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RE: OAG Docket No. 119

Comments of the Center for Constitutional Rights on Department of Justice, Proposed Rules: "DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006," 28 C.F.R. Part 28 (April 18, 2008)

Introduction and Statement of Interest

The Department of Justice has requested public comment on regulations designed to implement the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 by proposing the DNA Identification System at 28 C.F.R. Part 28.12. *See* Federal Register 21083-87 (April 18, 2008). The proposed rules require collection and retention of DNA samples from all individuals arrested by any U.S. agency, all individuals facing federal charges or convicted of a federal crime, as well as all non-citizens detained under the authority of the federal government.

The Center for Constitutional Rights opposes these regulations in full as an unjustified and unnecessary expansion of the federal DNA database. The proposed regulations will require DNA collection from innocent people, will permit DNA collection from any non-citizen at the border, and will disproportionately affect people of color.

The Center for Constitutional Rights is also extremely concerned about 'function creep' toward universal DNA database inclusion. As laid out in the background of the proposed rules, the federal database was originally conceived for those convicted of sexual and extremely violent offenses, on the theory that they are likely to be recidivists and their crimes are likely leave biological evidence. In 2001, the database was expanded to convictions on any crime of violence. In 2004 it was expanded again, this time for all convictions on any felony. The proposed regulations seek to once again expand the database, far beyond its original purpose, to include individuals who are not found guilty of any crime, including arrestees and civil immigration detainees. The frightening trend in these expansions is toward a database of universal inclusion.

The fact that Congress failed to have any hearings or debate on legislation with such serious constitutional and public policy concerns is troubling. Instead, the act was added as an amendment to the reauthorization of the Violence Against Women Act. This comment

procedure on the proposed regulations is the first opportunity for the public to voice their concern over this expansion of the federal DNA database.

The proposed regulations would mandate collection of DNA from innocent people.

Proposed section 28.12(b) mandates the collection of DNA from all individuals arrested by an agency of the United States, without regard as to whether there is an ultimate conviction or even a finding of probable cause for the arrest.

An arrest is not a determination of wrongdoing. Instead, our foundational constitutional principles mandate a complex series of checks to protect the innocent from accusation without requisite proof. These include a prompt hearing to ensure probable cause existed for an arrest, *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), a trial by impartial jury, *See* U.S. Const., Amdt. 5, and a presumption of innocence until proven guilty. *See Coffin v. U.S.*, 156 U.S. 432 (1895).

The proposed regulations dispense with all of these requirements. They would place an individual in the DNA database for the rest of his or her life without any inquiry or finding by any judicial officer. This wholly disregards with the presumption of innocence.

Collecting DNA from arrestees will have a grave chilling effect on free speech in Washington, D.C., where mass demonstrations are often met with mass arrests without probable cause. For example, in *Barham v. Ramsey*, 369 U.S. App. D.C. 146 (D.C. Cir 2006), police arrested hundreds of demonstrators in Pershing Square Park based solely on the fact that they were in proximity to demonstrators acting unlawfully. No probable cause was found for their arrest—the mass arrest was simply used as a method of clearing the park. Under the proposed regulations, lawful demonstrators in such a situation would have their DNA taken, entered into a database, and kept in perpetuity. Simply knowing that lawful demonstration activity could lead to collection of such sensitive genetic information by the government will surely give many individuals pause when considering whether or not to participate in such demonstrations.

The constitutionality of taking and retaining DNA from arrestees without a warrant or any judicial hearing is highly suspect. In *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006), the Minnesota State Court of Appeals found a system similar to the proposed regulations incompatible with the Fourth Amendment's prohibition on unreasonable searches. The statute at issue in *In re Welfare of C.T.L.* required DNA samples be taken from juvenile arrestees after a finding of probable cause for the arrest. *Id.* at 487. Of course, it has long been established that "the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches." *Skinner v. Ry. Labor Exectives' Ass'n.*, 489 U.S. 6-2, 618 (1989). Relying on the presumption of innocence, the *In re Welfare of C.T.L.* court found that "probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken … without first obtaining a search warrant," and ruled the state must either obtain a warrant for the biological specimen from a magistrate or wait until a conviction to obtain it. *Id.* at 490-92.

