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## **THE CRIMINAL ALIEN PROGRAM (CAP) Immigration Enforcement in Prisons and Jails**

The Criminal Alien Program (CAP) is an expansive immigration enforcement program that leads to the initiation of removal proceedings in many cases. While CAP has existed in one form or another for decades, there is still much to be learned about the program, how it is organized, and how it works. What is known is that CAP extends to every area of the country and intersects with most state and local law enforcement agencies.

For years, the CAP program has operated with little public attention and many of its elements have only recently come to light following FOIA litigation against Immigration and Customs Enforcement (ICE)<sup>1</sup>. The information obtained through the lawsuit regarding CAP's current organization and staffing suggests CAP is not a single program, but a loose-knit group of several different programs operating within ICE. Other than a small number of staff responsible for the administration of CAP at ICE headquarters, there is no dedicated CAP staff. Rather, ICE pulls personnel and resources from across the agency to perform CAP-related functions.

The ICE declarations and deposition also explain how CAP functions within prisons and jails. There appears to be little consistency in, and little or no policy governing, how CAP cooperates with state and local law enforcement agencies in different regions and in how CAP interacts with detainees in different facilities. Instead, CAP appears to function as an ad hoc set of activities that operate differently across the country and across penal institutions, raising questions about the adequacy of oversight, training, and accountability of the personnel implementing CAP.

This information confirms that there is still much about CAP that remains unknown or unclear. Given the breadth of CAP, the centrality of its role in immigration enforcement, and its large impact on the immigrant community, it is critical that ICE clarify how CAP operates.

### **What is the Criminal Alien Program (CAP)?**

The core goal of CAP is the identification of allegedly removable noncitizens who are incarcerated in jails and prisons, and the initiation of removal proceedings against them. CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout

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<sup>1</sup> Two declarations submitted by U.S. Immigration and Customs Enforcement (ICE) in response to a Freedom of Information Act (FOIA) lawsuit filed by the American Immigration Council and the Connecticut chapter of the American Immigration Lawyers Association, as well as the sworn deposition of CAP Unit Chief Jamison Matuszewski taken in the context of the litigation, have shed additional light on CAP. See the Legal Action Center's webpage, "[The Criminal Alien Program \(CAP\).](#)" for access to the declarations and deposition and more information about the lawsuit.

the country. It is one of several so-called “jail status check” programs intended to screen individuals in federal, state, or local prisons and jails for removability. While other such jail status check programs, like Secure Communities, have garnered much more attention, CAP is by far the oldest and largest such interface between the criminal justice system and federal immigration authorities. CAP also encompasses other activities, including the investigation and arrest of nondetained noncitizens.

CAP and its predecessors were created in response to the 1986 Immigration Reform and Control Act (IRCA). IRCA required the Attorney General, “in the case of an alien who is convicted of an offense which makes the alien subject to deportation...[to] begin any deportation proceeding as expeditiously as possible after the date of the conviction.”<sup>1</sup> In 1988, the Alien Criminal Apprehension Program (ACAP)<sup>2</sup> and the Institutional Removal Program (IRP)<sup>3</sup> were created. In 2006, ICE consolidated ACAP and IRP into CAP.

CAP is now listed as one of fourteen federal/local law enforcement programs under the umbrella of ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security).<sup>4</sup>

### **What other programs make up CAP?**

Beyond the core function of screening and interviewing individuals in prisons and jails, CAP includes several other components. Four components are implemented nationwide and one, the Law Enforcement Agency Response Unit (LEAR), is a pilot program functioning only in Arizona. The sub-programs that make up CAP are:

