



May 19, 2008

Mr. David J. Karp
Office of Legal Policy
U.S. Department of Justice
Room 4509, Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Comments of the American Civil Liberties Union (ACLU) and the ACLU of Northern California

Re: RIN 1105-AB24 Proposed Rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006.

The American Civil Liberties Union and its Northern California affiliate welcome the opportunity to comment on the Department of Justice's (DOJ's) proposed rules for collecting DNA evidence from federal arrestees and immigrants (73 Fed. Reg. 21083-21087). The ACLU is a nationwide, non-partisan organization of more than 550,000 members dedicated to protecting the principles of liberty, freedom and equality as set forth in the Bill of Rights to the United States Constitution. For more than 80 years, the ACLU has sought to preserve and strengthen individual freedoms and privacy in all aspects of American life.

The DNA Fingerprint Act of 2005 authorized the U.S. Attorney General to direct federal agencies to collect DNA from individuals arrested or non-U.S. persons detained under authorities of the United States.¹ The ACLU is concerned that this dramatic expansion of the law, attached as an amendment to the broadly popular Violence Against Women Act ("VAWA") reauthorization bill, was approved by Congress absent adequate consideration. We believe that had the DNA Fingerprint Act of 2005 been considered through the regular Congressional process, it would have been

¹ DNA Fingerprint Act of 2005 § 1004(a)(1)(A), 120 Stat 587 (2005), as amended by Adam Walsh Child Protection And Safety Act of 2006 § 155, 120 Stat 587 (2006), codified at 42 U.S.C. § 14135a(a) ("The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.").

met with significant public opposition because of its radical departure from the original intent and purpose of the forensic DNA databanking system.

Furthermore, the proposed rules give the Attorney General broad latitude to delegate his authority to other federal agencies to collect and test DNA.² For example, the regulation appears to allow the forcible taking of DNA from somebody arrested for misdemeanor trespassing on federal land during a demonstration.³

DOJ estimates that under the proposed regulations more than 1.2 million additional individuals will have their DNA (i) forcibly collected by multiple federal agencies (and potentially state and private organizations as well); (ii) profiled; and, (iii) maintained in the Combined DNA Indexing System (“CODIS”) each year. This represents a fifteen-fold increase in the number of DNA samples that will be collected from federal offenders.⁴ This number may increase over time, since the proposed regulations leave open the door to collection of DNA from even broader categories of individuals.

The ACLU formally opposed the DNA Amendment of 2005⁵ and remains strongly opposed to the collection and permanent retention of DNA from those arrested or detained and any other category of innocent persons,⁶ on grounds of privacy and constitutionality, as well as practicality. Moreover, we believe that collecting and retaining DNA from millions of innocent people alters the purpose of DNA collection from one of criminal investigation to population surveillance, subverting our deepest notions of a free and autonomous citizenry. Our comments below address these fundamental concerns as well as concerns that are specific to the regulations as proposed.

Concerns for Individual Privacy

The collection and retention of DNA from innocent people is an unacceptable and unnecessary intrusion into their privacy and places them at future risk of being stigmatized or discriminated against in a broad array of social contexts.

The proposed regulations are based on a flawed analogy between DNA and fingerprints. For example, DOJ asserts that “DNA profiles, which embody information concerning 13 ‘core loci,’ amount to ‘genetic fingerprints’ that can be used to identify an individual uniquely, but do not disclose an individual’s traits, disorders, or dispositions... The practical uses of the DNA profiles

² *Id.* (“The Attorney General may authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section”).

³ See, e.g., *United States v. Sued*, 143 F.Supp.2d 346, (S.D.N.Y. 2001) (federal conviction for “unlawful distribution of printed matter” in Statue of Liberty); *United States v. Fee*, 787 F.Supp. 963 (D.Colo.1992) (federal trespass conviction against people protesting against logging of ancient forest).

⁴ J. Luttman (FBI Laboratory, DNA Unit 1, Federal Convicted Offender Program), “Implementation of Database Expansion,” Presentation for Annual CODIS Conference, FBI, October 24, 2006.

⁵ See “ACLU letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005,” Letter to The Honorable Arlen Specter, Chair, Senate Judiciary Committee and the Honorable Patrick Leahy, Ranking Member, Senate Judiciary Committee, September 29, 2005.

