



## Explainer:

### DHS Expands Efforts to Collect DNA Samples from Immigrants<sup>1</sup>

April 9, 2020

In early 2020, the Trump Administration began implementing a multi-pronged effort to collect DNA samples from immigrants to be used by federal and state law enforcement authorities to investigate crimes.<sup>2</sup> Beginning April 8, 2020, the U.S. Department of Homeland Security (DHS) is authorized to collect DNA from all detained immigrants. This Explainer will summarize these policies and their origins, describe the asserted purpose behind them, who is affected, and concerns voiced by advocates and ethicists over the expansion of DNA sample collection from detained immigrants.

#### Introduction

The U.S. Department of Justice (DOJ) recently enacted a final rule to collect these DNA samples and enter them into the FBI's Combined DNA Index System (CODIS) database, allowing law enforcement officials to check if they match any DNA recovered from a crime scene.<sup>3</sup> The new policy emanates from the DNA Fingerprint Act of 2005, title X of Public Law 109-162, which authorizes the Attorney General to collect DNA samples from individuals who are arrested, facing charges, or convicted and from "non-United States persons who are detained under the authority of the United States."<sup>4</sup> After the Supreme Court's decision in *Maryland v. King*, DNA collection based on arrests or convictions for certain criminal offenses varies on a state-by-state basis, but all 50 states permit collection of DNA samples from people convicted of certain felony offenses.<sup>5</sup>

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<sup>2</sup> 85 FR 13483.

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

<sup>4</sup> *Id.* See 34 U.S.C. § 40702(a)(1)(A).

<sup>5</sup> See e.g., *Maryland v. King*, 569 U.S. 435 (2013) (upholding Maryland statute allowing DNA collection from individuals arrested for violent felony offenses); Nat'l Conference of State Legislatures, "DNA Arrestee Law,"

Until now, DHS has exempted collection of DNA from detained “non-U.S. persons” as not operationally feasible.<sup>6</sup> The rule published on March 9, 2020 removes the authority for DHS to make such an exemption, and restores that power only to the Attorney General.<sup>7</sup> Functionally, this means that DHS must now collect DNA samples from detained immigrants unless the DOJ decides otherwise. The rule will go into effect on April 8, 2020, although a pilot program to collect DNA samples from non-citizens at the border was announced in January.<sup>8</sup>

On January 3, 2020, DHS announced a pilot program where Customs and Border Protection (CBP) collects DNA samples from immigrants entering at two ports of entry (POEs) to the United States: Eagle Pass, Texas, and Detroit, Michigan. DHS projected that this program would be expanded to all ports of entry and immigrants in detention by January 2023.<sup>9</sup>

### **Why is the government implementing this policy?**

DOJ justifies the rule as a corrective to the so-called “artificial” distinction between the treatment of immigrants and criminal arrestees with respect to DNA identification.<sup>10</sup> DOJ has used increased prosecutions of immigration violations as evidence of criminality among even recent immigrants. For example, DOJ notes that “[non-citizens] who are apprehended following illegal entry have likely committed crimes under the immigration laws, such as 8 U.S.C 1325(a) and 1326, for which they can be prosecuted.”<sup>11</sup> DOJ further observes that “[t]he practical difference between criminal arrestees and immigration detainees, for purposes of DNA-sample collection, has been further eroded through policies favoring increased prosecution for immigration violations.”<sup>12</sup> In the final rule, DOJ rejected the objection that the rule promotes the criminalization of immigration and the recommendation by the United Nations that immigration violations be decriminalized, stating that “DNA-sample collection from immigration detainees does not criminalize any immigration violation,” and that “28 CFR 28.12(b) generally requires DNA-sample collection from non-U.S. person detainees, regardless of whether the immigration violations for which they are detained are crimes or only civil violations.”<sup>13</sup>

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<https://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> (50-state survey summarizing state offenses that permit DNA collection).

<sup>6</sup> 85 FR 13484 (noting that in 2010, then-Secretary of Homeland Security Janet A. Napolitano advised in a letter to then-Attorney General Eric Holder that “categorical collection from this population was not feasible.”)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 13483.

<sup>9</sup> See U.S. Department of Homeland Security, Privacy Impact Assessment, CBP and ICE DNA Collection, at 6, Jan. 3, 2020, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs080-detainedna-january2020.pdf>. See also US to start collecting DNA from people detained at the border, Nomaan Merchant, AP News, January 6, 2020 at <https://apnews.com/8e7d4e3d6e2ef24dcc4fd9e79552a3d0> (discussing the pilot program to be implemented at the Laredo and Detroit ports of entry).

<sup>10</sup> 85 FR at 13484.