- The **Violent Criminal Alien Section (VCAS)** investigates and prosecutes violations of the criminal provisions of the Immigration and Nationality Act in conjunction with the U.S. Attorney’s Office.<sup>5</sup> According to ICE, between 2008 and the present, VCAS has facilitated the arrests of approximately 36,000 persons.<sup>6</sup>
- The **Law Enforcement Agency Response Unit (LEAR)** is a pilot program that was established in Phoenix, Arizona to provide 24/7 responses to calls for assistance from state and local law enforcement agencies.<sup>7</sup> LEAR’s response team of around 16 people<sup>8</sup> conducts interviews to determine alienage and status, lodges detainers, makes arrests, and transports and processes individuals for removal.<sup>9</sup> LEAR also facilitates operations to disrupt human trafficking, smuggling, and transnational organized crime. According to ICE, since 2007, LEAR has led to the arrest of approximately 21,000 persons.<sup>10</sup>
- The **Rapid Repatriation of Eligible Custodial Aliens Accepted for Transfer (Rapid REPAT)** is a joint partnership with state correctional and parole agencies that releases nonviolent noncitizens who have been issued final orders of removal into ICE custody for immediate deportation. According to ICE, the effort is geared towards alleviating the demands of large prison populations by allowing ICE to deport a prisoner prior to the end of his or her sentence.<sup>11</sup> Since 2009, CAP has identified approximately 5,000 individuals through Rapid REPAT.<sup>12</sup>

- The **Deportation Enforcement and Processing Offenders by Remote Technology (DEPORT) Center** was created in 2006 as the centralized processing center for placing removable noncitizens detained by the Federal Bureau of Prisons into immigration proceedings, with the cooperation of local field offices. According to ICE, since 2009, CAP has encountered approximately 96,000 individuals at the DEPORT center.<sup>13</sup>
- **Joint Criminal Alien Removal Task Forces (JCART)** identifies, investigates, and arrests at-large “criminal aliens” convicted of drug trafficking offenses, crimes of violence, sex offenses, and other crimes. According to ICE, JCART also identifies and targets noncitizens involved in human trafficking, smuggling, and transnational organized crime for increased information collection. It combines the efforts and resources of CAP with those of other federal and local entities, such as probation and parole offices, the Bureau of Prisons, and local law enforcement agencies to arrest and investigate at-large criminals and conduct other special operations.<sup>14</sup>

### **Are all noncitizens identified by CAP “criminals”?**

DHS purports to focus its “jail status check” programs (including CAP and Secure Communities) on immigrants with serious criminal backgrounds. According to the CAP Unit Chief, however, individuals in jails or prisons may be identified by CAP when they only have pending charges, and will be included as CAP removals even if they are never convicted of a crime.<sup>15</sup> In fact, DHS statistics show that a large percentage of immigrants apprehended under CAP are not criminals at all. An October 2009 DHS report found that 57 percent of immigrants identified through CAP in fiscal 2009 had no criminal convictions, up from 53 percent in fiscal 2008.<sup>16</sup> While DHS statistics show the percentage of removed noncitizens with a criminal conviction has increased in recent years, there is no specific data about those identified by CAP or the nature of their convictions.

### **How is CAP staffed?**

There are still questions surrounding the issue of how CAP is organized and staffed by ICE. However, new information provided by ICE sheds some light on the organizational structure of the program, highlighting a significant shift in the way CAP is staffed.

CAP is currently housed within the Criminal Alien Division of ICE Enforcement and Removal Operations (ERO). The Secure Communities and 287(g) enforcement programs are housed in the same division. CAP staff at ICE headquarters includes a Unit Chief, two Section Chiefs, and 10 staff officers who are solely assigned to carry out CAP functions.<sup>17</sup>

Initially, CAP functions in the field were performed by CAP teams of 10 employees, which consisted of several law enforcement officers, including Supervisory Detention and Deportation Officers, Deportation Officers, Immigration Enforcement Agents, and Enforcement Removal Assistants.<sup>18</sup> CAP teams were placed within ERO field offices based on a risk assessment database, which determined what resources were needed to screen the jails and prisons identified.<sup>19</sup>