The proposed regulations suffer the same constitutional flaw—allowing innocent people to have sensitive biological information seized by the government on nothing more than the

whim of a law enforcement agent. In fact, the proposed regulations are even less protective than the unconstitutional Minnesota statute. Whereas the Minnesota statute at least required a finding of probable cause for the arrest before taking the arrestees DNA, the proposed regulations lack even that minor safeguard.

Insofar as the proposed regulations seek to obtain genetic information from innocent people and keep their DNA profile in a database for their lifetime, they do not serve a legitimate purpose and are in contravention of the Fourth Amendment's prohibition on unreasonable searches and seizures.

The proposed regulations would permit DNA collection from all non-citizens at the border

Proposed section 28.12(b) also requires the collection of DNA from "non-United States person who are detained under the authority of the United States." While ostensibly aimed at collecting DNA from non-citizens detained while in removal proceedings, the proposed regulations lack a definition of "detained" and potentially permit DNA collection from any foreign person entering the United States.

The standard for detention at the border is remarkably low. For instance, border detention can permissibly be based on such lax and subjective factors as nervousness, unusual conduct, loose-fitting or bulky clothing, an itinerary suggestive of wrongdoing, lack of employment or self-employment, inadequate luggage, or evasive or contradictory answers. *See United States v. Asbury*, 586 F.2d 973, 976-77 (9th Cir. 1978) (collecting cases). Therefore, under the proposed rules, visitors to the United States could have their DNA taken and stored permanently for, *inter alia*, wearing baggy clothing.

Proposed section 28.12(b)(2) only appears to address this issue. That section states that the proposed regulations do not require DNA collection on non-arrestee "[a]liens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings." But this is not to say that DNA collection in such a circumstance is prohibited. In fact, the proposed regulations explicitly leave the decision to use the regulations for DNA collection at ports of entry to the discretion of either the Attorney General or Secretary of Homeland Security. In other words, while the proposed regulations do not *mandate* the Homeland Security staff to take DNA samples of everyone pulled out of line for questioning at an airport immigration station, they do permit it.

We see no justification in collecting and storing DNA from the hundreds of thousands of lawful annual visitors to the United States, and believe the regulations should be revised to prohibit DNA collection from non-citizens detained at ports of entry.

The proposed regulations would disproportionately affect people of color

Proposed section 28.12(a)(1) mandates DNA collection from all persons in Bureau of Prisons custody who have been found guilty of a federal offense. This provision will serve to disproportionately pack people of color into the DNA database by aggravating existing racial disparities in the criminal justice system.

The disparity in the racial composition of America's prison population is well known and alarming. Nationwide, the black population is imprisoned 5.6 times more often than whites. *See* Marc Mauer and Ryan S. King, Uneven Justice: State Rates of Incarceration by Race and Ethnicity (July, 2007), p.13, available at: http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_stateratesofincbyraceandethnicity.pdf. Hispanics are imprisoned 1.8 times more than whites. *Id*. at 16. More specifically, the Bureau of Prisons inmate population is currently 39.5% Black and 31.8% is of Hispanic ethnicity. *Federal Bureau of Prisons*, Quick Facts About the Bureau of Prisons, available at: http://www.bop.gov/news/quick.jsp.

As it stands today, the DNA database is already highly skewed toward greater inclusion of people of color. Expanding the DNA databank to include larger swaths of disproportionately represented racial and ethnic minorities raises serious issues for civil rights and racial justice.

Conclusion

For the reasons outlined above, the Center for Constitutional Rights opposes the proposed regulations on moral, public policy, and constitutional grounds.

Further, we call on the Department of Justice to hold hearings on the legal and policy implications of the proposed regulations. The passage of the DNA Fingerprint Act of 2005 did not involve legislative hearings or findings. Instead, it was passed as an amendment to the reauthorization of the Violence Against Women Act. The public were never given a chance to weigh in on the legislation or its implication. While we welcome the opportunity to submit these comments, we believe this is a situation where a full hearing is warranted to weigh the implications of these regulations on civil liberties and public policy.

At a minimum, the Center for Constitutional Rights requests that our concerns be taken into account and that the rule be amended. We further request that our concerns and suggestions be addressed during the final promulgation of the rule.

Respectfully submitted,

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CENTER FOR CONSTITUTIONAL RIGHTS