

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

The Criminal Alien Program (CAP) is an expansive immigration-enforcement program that is responsible for the initiation of a large proportion of removal proceedings. 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.

A declaration submitted by U.S. Immigration and Customs Enforcement (ICE) in response to a Freedom of Information Act (FOIA) request by the American Immigration Council and the Connecticut chapter of the American Immigration Lawyers Association has shed additional light on CAP. The declaration provides information about how CAP is currently organized and staffed, and suggests that 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 declaration also explains how CAP functions within prisons and jails. There appears to be little consistency in how CAP cooperates with local law-enforcement agencies in different regions and in how CAP interacts with detainees in different facilities. The declaration paints a picture of an *ad hoc* set of programs 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 explain how CAP operates.

What is the Criminal Alien Program (CAP)?

CAP is administered by ICE, which identifies allegedly removable noncitizens who are incarcerated in jails and prisons, as well as those who are not incarcerated, and places them into removal proceedings. CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout 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 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.”¹ In 1988, the Alien Criminal Apprehension Program (ACAP)² and the Institutional Removal Program (IRP)³ were created. In 2006, ICE consolidated ACAP and IRP into CAP. CAP is now listed as one of 14 federal/local law-enforcement programs under the umbrella of ICE ACCESS (Agreements in Cooperation in Communities to Enhance Safety and Security).⁴

What programs comprise CAP?

CAP consists of several sub-programs. There is some inconsistency as to which sub-programs combine to create CAP. The CAP webpage and the ICE declaration each list four subprograms, but they are not the same four. The five sub-programs mentioned in the two sources are:

- The **Violent Criminal Alien Section (VCAS)** enforces violations of criminal immigration law. According to ICE, between 2008 and the present, VCAS has facilitated the arrests of approximately 36,000 persons.⁵
- The **Law Enforcement Agency Response Unit (LEAR)** was established in Arizona to provide 24/7 response to calls for assistance from state and local law-enforcement agencies. LEAR conducts interviews to determine alienage and status, lodges detainees, makes arrests, and transports and processes individuals for removal. LEAR also facilitates operations to disrupt human trafficking, smuggling, and transnational organized crime. According to ICE, between 2007 and the present, LEAR has led to the arrest of approximately 21,000 persons.⁶
- The **Rapid Repatriation of Eligible Custodial Aliens Accepted for Transfer (Rapid REPAT)** is a joint partnership with state correctional and parole agencies that allows the early release of nonviolent noncitizens who have been issued final orders of removal for immediate deportation. According to ICE, between 2009 and the present, CAP has identified approximately 5,000 individuals through Rapid REPAT.⁷
- 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 Bureau of Prisons into proceedings, with the cooperation of local field offices. According to ICE, between 2009 and the present, CAP has encountered approximately 96,000 individuals at the DEPORT center.⁸
- The **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. JCART also identifies and target noncitizens involved in human trafficking, smuggling, and transnational organized crime for increased information collection. In addition, JCART partners with other law-enforcement entities, such as probation and parole offices, the Bureau of Prisons, and local law-enforcement agencies to conduct special operations.⁹

Are all noncitizens identified by CAP “criminals?”

The Department of Homeland Security (DHS) purports to focus its “jail status check” programs (including CAP and Secure Communities) on immigrants with serious criminal backgrounds. However, 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 Year (FY) 2009 had no criminal convictions, up from 53 percent in FY 2008.¹⁰ While DHS statistics show that 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 many questions surrounding the issue of how CAP is organized and staffed by ICE. However, new information provided by ICE sheds some additional light on the organizational structure of the program, highlighting a significant shift in the way CAP is staffed.

CAP is currently housed within ICE Enforcement and Removal Operations (ERO). Staffing CAP at ICE headquarters are a Unit Chief, two Section Chiefs, and 10 staff officers who are solely assigned to work on CAP functions.¹¹ Initially, CAP functions were performed by “CAP teams” which consisted of several law-enforcement officers, including Supervisory Detention and Deportation Officers, Deportation Officers, Immigration Enforcement Agents, and Enforcement Removal Assistants. Teams were strategically placed within ERO field offices and sub-offices and were assigned to prisons and jails within each area of responsibility.¹²

At some point, ICE did away with the formal team structure, and ERO field office directors are now free to use any of the 7,854 ERO employees and any available resources to implement CAP.¹³ According to ICE, “most ERO officers have, at one point in their career, been assigned to perform CAP operations as their primary responsibility.”¹⁴

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 much variation from institution to institution. New information from ICE leaves the impression of CAP as 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 must report all 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.¹⁵ It remains unclear exactly how state and local facilities share information with CAP, e.g., whether lists of all detainees are shared, or just certain detainees suspected of being noncitizens, or whether the facilities simply grant CAP officers access to all detainees.

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, rather than in-person, interviews with ICE. Some counties give ICE 24/7 access to the jail, while other localities limit ICE agents' access to the jail 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. An interview is, at 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.”¹⁶ CAP officers identify themselves prior to an interview,¹⁷ but may or may not be in uniform.