<sup>11</sup> *Id.*; Jessica Zhang & Andrew Patterson, *The Most Prosecuted Federal Offense in America: A Primer on the Criminalization of Border Crossing*, Lawfare Blog, July 25, 2019, <https://www.lawfareblog.com/most-prosecuted-federal-offense-america-primer-criminalization-border-crossing>.

<sup>12</sup> 85 FR at 13485.

<sup>13</sup> *Id.* at 13491.

In the rule, DOJ offers five government interests served by expansion of DNA sample collection to immigrant detainees, including to allow for accurate identification; to ensure the safety of other detainees and facility staff where detainees are held; to inform decisions about continued detention or release, including risk of flight or threat to public safety; and to clear innocent persons who might otherwise be wrongly suspected or accused, and identify the actual perpetrator.<sup>14</sup>

### **Who is affected by the policy?**

Because the new rule repeals previous DOJ regulations that allowed the DHS Secretary to make exemptions based on operational exigencies or resource limitations, the policy now requires DNA collection from “non-U.S. persons who are detained under the authority of the United States.”<sup>15</sup> This group is understood to comprise immigrants detained for removal proceedings because they have existing removal orders or are subject to grounds of removability or inadmissibility, including migrants seeking entry to the United States for the purpose of applying for asylum or those apprehended shortly after entry for that purpose. In contrast, persons arriving at ports of entry with lawful immigrant and non-immigrant visas, or who are lawful permanent residents, are not subject to DNA sample collection pursuant to this rule.

The rule further clarifies that the DNA collection policy does not apply to individuals in the following circumstances:

- Non-citizens lawfully in, or being processed for lawful admission to the United States;<sup>16</sup>
- Non-citizens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings;<sup>17</sup> and
- Non-citizens held in connection with maritime interdiction.<sup>18</sup>

Hence, persons entering at a port of entry to the United States with a valid visa, who are referred to secondary inspection, will not have their DNA collected pursuant to this rule unless a decision is made to detain them for removal proceedings or to cancel their visa and issue an expedited removal order.

The pilot program announced in January 2020 permits CBP to collect DNA samples initially from non-citizens entering at the Eagle Pass and Detroit POEs who have been convicted of a criminal offense or are referred for prosecution, including children as young as 14 years old.<sup>19</sup> By 2023, DHS projects that it will collect DNA from all criminal arrestees—including all “U.S. persons;” all non-citizens detained for processing and released on their own recognizance; all non-citizens detained for processing under administrative processing and removal

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<sup>14</sup> *Id.* at 13485-86.

<sup>15</sup> *Id.* at 13484; 34 U.S.C. § 40702(a)(1)(A).

<sup>16</sup> 28 C.F.R. § 28.12(b)(1).

<sup>17</sup> 28 C.F.R. § 28.12(b)(2). The proposed rule characterizes this class of non-citizens as overlapping with the first exception and excluding those “lawful entrants” who are “briefly held up at airports during routine processing or taken inside for secondary inspection,” and who are not “subject to further detention or proceedings.” 85 FR 13484.

<sup>18</sup> 28 C.F.R. § 28.12(b)(3). The proposed rule states that DNA collection from this category of non-citizens “may be unnecessary and practically difficult or impossible.” 85 FR 13484.

<sup>19</sup> CBP and ICE DNA Collection, *supra* n.9, at 6.

proceedings; and all non-citizens subject to expedited removal, reinstatement of removal, administrative removal, and all voluntary returns.

### Why should we be concerned?

The collection of DNA samples from detained non-citizens is a broad expansion of authority that impacts the privacy rights of all persons living in the United States.<sup>20</sup> Unlike fingerprints, which can only be used for identification, DNA provides “a massive amount of unique, private information about a person that goes beyond identification of that person.”<sup>21</sup> A DNA sample “contains [a person’s] entire genetic code—information that has the capacity to reveal the individual’s race, biological sex, ethnic background, familial relationships, behavioral characteristics, health status, genetic diseases, predisposition to certain traits . . .”<sup>22</sup> The new rule massively expands DNA collection and retention for a vulnerable population without evidence that it will increase public safety.

Many already oppose the collection of DNA from people arrested or investigated for crimes. Collection of DNA in the criminal legal system was initially limited to those who had been convicted of violent crimes.<sup>23</sup> It has since been expanded by both federal and state law enforcement agencies, such that in 2013, the Supreme Court ruled in *Maryland v. King* that DNA may be collected from persons who have only been *arrested* for a violent felony, regardless of disposition.<sup>24</sup> Now, and with technological advances, many jurisdictions have moved toward collecting DNA as a matter of course for misdemeanor offenses, even where DNA is not implicated at all in the offense.<sup>25</sup> This rule goes further by basing DNA collection on a person’s immigration status.