By 2010, ICE had done away with the formal team structure, because in practice, CAP duties were being performed by ICE officers beyond those officially on the CAP team.<sup>20</sup> Now, ERO field office directors are free to use any of the approximately 7,854 ERO employees and any available resources to implement CAP.<sup>21</sup> According to ICE, “most ERO officers have, at one point in their career, been assigned to perform CAP operations as their primary responsibility.”<sup>22</sup>

The 13 staff members at headquarters are now the only specifically designated CAP officials, although in each field office one individual is designated as the CAP point-of-contact. Each of the 10 staff officers reviews day-to-day operations within the field offices in his or her geographic region by monitoring jail intake numbers, the number of federal prosecutions for any violation of the criminal code, and operational coordination within the program.<sup>23</sup> Staff officers generally receive information from the assistant field office directors, review statistical reports from the Law Enforcement Support Analysis Division, and review screenings within the CAP risk assessment tool.<sup>24</sup>

Notably, although “CAP officer” is no longer a meaningfully different designation from “ERO officer,” many ICE positions continue to be specifically funded as CAP officers.

### **How does CAP work within prisons and jails?**

There is no single model for how CAP functions within prisons and jails; there appears to be significant variation from one institution to another. New information from ICE leaves the impression that CAP is an ad hoc process that varies depending on the ICE staff and the institution in which it is operating.

Penal institutions that participate in CAP share information about their inmates with ICE and allow ICE agents to interview suspected removable immigrants. Federal correctional institutions report all self-identified foreign born inmates to DHS. State and local facilities voluntarily cooperate with DHS by providing ICE with a list of people in custody, whom ICE agents then interview to determine their removability.<sup>25</sup> Anecdotally, it appears that different state and local facilities share information with CAP in a range of ways, from sharing lists of all detainees to flagging certain detainees suspected of being noncitizens to simply granting CAP officers access to all detainees and facility records.

The operation of CAP varies among participants, with local law enforcement using a variety of methods for collaborating with ICE. For instance, some jurisdictions have ICE agents located in the jails, while others allow telephone or video conference access, rather than in-person interviews with ICE. Some counties give ICE agents 24/7 access to the jail, while other localities limit ICE agents’ access to certain hours or days of the week. Some local jurisdictions may report to ICE every day, while others report more infrequently.

### **What is a CAP “encounter”?**

Any contact between an individual and a CAP officer is called a CAP *encounter*. According to ICE, a CAP encounter is defined as “an interview or a screening.”<sup>26</sup> An interview is, at a minimum, a conversation that is documented, while a screening is a review of biographic and

biometric identifiers associated with the individual who has been encountered.”<sup>27</sup> CAP officers are required to identify themselves prior to an interview,<sup>28</sup> but may or may not be in uniform.<sup>29</sup> Since the elimination of the CAP team structure, any officer performing a CAP duty is considered a CAP officer for the purposes of that encounter.<sup>30</sup>

According to ICE, there is no typical CAP encounter, and there is no particular documentation that is created as a result of a CAP encounter. CAP encounters vary based on factors including the individual’s legal status, nationality, criminal history, length of time in the United States, place of encounter, and number of previous encounters. “Based on these factors, ICE determines the manner of processing and types of forms to use to initiate removal proceedings.”<sup>31</sup>

Although the most common type of CAP encounter is with someone found in a jail or prison, and subject to removal,<sup>32</sup> CAP officers also deal with individuals who are not presently incarcerated. CAP officers may conduct “at-large” interviews of such people on the basis of a notification that an individual left a facility without being identified or before it was determined that he or she was removable.<sup>33</sup>

After a CAP encounter in a jail or prison, ICE may place an immigration hold (known as a “detainer”) on an individual who is suspected of being removable. A detainer lets the jail officials know that ICE requests custody of an individual upon his or her release from local custody.<sup>34</sup> The detainer purports to authorize the local agency to detain the individual for an additional 48 hours (excluding weekends and holidays),<sup>35</sup> which means that when the noncitizen is set to be released (e.g., when criminal charges have been disposed of through a finding of guilt or innocence, when criminal charges have been dropped, when bail has been secured, or when a convicted individual has served his or her sentence), ICE agents have between two and five days to take custody of the individual. If ICE does not assume custody of the individual by that point, the individual must be released.<sup>36</sup>

