors.<sup>185</sup> The risk of experiencing a wrongful liberty deprivation for a substantial amount of time is especially strong for those who lack

---

<sup>180</sup> U.S. Const. amend. V; see *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *United States v. Salerno*, 481 U.S. 739, 750 (1987).

<sup>181</sup> *Mathews*, 424 U.S. at 341–42.

<sup>182</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (explaining that procedural due process necessitates an evidentiary hearing before the termination of welfare benefits).

<sup>183</sup> Assuming the scheduling of amelioration hearings is treated similarly to that of bond redetermination hearings, the noncitizen would likely be in front of the judge within a few days to a few weeks.

<sup>184</sup> GAO, *Improved Data Collection*, *supra* note 32, at 18.

<sup>185</sup> GAO, *Immigration*, *supra* note 12, at 12.

counsel and are, therefore, less likely to timely file for amelioration of their ISAP conditions or negotiate with ICE for release from GPS monitoring.

Turning to the third element, wrongful enrollment in GPS monitoring causes asylum-seekers considerable hardship. As already discussed, the GPS ankle bracelets raise health concerns ranging from discomfort and psychological distress to severe, adverse physical reactions.<sup>186</sup> Furthermore, travel restrictions, limitations on an asylum-seeker's ability to leave his or her home, and mandatory check-ins strain access to gainful employment and the ability to adequately care for children.<sup>187</sup> Such restrictions can also impede an asylum-seeker's ability to seek counsel, an indispensable aspect for obtaining immigration relief.<sup>188</sup> The negative impact that improper enrollment in ISAP GPS monitoring has on asylum-seekers' health and ability to temporarily reside—and pursue their legal claims to stay—in the United States constitutes sufficient hardship to warrant meaningful procedural protections.<sup>189</sup> The hardship element, combined with the degree of liberty deprivation and length of wrongful enrollment in ISAP GPS monitoring, demonstrates a meaningful private liberty interest of asylum-seekers worthy of adequate procedural protection.

## 2. *The Current Procedure*

When analyzing the second factor, the Court assesses the risk of erroneous deprivation embodied in the current procedure as well as the value of proposed substitute procedures. For ISAP's current enrollment procedures, the risk of erroneous deprivation is high while the value of proposed substitute procedures favors their incorporation. As this Subsection will explain, allowing asylum-seekers the opportunity to appear before an immigration judge at any time after their enrollment in ISAP to challenge their placement in GPS monitoring would provide an easily substitutable procedure with less risk of erroneous deprivation. If

---

<sup>186</sup> Letter from Wolfe-Roubatis, *supra* note 4, at 16.

<sup>187</sup> *Id.* at 6–14; IRC, *Freed but Not Free*, *supra* note 15, at 1; Fernandes, *supra* note 13.

<sup>188</sup> Nadadur, *supra* note 103, at 143.

<sup>189</sup> While this Note is not arguing that dignity concerns raised by the use of GPS monitoring bracelets directly implicate due process, some scholars argue that, from a due process theory perspective, dignity concerns can violate due process. See Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111, 114, 117 (1978) (explaining that due process as fairness requires that procedural due process account for dignity concerns).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1701

this solution were implemented by reinterpreting the word “custody” within 8 C.F.R. § 1236.1(d) to include participation in ISAP GPS monitoring, then ISAP would improve its function as an alternative to detention by focusing enrollment on individuals that are a flight or danger risk.<sup>190</sup>

*a. Risk of Erroneous Deprivation*

The power of the government to detain noncitizens, at its most basic level, is rooted in deportability.<sup>191</sup> If ICE cannot be sure that a noncitizen is deportable, then infringing on the noncitizen’s liberty interest is only justifiable by a risk of flight or danger.<sup>192</sup> Asylum-seekers are being enrolled in ISAP as a default, even though many of them are eventually granted asylum (or another form of immigration relief) and do not end up being deportable.<sup>193</sup> The risk of erroneous liberty deprivation through improper enrollment of asylum-seekers in ISAP GPS monitoring is high because the current procedures fail to adequately assess an asylum-seeker’s deportability, flight risk, or dangerousness. Procedures aimed at evaluating an asylum-seeker’s flight risk or level of dangerousness with an opportunity for the noncitizen to counter the government’s argument for GPS monitoring would increase the accuracy and value of enrollment procedures by addressing the core of the constitutional procedural due process concerns.

To evaluate the risk of erroneous deprivation inherent in the current procedure, the Court considers the safeguards in place to promote accuracy. In *Mathews v. Eldridge*, the Court focused on two safeguards in particular: whether the procedures reflect the nature of the relevant inquiry and whether an individual had the opportunity to respond to the

---

<sup>190</sup> This solution would also improve ISAP’s function as an alternative to detention because this interpretation of custody would allow certain individuals subjected to statutorily mandated detention to be enrolled in ISAP with GPS monitors. Since the word “custody” is used in the statutory provision that governs mandatory detention of criminal aliens, a broad interpretation of “custody” as inclusive of GPS monitoring would allow for the enrollment of aliens detained for criminal reasons in ISAP’s GPS monitoring while abiding by the statutory requirements of the INA. See INA § 236(c), 8 U.S.C. § 1226(c) (2012) (stating that “[t]he Attorney General shall take into *custody* any alien” that is inadmissible or deportable for certain criminal reasons (emphasis added)).