⁶ See E. Nakashima, “U.S. to Expand Collection of Crime Suspects’ DNA,” *The Washington Post*, April 17, 2008, A01. See also, “Letter to The Honorable Robert C. Scott, Chair, House Judiciary Committee and the Honorable Louie Gohmert, Ranking Member, House Subcommittee on Crime, Terrorism, and Homeland Security regarding Hearing on ‘Reauthorization and Improvement of DNA Initiatives of the Justice for All Act of 2004,’” Signed by Caroline Fredrickson, Director, and Jesselyn McCurdy, Legislative Counsel, ACLU Washington Legislative office, April 17, 2008.

(‘genetic fingerprints’) in CODIS are similar in general character to those of actual fingerprints....”⁷

The notion that DNA profiles are analogous to fingerprints is flawed for three reasons. First, while the genetic markers used in law enforcement databases are often characterized as “junk DNA,” recent scientific studies have started to debunk the notion that the non-coding regions of the genetic code are devoid of any biological function.⁸ And while none of the CODIS loci have been found to date to be predictive for any physical or disease traits, this does not mean that such a correlation will not be found in the future.⁹ Moreover, it is not necessary for any of the forensic Short Tandem Repeats (“STRs”) to correlate directly with any stigmatizing information for there to be a concern; the specter of discrimination and stigma could arise where one or more STRs is found to correlate with another genetic marker whose function is known, so that the presence of the seemingly innocuous STR serves as a “flag” for that genetic predisposition or trait. A finding of this nature has already occurred; a study in England from 2000 found that one of the markers used in DNA identification is closely related to the gene that codes for insulin, which itself relates to diabetes.¹⁰

Secondly, unlike fingerprints, DNA can be used to investigate biological relationships between individuals. In some states, law enforcement agencies have started to search DNA databases for partial matches between profiles, a process known as familial searching.¹¹ In July 2006, the FBI released an interim policy allowing states to release identifying information of individuals in their database in the event of a partial match.¹² Thus, rather than using the database to search for the culprit, it is used to identify an individual who is demonstrably *innocent* of the crime – because the crime scene DNA does not match his -- in the hope that investigating this innocent person will provide a clue to the identity of the actual culprit. This recent shift in state and federal practice from using the databases to identify the perpetrator to using them to zero-in on innocent persons has occurred with little if any public debate and underscores the vast distinction between DNA and fingerprints and the need for strong genetic privacy protections.

Finally, the fingerprint analogy is misleading, because perhaps the most significant privacy concerns with DNA databanking are associated not with the DNA *profiles* that are retained electronically, but instead with the original *biological samples* that are stored indefinitely by forensic laboratories. Unlike fingerprints – two-dimensional representations of the physical attributes of our fingertips that can be used only for identification – DNA samples can provide insights into disease predisposition, physical attributes, and ancestry. Repeated claims that human behaviors such as aggression, substance addiction, criminal tendency and sexual orientation can be explained by genetics render law enforcement databases especially prone to abuse.

⁷ Federal Register, Vol. 73, No. 76 (Friday, April 18, 2008) p. 21084.

⁸ See Clive Cookson, *Regulatory Genes Found in “Junk DNA,”* FIN. TIMES, June 4, 2004; See also Justin Gillis, *Genetic Code of Mouse Published: Comparison with Human Genome Indicates “Junk DNA” May Be Vital,* WASH. POST, Dec. 5, 2002, at A1; *United States v. Kincade*, 379 F.3d 813, 818 n.6 (9th Cir. 2004) (en banc) (plurality opinion); *id.* at 849-50 (dissenting opinion).

⁹ For a detailed discussion on “Junk DNA” and forensic DNA profiling, see Simon A. Cole, “Is the ‘Junk’ DNA Designation Bunk?” *Northwestern University Law Review*, 2007.

¹⁰ See John D.H. Stead, Jerome Buard, John A. Todd and Alec J. Jeffreys, “Influence of allele lineage on the role of the insulin minisatellite in susceptibility to type 1 diabetes,” *Human Molecular Genetics*, Vol. 9, No. 20, 2000. See also D. Concar, “Fingerprint fear,” *New Scientist Space*, May 2, 2001.

¹¹ See B. Tansey, “State Widens DNA Scanning in Cold Cases,” *San Francisco Chronicle*, April 26, 2008, A01. See also M. Dolan and J. Felch, “California takes lead on DNA crime-fighting technique,” *Los Angeles Times*, April 26, 2008.

¹² FBI, CODIS Bulletin: “Interim Plan for the Release of Information in the Event of a Partial Match at NDIS,” July 20, 2006.