### **What is the scope of CAP?**

CAP is an expansive program that includes far-reaching cooperation with state and local law enforcement agencies and approximately 171 ICE sub-offices, support centers, and response centers.<sup>37</sup> “Through CAP, ICE potentially could interact with every municipal, county, state, and federal facility in the country.”<sup>38</sup>

Currently, CAP screens inmates from more than 4,300 federal, state, and local jails on a daily basis. CAP boasts 100% screening of all self-proclaimed foreign-born nationals found within Bureau of Prisons (BOP) facilities and all state correctional institutions.<sup>39</sup> In FY 2012, according to the Criminal Alien Program Risk Assessment (CAPRA), 3,054 of 3,066 county jails (99.6%) received 100% screening.<sup>40</sup> Currently, BOP provides CAP with a list of self-reported foreign-born prisoners, in a process governed by individual agreements between BOP offices and CAP. State prisons and jails are not under any mandatory reporting requirements and provide biographical information about their prisoners to CAP voluntarily.<sup>41</sup>

ICE claims there were approximately 2.5 million “CAP encounters” from 2007 to approximately mid-2012.<sup>42</sup> According to ICE, in FY 2011 there were 701,473 “CAP encounters” resulting in 221,122 arrests.<sup>43</sup>

CAP is the program responsible for the largest number of immigrant apprehensions. In fact, 48% of all removable immigrants identified by ICE in FY 2009 were apprehended through CAP—more than the 287(g) program, Fugitive Operations, and the Office of Field Operations combined.<sup>44</sup> The number of charging documents issued by ICE through CAP has more than tripled since FY 2006. In FY 2006, ICE charged 67,580 noncitizens through CAP, a figure that more than doubled the following fiscal year to 164,296.<sup>45</sup> In FY 2008, CAP agents charged 221,085 noncitizens.<sup>46</sup> In FY 2010, ICE issued 223,217 charging documents,<sup>47</sup> and in FY 2011, ICE issued 212,744 charging documents through CAP.<sup>48</sup>

### **How does CAP intersect with Secure Communities?**

Under Secure Communities, the fingerprints of all persons arrested by state or local police and submitted to the FBI are automatically checked against the DHS immigration database. When there is a Secure Communities “hit,” a CAP officer may go to the prison or jail and conduct an interview with the individual to determine whether he or she is, in fact, removable. Even if there is no Secure Communities “hit,” CAP officers may still interview inmates who identify themselves or are identified by their custodians as foreign-born. Of course, CAP also operates independently of Secure Communities, with the goal of identifying and interviewing removable individuals in jails and prisons.

### **How does CAP prioritize “criminal aliens”?**

According to ICE, “CAP prioritizes the detention and arrest of criminal aliens by using a risk-based approach” that targets certain noncitizens for removal proceedings “based on their perceived threat to the community.”<sup>49</sup> However, there does not appear to be a standardized procedure for this risk-based approach. For instance, there is no CAP-specific approach – such as the three-level system used by the Secure Communities program – that prioritizes individuals based on ICE’s civil immigration enforcement priorities.<sup>50</sup>

### **Does CAP identify only undocumented immigrants?**

Contrary to public perception, CAP does not identify only undocumented immigrants. Lawful permanent residents and other lawfully present nonimmigrants may be deportable if they have been convicted of certain crimes. However, many noncitizens identified through CAP have not been convicted of any offense. Additionally, U.S. citizens may be falsely identified as removable by CAP.