<sup>191</sup> See *Demore v. Kim*, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring).

<sup>192</sup> *Id.* at 532.

<sup>193</sup> Letter from Wolfe-Roubatis, *supra* note 4, at 3–5.

government's arguments.<sup>194</sup> For asylum-seekers enrolled in GPS monitoring, both of these safeguards are inadequate and contribute to a high risk of erroneous deprivation. The nature of the inquiry demands more process than is currently afforded, and asylum-seekers are not being provided a meaningful, realizable opportunity to respond to the government's reasons for their placement in GPS monitoring.

Analyzing the nature of the relevant inquiry involves looking at the type of evidence required to support a decision to enroll an asylum-seeker in GPS monitoring.<sup>195</sup> For the purposes of ISAP, the type of evidence required is that which would justify a finding of flight risk or dangerousness.<sup>196</sup> The current enrollment process as it exists now does not provide an adequate opportunity for evidence to be presented of flight risk or dangerousness. The first step—a decision based on the discretion of an ICE officer to enroll the asylum-seeker in GPS monitoring—involves only the officer's assessment and the unstandardized use of the RCA.<sup>197</sup> ICE officers have not consistently followed the RCA or other guidelines for discerning whether an asylum-seeker presents a flight or danger risk.<sup>198</sup> Without a defined and enforceable requirement that ICE must find a risk of flight or danger in order to enroll an asylum-seeker in ISAP, whether or not an ICE officer attempts to gather evidence related to these two characteristics will remain ambiguous.

Even if ICE officers attempted to gather evidence related to flight risk or dangerousness from asylum-seekers during the initial custody determination, a different forum would be better suited for the type of evidence probative of the two relevant factors. To show lack of dangerousness, an asylum-seeker would need to present the absence of criminal history, and, for lack of flight risk, the asylum-seeker would need to demonstrate prior immigration history as well as ties to an area or relatives in the United States.<sup>199</sup> The custody determination process as it stands is not an adequate forum for proffering this type of evidence.

---

<sup>194</sup> 424 U.S. 319, 343–46 (1976); see also *Turner v. Rogers*, 564 U.S. 431, 447–48 (2011) (including the same two factors as part of recommended substitute procedures that would satisfy procedural due process).

<sup>195</sup> Cf. *Mathews*, 424 U.S. at 343–45, 347 (analyzing the type of evidence required to support a decision to withdraw disability benefit entitlements).

<sup>196</sup> *Demore*, 538 U.S. at 531 (Kennedy, J., concurring); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); GAO, *Improved Data Collection*, supra note 32, at 6.

<sup>197</sup> OIG, *Alternatives to Detention*, supra note 23, at 11.

<sup>198</sup> *Id.* at 11–12.

<sup>199</sup> See *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 94 (B.I.A. 2009).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1703

An asylum-seeker is unlikely to demonstrate the necessary evidence to properly inform the ICE officer of these qualities or the lack thereof before his or her custody determination is made. Asylum-seekers may experience communication barriers, such as the lack of adequate interpretation services, as well as general confusion about the purpose of the interaction, leaving them uncertain about their role in the process.<sup>200</sup> Properly determining the existence of a flight risk or potential dangerousness involves many elements, including assessing the veracity of the asylum-seeker, digging up official documents, and searching for corroborating evidence. Procedures similar to a hearing would provide a better opportunity to assess the type of evidence needed to prove flight risk or dangerousness.<sup>201</sup> Implementing a procedure similar to that of a hearing would provide an adequate opportunity to appropriately analyze the relevant evidence and would reduce the risk of erroneous deprivation as a result.

While it is true that asylum-seekers enrolled in ISAP can challenge their GPS ankle bracelets in front of an immigration judge—affording an opportunity for relevant evidence related to flight risk and dangerousness to be presented—many are stripped of the chance to do so because of the seven-day filing window.<sup>202</sup> Once the seven-day window has elapsed,

---

<sup>200</sup> See, e.g., Barron & Briones, *supra* note 3 (describing several stories of asylum-seeking women fitted with GPS monitoring bracelets through ISAP without immigration officials explaining to them what was occurring throughout the custody determination and enrollment processes and reporting that immigration officials required the individuals' signatures on documents that were not translated and which the asylum-seeking women, therefore, could not understand); see also U.S. Gov't Accountability Office, GAO-10-714, Department of Homeland Security: DHS Needs to Comprehensively Assess Its Foreign Language Needs and Capabilities and Identify Shortfalls 5, 7, 9 (2010) (explaining that "DHS has taken limited actions to assess its foreign language needs" and must do so in order to provide adequate translation and interpretation services to the non-English-speaking individuals it interacts with); IRC, *Freed but Not Free*, *supra* note 15, at 15 (describing inadequate translation services for non-English speakers enrolled in ISAP generally); Letter from Wolfe-Roubatis, *supra* note 4, at 21 (suggesting that ICE officers should have an obligation to ensure that asylum-seekers understand the information that the officer is conveying to them regarding their placement in ISAP, even if it involves securing translation services).