These concerns should not be trivialized. The courts have recognized that the Constitution protects the right to maintain the privacy of “information about one’s body and state of health.”¹³ We need only look to the history of our own country, where a eugenics movement resulted in thousands of involuntary sterilizations of the so-called “feeble-minded,” “abnormal,” or “mentally deficient,” and where fears of crime and violence have resulted in repeated overreactions on the part of law enforcement.¹⁴ As Congress just this month recognized when it passed the Genetic Information Nondiscrimination Act of 2008, many of our states have a history of misusing genetic information by enacting “laws that provided for the sterilization of persons having presumed genetic ‘defects’ such as mental retardation, mental disease, epilepsy, blindness, and hearing loss, among other conditions,” as well as laws that discriminated against African Americans on the basis of their DNA.¹⁵

The proposed rule exacerbates existing concerns that stored biological samples may be misused. Proposed 28 C.R.C. 28.12(e) allows for federal agencies to contract out DNA collection to state or local government agencies or private entities. Collected DNA is to be sent to the FBI or “to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System.”¹⁶ Allowing multiple agencies to collect, store, process and analyze DNA samples is a recipe for error and abuse. Under this scenario, it will be difficult to assure proper and consistent approaches to handling and safeguarding DNA samples.

The best and only way to mitigate the concern that the biological samples will be used for purposes other than identification is to destroy the biological samples after profiling occurs, a reform measure long advocated by the ACLU. Nowhere do the proposed regulations require or suggest this step as a simple and effective way of protecting individual privacy.

Collection, Retention, and Use of DNA from Innocent Persons Violates the Fourth Amendment to the United States Constitution

The Fourth Amendment to the U.S. Constitution guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” This constitutional protection means that a “warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement.”¹⁷

The U.S. Supreme Court has long made it clear that the extraction of bodily fluids or tissue for analysis constitutes a search, subject to the Fourth Amendment.¹⁸ Following the high Court, the lower courts have consistently held that the taking and analysis of one’s DNA constitutes a “search” for two reasons: First, bodily intrusion is necessary for collecting a blood or buccal swab sample for use in DNA testing. Second, the substantial and uniquely personal information

¹³ *Doe v. City of New York*, 15 F.3d 264, 266-67 (2d Cir. 1994).

¹⁴ *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 461-65 (1985) (Marshall, J., concurring).

¹⁵ Genetic Information Nondiscrimination Act of 2008, H.R.493. §§ 2(2), (3). This provision has been passed by both houses of Congress and awaits the President’s signature.

¹⁶ Proposed 28 C.R.C. 28.12(f)(2).

¹⁷ *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999).

¹⁸ *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (blood tests); *see Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (urine tests).

contained in the DNA itself has been found to trigger protections guaranteed under the Fourth Amendment.¹⁹

Because DNA sampling constitutes a search, it is unconstitutional unless the sampling is conducted within an exception to the warrant requirement. And although the courts have generally upheld DNA testing of convicted felons who are imprisoned or on probation or parole, these cases do not justify the testing of arrestees.

Persons who are under the supervision of the criminal justice system following *conviction* of a crime have vastly reduced expectations of privacy.²⁰ This lowered expectation of privacy means that the police may intrude into their homes without a warrant or even individualized suspicion; the courts have therefore held that it similarly means that the government may intrude into their bodily and genetic privacy.²¹

The Court has also upheld searches of convicted felons on probation on the grounds that the government has “special needs, beyond the normal need for law enforcement,” for supervising them.²² Thus, some lower courts have upheld DNA collection from persons in prison or on felony probation or parole for this same reason.²³

Neither of these lines of cases justifies the seizure and banking of DNA from arrestees. In the United States, people who are arrested are presumed innocent; non-U.S. persons who are detained are not even accused of a crime. As such, they retain their full expectation of privacy and right to bodily integrity. The U.S. Supreme Court has thus made it clear that in order for the police, without a warrant, to take a biological sample from an arrestee for law-enforcement purposes they must have probable cause to think that the evidence will yield evidence of a crime *and* exigent circumstances exist that make it impossible to procure a warrant.²⁴ Because the collection of DNA for banking and searching in CODIS serves a law-enforcement purpose, collecting samples from arrestees without a warrant, probable cause, or exigent circumstances, as authorized by the proposed rule, would violate the Fourth Amendment.²⁵

The Minnesota Court of Appeals followed this logic in overturning Minnesota’s arrestee DNA testing law. In *In re Welfare of C.T.L.*²⁶ the court held that laws “that direct law-enforcement personnel to take a biological specimen from a person who has been charged but not convicted violate the Fourth Amendment to the United States Constitution.” *Id.* at 492. The court invalidated the statute at issue even though that law, unlike the proposed rule, applied only to serious, violent felonies and even though it authorized the police to take DNA samples only after a judge had found probable cause that the arrestee had committed a crime.²⁷ The federal rule,

¹⁹ See, e.g., *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); for a detailed overview of legal challenges relevant to DNA testing and retention, see Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127 (2001).