### **What additional concerns does CAP raise?**

As with Secure Communities, CAP may give police officers an incentive to arrest individuals who appear to be foreign-born. During a traffic stop, for example, a police officer may arrest a person of Latino descent, rather than issue a citation, to allow a CAP officer to subsequently

investigate his or her immigration status. A study of arrest data in Irving, Texas, found that local police regularly arrested Latinos to check their immigration status through CAP.<sup>51</sup> According to another study, in Travis County, Texas, a majority of immigrants subjected to detainers were arrested for misdemeanors. In 2008, 58 percent of detainers were placed on those charged with misdemeanors—up from 38 percent in 2007 and 34 percent in 2006.<sup>52</sup>

Another concern with CAP is that collaboration with ICE will erode community trust in the police force. When local authorities are perceived to be collaborating with immigration enforcement agents, immigrants hesitate to contact police due to fears of deportation. As increasing numbers of immigrants come in contact with ICE after minor brushes with police, this fear becomes more acute. When a significant portion of the population does not cooperate with the police, the entire community is less safe.

Additionally, the lack of uniform policies may encourage abuse by personnel at prisons and jails, as well as ICE agents undertaking CAP activities. Because lists of foreign-born inmates are provided by prisons and jails, it is possible that facility personnel may racially profile their inmates by, for example, generating lists based on race or last name. Additionally, because there appear to be few policies governing the circumstances under which CAP interviews and screenings are conducted, some ICE agents may elicit admissions of foreign birth through non-voluntary, misleading, or coercive interrogations.

## Conclusion

Though less well known than Secure Communities and the 287(g) program, CAP remains the oldest and most extensive enforcement program managed by ICE. CAP officers have access to virtually every penal institution in the country, and the program has led to the initiation of hundreds of thousands of removal proceedings in recent years. Yet while the basic outlines of the program are known, many details about CAP remain unclear.

Despite what the name of the program may suggest, many noncitizens identified through CAP have not been convicted any of offense. Instead, they only have been charged with a crime, raising the likelihood that local police will make pretextual arrests and thereby diminish the effectiveness of community policing efforts.

## Endnotes

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<sup>1</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1252(i).

<sup>2</sup> ACAP was designed to identify removable noncitizens who were in federal, state or local custody for short periods of time before being released to ICE. See [United States Department of Homeland Security, Criminal Alien Program \(CAP\) Draft Transition Plan](#) (Feb. 2006), p. 6.

<sup>3</sup> IRP was designed to identify and process noncitizens serving a criminal sentence in order to obtain a removal order. Through this program, ICE expeditiously removed individuals from the U.S. after they completed their sentences. See United States Department of Homeland Security, [Criminal Alien Program \(CAP\) Draft Transition Plan \(Feb. 2006\)](#), p. 6.

<sup>4</sup> See ICE ACCESS [website](#).

<sup>5</sup> [Matuszewski deposition](#), p. 28.

<sup>6</sup> [Matuszewski declaration](#), p. 11.

<sup>7</sup> [Matuszewski deposition](#), pp. 171; 30.

<sup>8</sup> [Matuszewski deposition](#), p. 30.

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<sup>9</sup> [Matuszewski declaration](#), p. 11.

<sup>10</sup> Ibid.

<sup>11</sup> [Matuszewski deposition](#), pp. 29-30.

<sup>12</sup> [Matuszewski declaration](#), p. 11.

<sup>13</sup> [Matuszewski declaration](#), p. 12.

<sup>14</sup> ICE Criminal Alien Program [website](#); [Matuszewski deposition](#), p. 28.

<sup>15</sup> Matuszewski deposition, pp. 222-24.

<sup>16</sup> Dr. Dora Schriro, “[Immigration Detention Overview and Recommendations](#),” Department of Homeland Security, Immigration and Customs Enforcement. October 6, 2009, pp. 12-13.

<sup>17</sup> [Matuszewski declaration](#), p. 7.

<sup>18</sup> [Matuszewski declaration](#), pp. 6-7.

<sup>19</sup> [Matuszewski deposition](#), pp. 38-41.

<sup>20</sup> [Matuszewski deposition](#), p. 39.