<sup>201</sup> Cf. *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (explaining that a welfare recipient must have the opportunity to present evidence orally before benefits are terminated).

<sup>202</sup> This is because asylum-seekers face myriad challenges in seeking counsel generally, which become greater barriers when asylum-seekers are given only seven days to overcome them. Such challenges can include an inability to speak English, lack of familiarity with the United States and its legal system, potentially low educational levels and socioeconomic status, lack of financial support or basic resources (such as a home, food, etc.), unfamiliarity with resources that exist (especially for those that are recent arrivals), and the shortage of

asylum-seekers are only left with the option to seek review from ICE—a procedural option that is opaquer than the initial custody determination process and lacks any system of standardized review.<sup>203</sup> Similar to the initial decision from an ICE officer, review from the agency—and possibly even the same officer that decided to initially enroll the individual in ISAP—fails to provide an adequate platform to properly inquire into an asylum-seeker’s flight or danger risk. The result of the current procedures is that asylum-seekers can be enrolled in ISAP GPS monitoring without the consideration of relevant, probative evidence that individuals may have in favor of their release without an ankle bracelet. Therefore, the nature of the inquiry necessary for enrollment in GPS monitoring demands a process that is better suited for the consideration of relevant evidence to individuals’ flight risk or dangerousness.

Current procedure is further prone to error because there is no opportunity for asylum-seekers to respond to ICE’s reasons for enrolling them in GPS monitoring. Only if an asylum-seeker is able to file for amelioration of the terms of his or her release within seven days and secure an appearance in front of an immigration judge, will he or she be able to confront the government’s arguments for his or her enrollment head-on. However, the complex process for an asylum-seeker in ISAP to file for amelioration of his or her terms of release within the seven days diminishes the probability he or she realistically will get such a chance.<sup>204</sup>

---

nonprofit or low-cost immigration practitioners in the United States, especially given the demands of the current political climate. See, e.g., Balaban, *supra* note 58 (describing, as an example of the difficulty asylum-seekers face when trying to acquire counsel, the story of an asylum-seeker who was released from ICE custody with a GPS monitoring bracelet and has been unsuccessful at finding an attorney for the entire time she has been in the United States (over a year) due to barriers such as her inability to speak English, her lack of financial resources and familiarity with the United States, and the shortage of low-cost immigration legal services providers in the United States); Letter from Wolfe-Roubatis, *supra* note 4, at 5 (“Asylum seekers are often indigent . . .”). It is also unclear whether asylum-seekers are notified about this seven-day window. Paperwork given to asylum-seekers upon enrollment in ISAP does not include any information about the seven-day limit on filing for amelioration of the conditions of release. See Paperwork from BI Inc., *supra* note 49 (containing no mention of a seven-day window); U.S. Imm. & Customs Enf’t, Order of Release on Recognizance/Supervision – Addendum (July 15, 2018) (containing no mention of a seven-day window) (on file with the Virginia Law Review Association); IRC, *Freed but Not Free*, *supra* note 15, at 14.

<sup>203</sup> See Letter from Wolfe-Roubatis, *supra* note 4, at 14–15 (describing the difficulty attorneys face in trying to negotiate with ICE for clients’ release from ISAP GPS monitoring and the lack of clear standards surrounding the process).

<sup>204</sup> See, e.g., Balaban, *supra* note 58 (“[T]he asylum process is extremely complex and confusing.”); Letter from Wolfe-Roubatis, *supra* note 4, at 5 (“[M]any of the things that

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1705

Those that are unable to obtain an appearance in front of an immigration judge are never provided with a justification for their enrollment in GPS monitoring.<sup>205</sup> As a result, a typical asylum-seeker in GPS monitoring is still unaware of the reasons justifying his or her placement in ISAP at the point when they would advocate for removal of the ankle bracelet by directly negotiating with ICE.<sup>206</sup> Under the current procedure, most asylum-seekers are unlikely to get the opportunity to directly challenge the accuracy of the government's position on their flight risk or dangerousness.

*b. Estimated Value of Substitute Procedures*

The current procedures involve a significant risk of error and could be greatly improved by eliminating the seven-day window to seek amelioration in front of an immigration judge. If asylum-seekers were able to challenge their placement in GPS monitoring in immigration court at *any time*, the enrollment process would provide a genuine opportunity for relief from an erroneous deprivation of liberty.<sup>207</sup> This amendment to the current procedures would improve both of the safeguards explored by the Court in *Mathews*.<sup>208</sup> Immigration court is a better forum to explore evidence surrounding flight risk and dangerousness and presents a guaranteed opportunity to confront and respond to ICE's reasons for ISAP

---

asylum seekers are asked to do for de-escalation are difficult and possibly legally prejudicial given their situations.”).