²⁰ *Samson v. California*, 547 U.S. 843 (2006).

²¹ See, e.g., *United States v. Kriesel*, 508 F.3d 941, 946-47 (9th Cir. 2007) (collecting cases); *Landry v. Att’y Gen.*, 709 N.E.2d 1085, 1092 (Mass. 1999); see also; *People v. Wealer*, 636 N.E.2d 1129 (Ill. App. Ct.); *Jones*, *supra* note 6, at 308.

²² *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

²³ *State v. Olivas*, 856 P.2d 1076, 1085 (Wash. 1993) (upholding the Washington DNA testing statute, stating that the purpose of the DNA data bank was to deter and prosecute recidivist acts, and that this purpose was a “special need” of government beyond normal law enforcement); see *Kriesel*, 508 F.3d at 946 (collecting cases).

²⁴ *Schmerber*, 384 U.S. at 770.

²⁵ *Ferguson*, 532 U.S. 67.

²⁶ *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006).

²⁷ *Id.* at 490-91; see M.S.A. § 299C.105 (listing qualifying offenses).

which applies to all crimes --even to misdemeanors -- and fails to contain even this limited judicial oversight, is similarly unconstitutional.

Even the cases that are cited as supporting the constitutionality of DNA sampling all involve people convicted of violent crimes or felonies. None of them hold even that somebody convicted of a non-violent misdemeanor, much less somebody merely accused of a misdemeanor, can be forced to provide a DNA sample. A felony conviction carries far more serious consequences than does a misdemeanor conviction, often including longer imprisonment and the loss of other rights including the right to vote, to serve on a jury, and to own a firearm. In light of these greater consequences, the U.S. Constitution provides persons accused of these more serious crimes with greater procedural protections to guard against wrongful convictions. For example, the right to appointed counsel, the right to a jury trial, and the right to review of charges by a grand jury all depend on the seriousness of the case. Thus, that the government may take DNA from a convicted *felon* does not mean it may take it from somebody convicted of a *misdemeanor*.²⁸

DNA Collection from Arrestees will Exacerbate Existing Racial Bias in the Criminal Justice System.

The ACLU is concerned that the disturbing element of racial disparity that runs throughout the U.S. criminal justice system will be compounded by the expansion of DNA collection to arrested and detained individuals. Racial disparities are systemic to our criminal justice system and are well documented. For example, while blacks comprise 13 percent of the national population, they make up 30 percent of people arrested, 41 percent of people in jail, and 49 percent of those in prison. In 1995, one in three black men between the ages of 20 and 29 was either in jail or prison, or on parole or probation.²⁹ Similarly, a 2008 report released by Pew Charitable Trusts showed that one in nine black men in their twenties and early thirties is in prison or jail.³⁰

A number of studies suggest that these ratios are not a reliable indicator of actual crime demographics. Many of these studies identify the point of arrest, in particular, as a stage in our criminal justice system where significant racial bias occurs on a routine basis. For example, a study conducted in the early 1990's by the California Commission on the Status of African Americans showed that while African Americans made up only 3% of California's population, they represented 40% of those entering state prisons. At the same time, the study found that blacks were far more likely to be arrested on unsustainable grounds than whites: an astonishing 92% of the black men arrested by police on drug charges were subsequently released for lack of evidence or inadmissible evidence, as compared with 64% of whites.³¹

A study released last month by the New York Civil Liberties Union documented the extraordinary racial bias in low-level marijuana arrests in New York City.³² The study found that over the past decade, New York City has arrested on average 100 people per day for

²⁸ *Cf. Welsh v. Wisconsin*, 466 U.S. 740 (1984) (reasonableness under Fourth Amendment depends on seriousness of underlying offense).