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, the place of the encounter, and the number of previous encounters. “Based on these factors, ICE determines the manner of processing and types of forms to use to initiate removal proceedings.”¹⁸

After the CAP encounter, 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.¹⁹ The detainer purports to authorize the local agency to detain the individual for an additional 48 hours (excluding weekends and holidays),²⁰ 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 out his or her sentence), ICE agents have between two and five days to take custody of the individual. If ICE does not obtain custody of the individual by that point, the individual must be released.²¹

What is the scope of CAP?

CAP is an extremely expansive program that includes vast cooperation with state and local law-enforcement agencies and approximately 171 ICE sub-offices, support centers, and response centers.²² Through CAP, ICE potentially could interact with every municipal, county, state, and federal facility in the country.”²³

Currently, CAP screens inmates from more than 4,300 federal, state, and local jails on a daily basis. CAP boasts 100% screening to all sentenced inmates in Bureau of Prisons (BOP) facilities and all state correctional institutions and in FY 2012, according to the Criminal Alien Program Risk Assessment (CAPRA), 3,054 of 3,066 county jails (99.6%) received 100% screening.²⁴ From 2007 to the present, ICE claims there have been approximately 2.5 million “CAP encounters.”²⁵ According to ICE, in FY 2011 there were 701,473 “CAP encounters” resulting in 221,122 arrests.²⁶

According to DHS, CAP is the program responsible for the largest number of “alien 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.²⁷ 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 164,296.²⁸ In FY 2008, CAP agents charged 221,085 noncitizens.²⁹ In FY 2010, ICE issued 223,217 charging documents,³⁰ and in FY 2011, ICE issued 212,744 charging documents through CAP.³¹

How does CAP intersect with Secure Communities?

Under Secure Communities, the fingerprints of all persons arrested by state or local police are routed to ICE. 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 can 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 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 prioritizes certain noncitizens for removal proceedings “based on their perceived threat to the community.”³² However, ICE has not provided the details of its risk-based approach. It is unknown whether CAP prioritizes based on ICE’s civil immigration-enforcement priorities³³ or whether CAP uses the same three-level system used by the Secure Communities program.³⁴

Does CAP identify only unauthorized immigrants?

Contrary to public perception, CAP does not identify only unauthorized immigrants. Legal permanent residents and other lawfully present nonimmigrants may be deportable if they have been convicted of certain crimes. However, most noncitizens identified through CAP have not been convicted of any offense.

What additional concerns does CAP raise?

As with Secure Communities, some fear that CAP gives police officers an incentive to arrest persons who look like immigrants. 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.³⁵ According to another study, in Travis County, Texas, a majority of immigrants subjected to detainers were arrested for misdemeanors. In 2008, 58 percent of detainees were placed on those charged with misdemeanors—up from 38 percent in 2007 and 34 percent in 2006.³⁶

Another concern with CAP is that collaboration with ICE will erode community trust in the police force. When local authorities are perceived to be acting 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.

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. ICE has released very little information about CAP, and has resisted disclosing documents about the program under the Freedom of Information Act. Furthermore, despite what the name of the program may suggest, the majority of noncitizens identified through CAP have not been convicted of any offense. Instead, most have only been charged with a crime, raising the likelihood that local police will make pretextual arrests and diminishing the effectiveness of community-policing efforts.

Endnotes

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

² 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.

³ 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.

⁴ See ICE ACCESS [website](#).

⁵ [Matuszewski declaration](#), p. 11.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid., p. 12.

⁹ ICE Criminal Alien Program [website](#).

¹⁰ Dr. Dora Schriro, “[Immigration Detention Overview and Recommendations](#),” Department of Homeland Security, Immigration and Customs Enforcement. October 6, 2009, p. 12-13.

¹¹ [Matuszewski declaration](#), p. 7.

¹² Ibid., pp. 6-7.

¹³ Ibid., p. 7.

¹⁴ Ibid., p. 12.

¹⁵ Ibid., p. 6.

¹⁶ Ibid.

¹⁷ Some advocates report that CAP officers do not always affirmatively identify themselves during an encounter.

¹⁸ [Matuszewski declaration](#), p. 8.

¹⁹ 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).

²⁰ 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).

²¹ For more information on immigration detainers, see [Immigration Detainers: A Comprehensive Look](#). Washington, DC: Immigration Policy Center, February 17, 2010.

²² [Matuszewski declaration](#), p. 5.

²³ Ibid.

²⁴ Ibid., p. 7.

²⁵ Ibid., p. 8.

²⁶ Ibid.

²⁷ Dr. Dora Schriro, “[Immigration Detention Overview and Recommendations](#),” Department of Homeland Security, Immigration and Customs Enforcement. October 6, 2009, p. 12.

²⁸ [ICE Fiscal Year 2008 Annual Report](#), p 3.

²⁹ Ibid.

³⁰ Department of Homeland Security Office of Immigration Statistics, [Immigration Enforcement Actions: 2010](#), June 2011, p. 3.

³¹ Department of Homeland Security Office of Immigration Statistics, [Immigration Enforcement Actions: 2011](#), September 2012, p. 4.

³² [Matuszewski declaration](#), p. 5.

³³ See [Memorandum from John Morton](#), Assistant Secretary, ICE, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Jun. 30, 2010).

³⁴ [Morton Memo](#), p. 2.

³⁵ 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.

³⁶ Andrea Guttin, “[The Criminal Alien Program: Immigration Enforcement in Travis County, Texas](#),” Washington, DC: Immigration Policy Center, February 17, 2010.