<sup>205</sup> The paperwork given to noncitizens during their ISAP enrollment process does not include any justification for their enrollment. See Paperwork from BI Inc., *supra* note 49; U.S. Imm. & Customs Enf't, *supra* note 202.

<sup>206</sup> In a letter to the Officer of Civil Rights & Civil Liberties of DHS and the Inspector General of DHS, legal services providers expressed frustration at their inability to know why their asylum-seeking clients had been enrolled in ISAP GPS monitoring and how to effectively advocate for their clients' release from the program as a result. Letter from Wolfe-Roubatis, *supra* note 4, at 5. If attorneys are “forced to guess” as to how the ISAP selection process works or how to get an ankle bracelet removed as a result of these opaque enrollment processes, then unrepresented asylum-seekers are similarly left in the dark. *Id.*

<sup>207</sup> See, e.g., *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 95 (B.I.A. 2009) (considering whether the noncitizen's enrollment in GPS monitoring was appropriate, but only because the noncitizen filed within the appropriate window).

<sup>208</sup> In addition to the safeguards enumerated in *Mathews v. Eldridge*, the Court has mentioned other procedural safeguards in the context of preventive detention that would also be afforded to asylum-seekers with an immigration court appearance. These factors include the opportunity to acquire counsel, an explanation of the reasons for continued enrollment or release, and decision-making from a neutral party based on an assigned burden of proof and specific factors. *United States v. Salerno*, 481 U.S. 739, 750–52 (1987).

enrollment. The increased accuracy afforded by providing asylum-seekers the opportunity to seek relief from GPS monitoring through an appearance in front of an immigration judge at any time enhances the overall fairness of enrollment and would properly ensure procedural due process protection.

Allowing for review from an immigration judge at any time could also provide an opportunity to help reshape ISAP as an alternative to detention for certain high-risk individuals. The most efficient way to provide for immigration judge review at any time would be to revise the meaning of “custody” within 8 C.F.R. § 1236.1(d) so that it contains GPS monitoring under ISAP as part of its definition.<sup>209</sup> Revising the meaning of custody in the Regulation to be synonymous with custody as used in the context of habeas petitions would enable criminal noncitizens subjected to mandatory detention to be placed in ISAP instead of physical detention.<sup>210</sup> If “custody” under 8 C.F.R. § 1236.1(d) were changed to refer to the same degree of government restraint as custody for habeas purposes, ISAP would be able to better fulfill its role as a true alternative to detention. Therefore, these substitute procedures prove valuable for asylum-seekers and would better allocate the government’s detention resources.

### *3. The Governmental Burden of Enhancing Current Procedure*

The governmental burden of affording asylum-seekers the opportunity to seek review from an immigration judge at any time during their enrollment in GPS monitoring is measured by the increased fiscal cost of providing more procedure and the impact on limited administrative resources.<sup>211</sup> It is likely that providing a meaningful opportunity for review in immigration court would create new costs, such as those associated with preparation by government counsel, and increase

---

<sup>209</sup> Revising the BIA’s interpretation of custody is feasible as a matter of statutory interpretation. See *Matter of Aguilar-Aquino*, 24 I. & N. Dec. 747, 750–52 (B.I.A. 2009) (discussing how the INA and the corresponding regulations are completely silent as to the meaning of custody and how the plain meaning of the word can be broader than physical detention). Of course, another option for changing the meaning of custody within the Regulation would be for DHS to modify the Regulation itself or to promulgate a rule clarifying the definition of custody within the Regulation.

<sup>210</sup> See INA § 236(c), 8 U.S.C. § 1226(c) (2012) (stating “[t]he Attorney General shall take into *custody* any alien” that is inadmissible or deportable for certain criminal reasons (emphasis added)).

<sup>211</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 347–48 (1976).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1707

administrative burdens by requiring the resources of an immigration judge, including their courtroom and staff.

When considering potential opportunities for increased cost, it is important to acknowledge the overall impact on resource allocation and the net cost at the system level. In the case of erroneously enrolling certain asylum-seekers in GPS monitoring, affording the chance for review in immigration court costs money. With high risks of erroneous enrollment and operation costs that accumulate every day from the services provided through ISAP, however, the overall cost to ICE might decrease with increased opportunities for immigration court review. Daily costs of ISAP average around \$10.55 per enrollee, and the amount of time asylum-seekers are enrolled in the program is increasing.<sup>212</sup> Adequate opportunities for the review of flight risk and dangerousness criteria could avoid the excessive costs of erroneously monitoring asylum-seekers that are low-risk and, therefore, not ideal candidates for ISAP ankle bracelets.

By reducing the costs from excessive GPS monitoring of low-risk asylum-seekers, immigration court review would also free up resources within ISAP to dedicate to high-risk noncitizens that pose a threat of flight or danger. As an alternative to detention, ISAP has the potential to reduce the overall costs of detention if properly implemented to remove certain noncitizens from physical detention into GPS monitoring. If immigration judges were to act as a backstop to prevent low-risk asylum-seekers from enrollment in GPS monitoring, resources could be better allocated to noncitizens that are high-risk. This would potentially ease the financial burden of physical detention by releasing some noncitizen candidates currently in detention into less expensive GPS monitoring.