²⁹ Human Rights Watch, "Punishment and Prejudice: Racial Disparities in the War on Drugs," May 2000, (Part III: "Incarceration and Race") Available at: <http://www.hrw.org/reports/2000/usa/index.htm#TopOfPage>

³⁰ Pew Charitable Trusts, "One in 100: Behind Bars in America 2008," February 28, 2008. Available Through: http://www.pewtrusts.org/our_work_report_detail.aspx?id=35900.

³¹ See S. Nazano, "Odds grim for black men in California," *Washington Post*, December 12, 1993, p. A23.

³² H. Levine and D.P. Small, "Marijuana arrest crusade: Racial bias and police policy in New York City 1997-2007," New York Civil Liberties Union: April 2008.

possessing small amounts of marijuana, and that most of these individuals were young Black and Latino men. Most notably, the study shows that while marijuana use is higher in whites than in blacks, the marijuana arrest rate of blacks is over five times the arrest rate of whites for low-level marijuana possession.

The addition of DNA samples and profiles of arrestees to CODIS will painstakingly reflect these unjust and unfounded racial biases. Moreover, an increasingly skewed database will further perpetuate racial discrimination in our criminal justice system, not diminish it, since those represented in the database are more likely than others to be implicated in a future crime. This suggests to us that the proposal will actually make DNA databanking increasingly race-conscious, rather than race neutral.

Collection of DNA from non-U.S. persons detained will deepen resentment and hostility among ethnic communities living in or visiting the United States and around the world

The proposed rule will also disproportionately affect immigrant communities. These communities have increasingly been the victims of racial profiling by federal, state and local law enforcement and border control policies enacted in the aftermath of September 11, 2001. Immediately following 9/11, thousands of people of Arabic, Middle Eastern and South Asian descent were targeted for questioning, detention, and arrest by government authorities essentially because of their ethnic background.³³ Shortly thereafter, tens of thousands of individuals from select countries were subjected to “special registration requirements” – including fingerprinting and photographing -- under the federal government’s National Security Entry-Exit Registration System program.³⁴ More recently, the expansion of state and local enforcement of immigration law – fueled in large part by anti-immigrant sentiment, with encouragement from the federal government – has also led to increased stops and arrests of persons who appear to be foreign (particularly Latinos) for alleged traffic violations.

And this is on top of the nearly 300,000 men, women, and children who are detained by U.S. Immigration and Customs Enforcement each year, the majority of whom have no criminal history whatsoever. Many of these people are fleeing persecution and torture; others are simply misunderstood by customs agents.³⁵ Under the proposed rule, all of these individuals – already unnecessarily treated as criminals – will also have to provide their DNA.

The enforcement measures and border control programs described above have already had the effect of alienating many immigrant communities. Requiring all individuals who are stopped and detained – potentially even briefly -- to undergo forcible DNA collection is a dangerous step that will undoubtedly deepen the resentment and hostility among these communities both in the United States and abroad.

Expansion of DNA Collection to the Innocent is Unnecessary and Unlikely to Make Us Safer

³³ T. Ginsberg, “Profiling Charged on Nightmare Flight,” *Philadelphia Inquirer*, September 19, 2002; see also C. Eisenberg, “A Troubling Year for Muslims in America,” *Newsday*, September 2, 2002

³⁴ See ACLU, *Science Under Siege: The Bush Administration’s Assault on Academic and Scientific Inquiry*, Written by T. Simoncelli and J. Stanley, June 2005, pp. 14-20, available at: <http://www.aclu.org/privacy/gen/15329pub20050620.html>.

³⁵ See N. Bernstein, “Italian’s Detention Illustrates Dangers Foreign Visitors Face,” *The New York Times*, May 14, 2008.

The ACLU believes that routine collection of DNA from arrestees and non-U.S. detainees is unnecessary and unlikely to make us safer. Law enforcement already has ample authority to collect DNA from individuals who are arrested. Where a DNA sample is necessary for the investigation of a crime – such as where biological evidence is available at the scene of a crime for comparison with DNA from a suspect – law enforcement can obtain a warrant for DNA collection. In addition, as discussed above, in some limited circumstances, police can obtain DNA without a warrant, where they have probable cause to think that the evidence will yield evidence of a crime *and* exigent circumstances exist that make it impossible to procure a warrant. These traditional and well-established safeguards are sufficient to allow law enforcement to investigate crime without undermining individual rights.