<sup>21</sup> [Matuszewski declaration](#), p. 7.

<sup>22</sup> [Matuszewski declaration](#), p. 12.

<sup>23</sup> [Matuszewski deposition](#), pp. 11-12.

<sup>24</sup> [Matuszewski deposition](#), pp. 48-49.

<sup>25</sup> [Matuszewski declaration](#), p. 6.

<sup>26</sup> [Matuszewski declaration](#), p. 8.

<sup>27</sup> Ibid.

<sup>28</sup> Some advocates report that CAP officers do not always affirmatively identify themselves during an encounter.

<sup>29</sup> According to CAP Unit Chief Matuszewski, CAP follows the ERO-wide policy on uniforms, but does not have its own policy regarding uniforms. Matuszewski deposition, p. 188.

<sup>30</sup> [Matuszewski deposition](#), p. 60.

<sup>31</sup> [Matuszewski declaration](#), p. 6.

<sup>32</sup> [Matuszewski deposition](#), p. 69.

<sup>33</sup> [Matuszewski deposition](#), p. 60.

<sup>34</sup> There has been significant debate regarding whether a detainer is a request by ICE to local law enforcement agency or a command by ICE requiring state or local officials to hold a noncitizen in custody. *See, e.g.*, Kate M. Manuel, [Immigration Detainers: Legal Issues 11-14](#) (Congressional Research Service, Aug. 31, 2012) (describing arguments on both sides of the debate).

<sup>35</sup> *See* [ICE Detainer Form, I-247](#). Despite the language of the detainer form, arguments have been made that it is unconstitutional to hold a person for more than 48 hours regardless of whether that time includes weekends or holidays. *See e.g.*, [Complaint, Brizuela v. Feliciano](#) (D. Conn filed Feb. 13, 2012) (arguing that detention pursuant to a detainer without a probable cause hearing before a neutral magistrate violates the Fourth, Tenth and Fourteenth Amendments).

<sup>36</sup> For more information on immigration detainers, *see* [Immigration Detainers: A Comprehensive Look](#). Washington, DC: Immigration Policy Center, February 17, 2010.

<sup>37</sup> [Matuszewski declaration](#), p. 5.

<sup>38</sup> [Matuszewski declaration](#), p. 5.

<sup>39</sup> [Matuszewski deposition](#), p. 227.

<sup>40</sup> [Matuszewski declaration](#), p. 7.

<sup>41</sup> [Matuszewski deposition](#), pp. 228-29.

<sup>42</sup> [Matuszewski declaration](#), p. 8.

<sup>43</sup> Ibid.

<sup>44</sup> Dr. Dora Schriro, “[Immigration Detention Overview and Recommendations](#),” Department of Homeland Security, Immigration and Customs Enforcement. October 6, 2009, p. 12.

<sup>45</sup> [ICE Fiscal Year 2008 Annual Report](#), p 3.

<sup>46</sup> Ibid.

<sup>47</sup> Department of Homeland Security Office of Immigration Statistics, [Immigration Enforcement Actions: 2010](#). June 2011, p. 3.

<sup>48</sup> Department of Homeland Security Office of Immigration Statistics, [Immigration Enforcement Actions: 2011](#). September 2012, p. 4.

<sup>49</sup> [Matuszewski declaration](#), p. 5.



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<sup>50</sup> See [Memorandum from John Morton](#), Assistant Secretary, ICE, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Jun. 30, 2010).

<sup>51</sup> Trevor Gardner II and Aarti Kohli, "[The CAP Effect: Racial Profiling in the ICE Criminal Alien Program](#)," The Chief Justice Earl Warren Institute on Race, Ethnicity, & Diversity, Berkeley Law Center for Research and Administration, September 2009.

<sup>52</sup> Andrea Guttin, "[The Criminal Alien Program: Immigration Enforcement in Travis County, Texas](#)," Washington, DC: Immigration Policy Center, February 17, 2010.