Increased opportunity for appearances in immigration court may reduce overall government cost and improve resource allocation, but such a change would also add to the already extensive caseloads of immigration judges. Considering the immense backlogs in the immigration courts today,<sup>213</sup> increasing the administrative burden on immigration judges is a cause for concern. The administrative burden, however, may lessen over time. With immigration court review available to asylum-seekers enrolled in GPS monitoring, the heightened procedural

---

<sup>212</sup> GAO, Improved Data Collection, *supra* note 32, at 13, 18.

<sup>213</sup> Molly O'Toole, Trump Plan Fails to Cut Immigration Court Backlog, as Caseload Soars More than 26%, L.A. Times (Feb. 21, 2019, 12:45 PM), <https://www.latimes.com/politics/la-na-pol-immigration-court-backlog-worsens-20190221-story.html> [<https://perma.cc/W4ZK-AWYA>].

safeguards would likely cause an adaptive response within ICE. As the immigration judges provide feedback on ICE's enrollment decisions through case-by-case review, ICE officers will be able to better tailor initial enrollment to noncitizens that appear to be ideal GPS monitoring candidates under the flight risk or danger criteria imposed by the court. Therefore, over time, the administrative burden on the immigration courts would likely lessen.

#### *4. Analysis of the Three Factors*

Considering the three factors, procedural due process demands more procedure than is currently afforded to asylum-seekers enrolled in GPS monitoring through ISAP. Because of the fundamental importance of liberty and the high risk of erroneous deprivations under the current procedures, implementing the substitute process with opportunity for appearance before an immigration judge at any time would increase the quality of required safeguards and satisfy procedural due process. Providing asylum-seekers with the opportunity to seek review in immigration court would also potentially reduce overall detention costs of the government. While it is true that affording more procedure will contribute some additional administrative burden, necessary procedural due process protections should not be avoided on that basis alone.<sup>214</sup> Asylum-seekers have the procedural due process right to an opportunity to be heard that is tailored to their "capacities and circumstances."<sup>215</sup> Appearance in front of an immigration judge with the protections afforded by immigration court would afford such a constitutionally adequate opportunity.

#### *C. ISAP Enrollment in GPS Monitoring Violates Fundamental Fairness*

Aspects of the current enrollment process for ISAP GPS monitoring violate due process by contravening fundamental fairness. The fundamental fairness component of due process requires the absence of conduct which offends the community's sense of fair play<sup>216</sup> and the

---

<sup>214</sup> *Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. . . . [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.").

<sup>215</sup> *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970).

<sup>216</sup> *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Rochin v. California*, 342 U.S. 165, 172–73 (1952); *Roberts v. Maine*, 48 F.3d 1287, 1292 (1st Cir. 1995).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1709

presence of certain procedures that are essential in a free society when individual liberty is at stake.<sup>217</sup> Fundamental fairness prohibits the government from engaging in certain conduct that is outrageous or behavior which shocks the collective conscience during the decision-making process regarding an individual's liberty.<sup>218</sup>

The requirements of fundamental fairness are determined from the perspective of society.<sup>219</sup> In recent years, fundamental fairness surrounding procedural protections provided to noncitizens in removal proceedings has strengthened.<sup>220</sup> Considering this shift, fundamental fairness demands more than what the current ISAP enrollment process entails. Specifically, ISAP enrollment violates the requirement of fundamental fairness by posing as a voluntary program when participation in ISAP GPS monitoring is not an individual asylum-seeker's choice. The illusion of a voluntary program is fundamentally unfair because it allows ISAP officers, as agents of ICE, to shield ICE from due process objections through the deception of participant consent. These violations of fundamental fairness contribute to excessive use of GPS monitoring on low-risk asylum-seekers as they streamline the enrollment process by providing a smokescreen for the avoidance of procedures.

Because ISAP GPS enrollment appears on paper as an agreement to "voluntarily" participate,<sup>221</sup> individual ICE officers are relieved from needing to specify why any particular individual is enrolled in the program. To be more specific, if the individual consents to participation in the program, then there is no need to determine that they are a flight or danger risk. Framing enrollment as voluntary can strip asylum-seekers of the ability to demand more procedural safeguards than those currently in place because the paper trail reflects a waiver of any such protections. Staging an appearance of consent when none exists in order to avoid providing procedural safeguards violates societal norms surrounding fair play. This is especially apparent when looking at related principles

---

<sup>217</sup> Ronald Jay Allen et al., *Comprehensive Criminal Procedure* 77 (4th ed. 2016).

<sup>218</sup> *Rochin*, 342 U.S. at 172; Allen et al., *supra* note 217, at 77.

<sup>219</sup> *Rochin*, 342 U.S. at 170–72; Duncan Fulton, Comment, *Emergence of a Deportation Gideon?: The Impact of Padilla v. Kentucky on Right to Counsel Jurisprudence*, 86 Tul. L. Rev. 219, 235 (2011).