The proposed rule not only allows for the routine collection of DNA from federal arrestees; it also allows this DNA to be analyzed and compared with any and all other stored DNA profiles in the CODIS system whether or not conviction occurs. If the purpose of collecting DNA from arrestees is to aid in identifying them and investigating a particular crime for which they have been arrested, there is no need to allow those samples to be compared with the crime-scene database. The ACLU recommends that the rule prohibit comparison of an individual's DNA profile with anything other than the DNA profiles generated from the crime scene evidence for which s/he is suspected unless or until that person is convicted.

The collection and retention of DNA from millions of innocent people is unlikely to further the cause of justice. Useful DNA is not detectable at the scenes of the majority of crimes, particularly non-violent crimes. As such, the utility of a forensic DNA database is limited by the ability to collect uncontaminated and un-degraded DNA at crime scenes, not by the total number of people in the database. As the database expands to people convicted of minor offenses or those merely arrested or detained, the chances that any given profile in the database will help resolve a future crime diminish. This phenomenon has been well documented in the United Kingdom, where the expansion of the forensic DNA database to anyone arrested for a recordable offense has not coincided with a significant increase in “cold hits.”³⁶

The proposed rule may even undermine law enforcement. The fifteen-fold increase in demand for DNA testing will undoubtedly result in a massive laboratory backlog. Such backlogs can have tragic outcomes. Last year, the California Commission on the Fair Administration of Justice, a bipartisan panel of criminal justice experts and practitioners, released an emergency report that documented enormous backlogs of about 160,000 untested DNA samples in California's state lab arising from the expansion of California's databank to all felons.³⁷ The panel reported that “delays of six months or more have become the norm” in analyzing rape kits in the state.³⁸ In one case, a rapist attacked two more victims, including a child, while his DNA sat on a shelf awaiting analysis.³⁹ Backlogs can also increase the chances of error in DNA analysis, labeling, or interpretation as lab analysts are pressured to cut corners to meet their workload. Such errors have already resulted in a few known miscarriages of justice. Josiah

³⁶ See “DNA bank solves only one crime for every 800 new entries despite massive investment,” Daily Mail (UK) (May 5, 2008), available at: http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=564051&in_page_id=1770. See also Genewatch UK, *The Police National DNA Database: An Update*, July 2006, available through: <http://www.genewatch.org/sub-539478>

³⁷ California Commission on the Fair Administration of Justice: Emergency Report and Recommendations Regarding DNA Testing Backlogs at 2 (Feb. 20, 2007), available at <http://www.ccfaj.org/documents/reports/problems/official/Report%20on%20DNA%20Backlogs.pdf>.

³⁸ *Id.* at 3.

³⁹ *Id.*

Sutton spent nearly five years in prison, starting at the age of 16, for a rape he could not have committed as a result of an error made by an analyst at the Houston Crime Lab.

For these reasons, the ACLU is concerned that the proposed rule may not be based on the best available data regarding the costs and benefits of such a broad DNA-collection policy and may not reflect an adequate consideration of narrower alternatives. See Executive Order 12866 § 1(b)(6)-(8).

The Proposed Rule Improperly Fails to Specify Who will be Required to Provide DNA Samples, in Violation of Due Process, Congressional Intent, the APA, and the Privacy Act

Although the first sentence of proposed 28 C.R.C. 28.12(b) provides that agencies “shall collect DNA samples from” certain broad classes of persons, other provisions of the proposed rule adopt so many permissive exceptions to this general rule, and exceptions to the exceptions, so that it is impossible to know who will be required to provide DNA samples.

First, the proposed rule states that collection “may be limited to individuals from whom the agency collects fingerprints,” but only “[u]nless otherwise directed by the Attorney General.⁴⁰ Collection “may be subject to other limitations or exceptions approved by the Attorney General.”⁴¹ The rule then provides four separate exemptions for collection from non-U.S. persons, one of which comprises “aliens with respect to whom . . . the collection of DNA samples is not feasible because of operational exigencies or resource limitations.”⁴² However, the regulations also give the Secretary of Homeland Security the authority to waive these four exceptions. Nothing says how these exceptions or limitations are to be determined, enforced, or made public.

The Privacy Act imposes a number of duties on federal agencies that maintain a “system of records” on individual Americans.⁴³ The CODIS database falls within the statutory definition of “system of records.”⁴⁴ The Act thus requires the Department to publish in the Federal Register “the categories of individuals on whom records are maintained in the system.”⁴⁵ Instead of complying with this provision, the proposed regulation gives the Attorney General and the Secretary of Homeland Security the unfettered discretion to decide who, within the broad groups covered by the statute itself, will or will not have to submit DNA samples, with no requirement of publication in the Register or anywhere else.

By failing to specify whose DNA will be collected, the proposed rule also defeats Congress’s intent in requiring the Department to promulgate regulations to govern DNA collection. The purpose of the rulemaking process is to allow Congress to identify a problem, make the basic policy decision as to how to address that problem, and then to turn it over to an agency to develop regulations to “fill in areas of uncertainty with specific rules.”⁴⁶ Thus, Section 14135a of Title 42 says that the government “may” take DNA from broad classes of persons and then directs the Attorney General to promulgate regulations to prescribe who among these groups will have to provide DNA samples.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* 28.12(b)(1)-(4).

⁴³ See 5 U.S.C. § 552a.

⁴⁴ *Id.* § 552a(a)(5).

⁴⁵ *Id.* § 552a(e)(4)(B).

⁴⁶ *South Terminal Corp. v. E.P.A.*, 504 F.2d 646, 670 (1st Cir. 1974).

The proposed rule utterly fails to fulfill this purpose. Rather than informing the public and interested persons of who will be required to provide DNA samples, it instead contains permissive language and deferred decision-making that adds nothing but confusion to the statutory language. An arrestee or non-U.S. person⁴⁷ facing a demand that he provide his DNA simply cannot, from the rule, know whether or not he must comply. Regulations cannot, as this one does, “simply replace statutory ambiguity with regulatory ambiguity.”⁴⁸ And because refusal to cooperate with an “authorized” collection is a misdemeanor under § 14135a(a)(5), this level of vagueness violates Due Process as well as the APA.⁴⁹

The Proposed Rule Imposes Extraordinary Administrative Burdens on Multiple Federal Agencies that Are Likely to Result in Interagency Confusion, Duplicate DNA Sampling, and Error.

While the proposed rule is unclear as to precisely who will have their DNA collected, the broad classes of individuals identified appear to apply to at least 1.2 million individuals each year. This includes approximately 125,000-250,000 federal arrests and 1.2 million non-U.S. detainees.⁵⁰ Any federal agency that arrests or detains individuals or supervises individuals facing charges is granted DNA collection authority and is expected to have DNA collection programs in place by the end of the calendar year. This potentially includes the Federal Bureau of Investigation (FBI), Federal Bureau of Prisons (BOP), Bureau of Alcohol Tobacco and Firearms (ATF), Drug Enforcement Administration (DEA), and the Department of Homeland Security (DHS), among others.

To our knowledge, none of these agencies, with the exception of the FBI and BOP, have staff on hand who have received proper training in DNA collection. This means that each of these agencies will have to develop DNA collection programs and hire staff who are qualified to oversee and carry out such a program. Proposed 28 C.R.C. 28.12(e) allows for federal agencies to contract out DNA collection to state or local government agencies or private entities, presumably as an attempt to ease the administrative burden that would otherwise be placed on these agencies.

The ACLU is concerned that allowing DNA collection to take place at an unlimited number of unknown and unspecified sites will increase the likelihood that duplicate sampling will occur and that mistakes will be made. The communication among multiple agencies and organizations is likely to be far from seamless, so that duplicate collection and testing is bound to occur. This will not only waste resources, but will likely aggravate those who are being asked to provide a second or third sample. And with potentially tens of organizations collecting DNA, it will be difficult to ensure that standard collection, labeling and storage techniques are being followed. Sample switches have occurred in the past, and with grave consequences.⁵¹

⁴⁷ Also, the rule fails to say how officials will determine who is a non-U.S. person and thus subject to collection, or to provide a mechanism for the destruction of samples that are erroneously taken from citizens or lawful permanent residents.

⁴⁸ *Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 782 (1998); see *MST Exp. v. Department of Transp.*, 108 F.3d 401, 406 (1998); *St. Luke's Methodist Hosp. v. Thompson*, 182 F.Supp.2d 765, 781-82, 784 (N.D.Iowa 2001), aff'd., 315 F.3d 984 (8th Cir. 2003).

⁴⁹ See *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

⁵⁰ J. Luttman, 2006.

⁵¹ See W.C. Thompson, F. Taroni, and C.G.G. Aitken, “How the Probability of a False Positive Affects the Value of DNA Evidence,” *J. Forensic Science*, Vol. 48, No. 1 (Jan 2003).