<sup>220</sup> Fulton, *supra* note 219, at 236–37.

<sup>221</sup> Paperwork from BI Inc., *supra* note 49; Barron & Briones, *supra* note 3.

prohibiting this behavior in the agreement process during both contract formation and plea bargaining.

*1. Framing ISAP as a Voluntary Program Enables Procedural Deficiencies*

To begin, enrollment in ISAP is not voluntary for asylum-seekers. ICE has the statutory authority to detain an asylum-seeker or to release the individual with certain conditions.<sup>222</sup> Participation in ISAP is a condition of ICE's discretionary release.<sup>223</sup> If an asylum-seeker were to refuse to participate in ISAP, an ICE officer could enroll them regardless.<sup>224</sup> ICE has even stated in a publicly available policy memorandum that ISAP is not a program "requiring an alien to volunteer to participate."<sup>225</sup>

Despite the fact that enrollment in ISAP does not require an asylum-seeker's consent, the document that asylum-seekers sign before receiving their GPS monitors states that their participation in the program is voluntary.<sup>226</sup> Depicting ISAP enrollment as a voluntary decision when it is not truly voluntary creates problems under fundamental fairness because the guise of participant consent can be used to evade procedural protections necessary when liberty interests are at stake. When considering whether to release an asylum-seeker from detention and what, if any, conditions to impose, ICE officers are supposed to assess the individual's flight risk or dangerousness.<sup>227</sup> If an asylum-seeker appears to have opted into ISAP through an agreement stating that his or her participation is voluntary, however, the enrollment of that individual is less likely to be scrutinized.<sup>228</sup> The appearance of consent can deter legal challenges where they might otherwise be blatantly warranted. Evading procedural protections also makes the enrollment process faster and

---

<sup>222</sup> INA § 236(a), 8 U.S.C. § 1226(a) (2012).

<sup>223</sup> GAO, Improved Data Collection, *supra* note 32, at 6–7.

<sup>224</sup> As already discussed, however, this should not be the case unless the individual poses a flight risk or risk for dangerousness identified through an individualized and meaningful determination. See *supra* Section III.A.

<sup>225</sup> Wesley J. Lee, U.S. Imm. & Customs Enft., Alternatives to Detention Programs (ATDP) Enrollment Guidance 1 (June 28, 2005) (on file with the Virginia Law Review Association).

<sup>226</sup> Paperwork from BI Inc., *supra* note 49.

<sup>227</sup> GAO, Improved Data Collection, *supra* note 32, at 6.

<sup>228</sup> Consent has long been treated as an exception to many constitutionally required procedures such as the probable cause and warrant requirements of the Fourth Amendment. See *United States v. Drayton*, 536 U.S. 194, 201 (2002); *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *United States v. Matlock*, 415 U.S. 164, 170 (1974).

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1711

cheaper from the government's perspective, facilitating the increase of low-risk asylum-seekers subjected to GPS monitoring.

*2. Fundamental Fairness Would Not Permit ISAP Participation to Be Voluntary*

Not only does “voluntary” ISAP enrollment pose problems under fundamental fairness by circumventing procedural protections, the concept of voluntary participation in ISAP violates the societal sense of fair play due to its predatory nature. The use of supposed asylum-seeker consent as a tool to avoid providing adequate procedures is particularly deceptive because voluntary participation in ISAP is not possible within the current enrollment structure. Even if ICE did not maintain the sole legal authority to enroll noncitizens in ISAP, the power dynamics at play surrounding enrollment would prohibit asylum-seekers from enrolling voluntarily in any meaningful sense. When looking to other sources of law as a proxy for societal expectations, namely, the law surrounding contracts and plea bargaining, it is apparent that “voluntary” ISAP enrollment fails to meet the standards required by fundamental fairness in order to be truly voluntary.

Enrolling asylum-seekers “voluntarily” in ISAP would violate fundamental fairness because it would deny asylum-seekers the typical protections afforded in similar legal scenarios involving binding agreements. Starting with the societal norms surrounding contract formation, if the agreement to participate in ISAP were to be viewed as a contract,<sup>229</sup> it would be unenforceable on unconscionability grounds. The agreement between the ISAP officer and the individual ISAP enrollee reads like a contract in that it lists the terms of “voluntary” enrollment, including provisions like noncitizen responsibility for keeping the GPS bracelet charged.<sup>230</sup> The nature of the circumstances surrounding the agreement, however, indicates that enrollment on behalf of the asylum-seeker is not a meaningful choice because the asylum-seeker has no bargaining power, making the agreement unconscionable and, therefore, unenforceable.<sup>231</sup> If contract law is used as a proxy for societal expectations under fundamental fairness, then ISAP voluntary enrollment

---

<sup>229</sup> This is not the first time the U.S. government and noncitizens have been compared to two contracting parties. See Nadadur, *supra* note 103, at 164.

<sup>230</sup> Paperwork from BI Inc., *supra* note 49.

<sup>231</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

would require more in the way of procedural protection before an asylum-seeker could bargain away his or her liberty to an agent of the government.

Certain requirements of the plea-bargaining process can also help demonstrate how “voluntary” enrollment in ISAP is procedurally deficient under fundamental fairness standards. An agreement to participate in ISAP is similar to a plea bargain in the sense that plea bargaining involves an agreement with the government surrounding a liberty deprivation. When looking to plea bargaining as an example, “voluntary” enrollment in ISAP lacks the protections expected by society in agreements with the government surrounding individual liberty. In particular, guilty pleas must be voluntary and intelligent.<sup>232</sup> While enrollment in ISAP likely would satisfy the Supreme Court’s standard for voluntariness within the plea-bargaining context,<sup>233</sup> it would fail the requirement that such an agreement must be intelligent.

---

<sup>232</sup> *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

<sup>233</sup> In the plea-bargaining context, an agreement is not considered voluntary if induced by threats or coercion. *Machibroda v. United States*, 368 U.S. 487, 493 (1962). If “threats” and “coercion” were taken at their plain meaning, ISAP enrollment would not likely be categorized as voluntary according to the plea-bargaining definition, because asylum-seekers are told that they must either sign the document indicating their “voluntary” participation or they will be returned back to physical detention. See *Barron & Briones*, *supra* note 3. However, the Supreme Court held in *Brady v. United States* that a guilty plea is considered voluntary even if made to avoid the possibility of the death penalty. 397 U.S. 742, 755 (1970). Because the possibility of receiving the death penalty is considered neither a threat nor coercion under the Supreme Court’s interpretation of the voluntariness standard, it is unlikely that ISAP enrollment, as a choice made to avoid returning to immigration detention, would be considered involuntary by plea-bargaining standards. This Note is not arguing that the Supreme Court’s interpretation of “voluntary” in the plea-bargaining context is ideal nor that it should be the standard by which ISAP enrollment is analyzed when considering an overall fundamental fairness inquiry. In fact, the Supreme Court’s interpretation of voluntariness in the plea-bargaining context has been criticized for inadequately accounting for the substantive pressure or coercion defendants experience from the disproportionality between sentencing offered in plea bargaining and sentencing potentially faced at trial. See Josh Bowers, *Plea Bargaining’s Baselines*, 57 *Wm. & Mary L. Rev.* 1083, 1086, 1089 (2016) (arguing that voluntariness should be viewed through a proportionality baseline that focuses on whether the deal offered is so disproportionate to the sentence that it coerces the defendant into taking the deal, rather than the alternative, legalistic approach). If the legalistic baseline were applied to the asylum-seeker’s purported choice of whether to enroll in ISAP or return to detention, then such a choice to enroll would be considered voluntary because it would be within ICE’s legal power to return the asylum-seeker to detention. If the inquiry, like that of the proportionality baseline, focused on the substantive pressure asylum-seekers face from the option of returning to detention, however, then such a “choice” would not likely be considered voluntary.

2019] *Unshackling the Due Process Rights of Asylum-Seekers* 1713

If the decision to enroll in ISAP were truly of an asylum-seeker's own free will under plea-bargaining standards, then it would have to be intelligent.<sup>234</sup> An intelligent decision to accept a plea typically indicates that such a decision was made after the defendant received advice from competent counsel, knew the charges against him or her, and understood the consequences of his or her acceptance.<sup>235</sup> In the case of the asylum-seeker, enrollment in ISAP under the current structure is not intelligent because it lacks each of these safeguards. Asylum-seekers have no right to government appointed counsel and often lack counsel as a result.<sup>236</sup> Explanations about why asylum-seekers are being enrolled in ISAP and what participation entails are inadequate or nonexistent, and there is minimal effort to ensure that enrollees understand what is happening during their enrollment process.<sup>237</sup> For instance, the enrollment process does not afford additional protections or procedures to accommodate individuals that are illiterate or incapable of understanding due to other forms of incompetence.<sup>238</sup> This is especially problematic when the evidence of "voluntary" participation is a single signed agreement.<sup>239</sup>

Asylum-seekers are further incapable of making an intelligent decision to participate in ISAP due to language barriers. For example, ICE only provides documents stating the conditions of ISAP participation in English.<sup>240</sup> Proper translation and interpretation are essential for non-English-speaking individuals to understand what is happening.<sup>241</sup> Without

---

<sup>234</sup> *Boykin*, 395 U.S. at 242.

<sup>235</sup> *Brady*, 397 U.S. at 756.

<sup>236</sup> Nadadur, *supra* note 103, at 143; see *supra* note 202 and accompanying text.

<sup>237</sup> See Letter from Wolfe-Roubatis, *supra* note 4, at 21–22 (suggesting policy changes to establish and apply clear criteria for enrollment of asylum-seekers in ISAP); see also *supra* note 200 (citing examples illustrating how ICE does not explain to many asylum-seekers what is going on).

<sup>238</sup> See Barron & Briones, *supra* note 3 (describing how ICE officers have asylum-seekers sign documents even when the asylum-seekers do not understand what the documents say); Letter from Wolfe-Roubatis, *supra* note 4, at 21 (stating that ICE officers should have an obligation to ensure that asylum-seekers understand the information that the officer is conveying to them regarding their placement in ISAP, implying that ICE officers currently do not ensure that asylum-seekers understand).