The proposed rule also allows for DNA samples to be tested by laboratories other than the FBI laboratory: “Each agency required to collect DNA samples shall... (2) Furnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System.”⁵² The proposed rule fails to propose any standards by which a private laboratory or other agency might be deemed qualified for analyzing DNA samples. It is important to recognize that DNA testing is not infallible. Mistakes can and have occurred in DNA analysis and in the interpretation and reporting of results. Standard operating procedures will be far more difficult to maintain if DNA testing is outsourced to multiple laboratories. Error rates are likely to increase and new sources of error may be introduced as samples are processed by and transferred to and from multiple facilities.⁵³

The Cost Estimate Provided To OMB Fails to Consider Full Range of Costs Associated with the Proposed Rule.

The proposed rule indicates that it has been drafted and reviewed in accordance with Executive Order 12866 and that it has been designated a “significant regulatory action” requiring a cost estimate and OMB review.

The ACLU is concerned that the cost estimate as provided to OMB and discussed in the notice of the proposed rule does not accurately reflect the full costs of this expanded DNA collection and testing program. DOJ estimates per sample analysis and storage at \$37.50. The details of this estimate are not made available, but it seems to cover only the baseline costs of the DNA testing kits, analysis and storage. It is unclear also how the \$1.50 per sample cost of storage was calculated, given that storage is indefinite. Apparently, storage costs in the U.K. are close to \$9 per year.⁵⁴ Moreover, it seems unlikely that the \$37.50 per sample cost estimate reflects the full costs associated with developing intra and inter-agency DNA collecting programs, training and employing personnel to collect and analyze samples, or upkeep and expansion of laboratory facilities. The ACLU recommends that DOJ complete a more realistic assessment of the full range of costs associated with the collection, processing and storage of DNA from more than 1 million individuals each year.⁵⁵

Conclusion

As Congress and the courts have recognized, the extraction, analysis, and banking of human DNA raises important legal, privacy, and policy concerns. Thus, when Congress authorized the Department of Justice that it “may, as prescribed . . . in regulation” forcibly take DNA samples from people who have never been convicted of a crime, it doubtless intended that the regulations would address these concerns and would limit any DNA sampling to instances where it is and where the benefits outweigh the costs. The proposed rule fails to do this, but instead authorizes the extraction of DNA in every situation that could possibly be covered by the statute.

⁵² 28 C.R.C. 28.12(f).

⁵³ These considerations, too, raise concerns about whether the proposed rule complies with Executive Order 12866, particularly §§ 1(b)(6)-(8) of that order.

⁵⁴ See “DNA bank solves only one crime for every 800 new entries despite massive investment,” Daily Mail (UK) (May 5, 2008), *supra*, (reporting yearly costs of £3million (just under \$5.87 million) to store 660,000 samples, for an annual cost of \$8.89/sample).

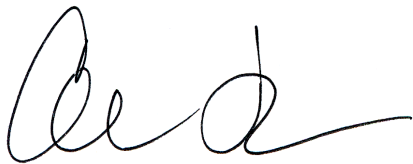
⁵⁵ See Executive Order 12866 § 1(b)(6).

The ACLU is also concerned that the Department's supporting analysis does not address the legal and privacy problems with the proposed regulation. Although the Department's legal analysis cites the single case that has upheld arrestee testing of persons arrested of violent crimes, it does not even mention another published appellate opinion which held such testing unconstitutional.

In addition, the Department's analysis has neglected to consider the full ramifications of this proposal for communities of color and innocent people seeking lawful entry to the United States. Forcing scores of innocent people from each of these communities to provide DNA samples will do nothing to make our nation safer and will only exacerbate existing resentment and hostility among these communities.

Finally, the Department has underestimated the costs of this program as well as the extent the practical difficulties associated with requiring multiple agencies to coordinate collection of DNA from more than 1.2 million individuals per year. The ACLU thus requests that the Department reconsider the proposed rule and issue a new rule that properly analyzes the issues and complies with Congress's intent and with the Constitution.

Sincerely,



Caroline Fredrickson
Director
American Civil Liberties Union
Washington Legislative Office



Michael W. Macleod-Ball
Chief Legislative and Policy Counsel
American Civil Liberties Union
Washington Legislative Office



Tania Simoncelli

Science Advisor
American Civil Liberties Union
Technology and Liberty Program

Michael T Risher

Michael T. Risher
Staff Attorney
American Civil Liberties Union
of Northern California