<sup>239</sup> Paperwork from BI Inc., *supra* note 49.

<sup>240</sup> U.S. Imm. & Customs Enf't, *supra* note 202.

<sup>241</sup> This is why adequate interpretation services are considered a fundamental aspect of removal proceedings for non-English-speaking noncitizens. See *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) (stating that "[d]ue process requires that an applicant be given competent translation services" if the noncitizen does not speak English); Exec. Office for Imm. Review, *Immigration Court Practice Manual* 70 (2016); Barron & Briones, *supra* note 3 (explaining

adequate translation and interpretation throughout the enrollment process, a decision to participate in ISAP could never be intelligent under the plea-bargaining standards as it would not be understood. While it is true that enrollment in ISAP is different from plea bargaining in that criminal defendants are afforded many more constitutional protections than noncitizens in ICE custody, fundamental fairness would demand a much higher level of comprehension surrounding the decision to “voluntarily” enroll in ISAP if the asylum-seeker really were exercising a choice in the matter. Looking to plea-bargaining norms as a reference for societal expectations, swindling asylum-seekers out of liberty by having them sign agreements they cannot understand certainly falls short of procedures which would be considered fair play and acceptable under fundamental fairness standards.

To overcome the fundamental fairness deficiencies, ICE should cease promoting a false image of voluntariness for participation in ISAP. Enrollment in ISAP under the current legal framework is not voluntary, and the circumstances surrounding enrollment would never allow for participation to be voluntary in a manner consistent with society’s sense of fair play. In order to abide by fundamental fairness requirements, ICE should coordinate with BI to eliminate any language from ISAP forms stating that participation is voluntary. Erasing the improper label of ISAP as a voluntary program would reduce confusion surrounding which procedures should be utilized by ICE before enrollment in the program and accurately reflect the legal authority that ICE has to demand participation in ISAP.<sup>242</sup> Such changes would also slow excessive asylum-seeker enrollments in GPS monitoring by eliminating a method to bypass procedural protections. Combined with this Note’s suggested changes to adequately protect substantive due process and procedural due process, abiding by fundamental fairness requirements would curb the rates at which low-risk asylum-seekers are arbitrarily and improperly deprived of liberty through ISAP GPS monitoring.

---

that, without interpreters, asylum-speakers often sign documents without knowing what they say).

<sup>242</sup> ICE should only be able to demand participation for those that have been deemed a flight or danger risk through an individualized determination. See *supra* Section III.A.

## IV. CONCLUSION

ISAP GPS monitoring is failing as an alternative to detention. Instead of removing high-risk individuals from detention, the program is casting an ever-wider net of government custody and improperly subjecting low-risk asylum-seekers to invasive and inhumane requirements as a result. Constitutionally deficient procedures throughout ISAP enrollment have allowed for this easy expansion of GPS monitoring at the expense of asylum-seekers' liberty. In order to implement ISAP as a true alternative to detention, the constitutional defects in the enrollment procedure must be properly addressed.

As substantive due process demands, asylum-seekers should not be enrolled in GPS monitoring without an individualized finding of flight risk or dangerousness. This individualized finding should occur at the custody determination level with the required use of an enhanced and reliable RCA. For asylum-seekers that wish to challenge their enrollment in GPS monitoring, appearance before an immigration judge for amelioration of their release conditions should be available at any time after they are placed in the program. The best way in which to address this procedural due process problem is to revise the meaning of "custody" within 8 C.F.R. § 1236.1(d) so that it contains GPS monitoring under ISAP as part of its definition and facilitates ISAP functioning as a true alternative to detention.

In striving to achieve the role of an alternative to detention, ISAP should also abide by the requirements of fundamental fairness and eliminate any notion that participation in the program is voluntary. The purpose of alternatives to detention is not to recruit low-risk noncitizens into custody when they otherwise would not be subjected to government confinement under detention mandates and norms. The illusion of voluntariness is fundamentally unfair as it creates confusion surrounding the program and participants' rights. To function as an effective alternative to detention, ISAP must contribute to a more efficient allocation of resources by removing noncitizens from detention instead of adding to the overall number of noncitizens subjected to government intrusion on physical liberty.

The excessive enrollment of low-risk asylum-seekers in GPS monitoring is a drain on taxpayer dollars, an inhumane burden on trauma-surviving individuals, and a distraction from the true purpose of alternative-to-detention programs. GPS monitoring should be reserved for high-risk individuals that are prime candidates for detention in order to

ease the overall burden of the detention system. Low-risk asylum-seekers are better suited for less invasive supervision tactics, such as those utilized in the original alternative to detention program, AAP. Congress, the BIA, DHS, or ICE itself must correct ISAP's course and cure these procedural deficiencies. By providing asylum-seekers with adequate due process protections during enrollment in GPS monitoring, ISAP can be reset on the proper track to achieving its initial objectives in a humane and efficient manner.