Along with other programs that the Trump administration has implemented—such as Rapid DNA testing of family units at the border<sup>26</sup>, and collection of fingerprints from all adults

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<sup>20</sup> Daniel I. Morales, Natalie Ram, and Jessica L. Roberts, Opinion, *DNA Collection at the Border Threatens the Privacy of All Americans*, New York Times, January 23, 2020, <https://www.nytimes.com/2020/01/23/opinion/dna-collection-border-privacy.html?action=click&module=Opinion&pgtype=Homepage>

<sup>21</sup> *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).

<sup>22</sup> *People v. Buza*, 4 Cal. 5th 658, 720 (2018) (Cuellar, J., dissenting) (citations omitted).

<sup>23</sup> Mariana Ortega, *Forensic DNA Database Expansion*, Generations Ahead (2011), at 3, [https://www.prisonpolicy.org/scans/GenAhead\\_ForensicDNADatabaseExpansion2011\\_\(2\).pdf](https://www.prisonpolicy.org/scans/GenAhead_ForensicDNADatabaseExpansion2011_(2).pdf)

<sup>24</sup> 569 U.S. 435 (2013).

<sup>25</sup> See Electronic Frontier Foundation, *Federal DNA Collection*, <https://www.eff.org/cases/federal-dna-collection>. See e.g., Bill Farrar, *Proposal to Expand Mandatory DNA Collection in Virginia Raises Serious Privacy and Due Process Concerns*, ACLU Free Future Blog (Jan. 8, 2018), <https://www.aclu.org/blog/privacy-technology/medical-and-genetic-privacy/proposal-expand-mandatory-dna-collection> (noting that a proposal in Virginia would have added “obstruction of justice” and “shoplifting” to the list of misdemeanor offenses that authorized DNA collection.) Under the final rule authorizing DHS to collect DNA samples from immigrants with only immigration-related violations or no violations at all, goes further.

<sup>26</sup> Rapid DNA Testing is not covered by this explainer, as it is a separate program, but is discussed in Saira Hussain, *Rapid DNA Testing on Migrants at the Border is Yet Another Iteration of Family Separation*, EFF Deeplinks Blog (Aug. 2, 2019), <https://www.eff.org/deeplinks/2019/08/ices-rapid-dna-testing-migrants-border-yet-another-iteration-family-separation>. See also Priscilla Alvarez & Geneva Sands, *Exclusive: DHS to start DNA testing to establish family relationships at the border*, CNN (May 1, 2019), <https://www.cnn.com/2019/04/30/politics/homeland-security-dna-testing-immigration/index.html>.

in households seeking to care for unaccompanied minors<sup>27</sup>—the rule seeks to normalize biometric collection from immigrants based on specious notions of public safety. This, as the Electronic Frontier Foundation has warned, “brings us closer to a regime of DNA collection from the entire population.”<sup>28</sup> Despite the propensity toward increased DNA collection, there is no evidence that expanding the collection of DNA samples in CODIS results in more solved crimes.<sup>29</sup>

Many in the criminal legal system already oppose expanded DNA collection due to concerns about misidentification.<sup>30</sup> As DNA technology advances, smaller and smaller samples are collected from crime scenes, leading to questionable conclusions from matches found in CODIS. Apart from exposing them to the everyday machinery of criminalization, an incorrect match could lead to a wrongful conviction. And more generally, advocates find DNA collection of migrants to be “dehumanizing and a serious breach of privacy against vulnerable populations.”<sup>31</sup> Recasting migrants, including immigrants detained after their entry to the United States, uniformly as threats to public safety is an example of governmental overreach that relies on the association of migration with criminality. Once this step is taken, other expansions of DNA surveillance against migrants and others will follow.

Advocates and ethicists also criticize these policies as containing insufficient safeguards for wrongful DNA collection.<sup>32</sup> The exceptions to the DNA collection policies discussed here are sometimes imprecisely drawn. The policies provide no recourse to persons who meet an exception to the DNA collection policy and are wrongfully subjected to collection, such as U.S. citizens and permanent residents that may be erroneously detained, as ICE estimated happened to nearly 1500 people over a six-year period.<sup>33</sup>

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<sup>27</sup> Joshua Barajas, *What changes to this fingerprinting rule could mean for migrant children in U.S. custody*, PBS (Dec. 19, 2018), <https://www.pbs.org/newshour/nation/what-changes-to-this-fingerprinting-rule-could-mean-for-migrant-children-in-u-s-custody>.

<sup>28</sup> Electronic Frontier Foundation, *Comments of EFF re DOJ Proposed Rule on DNA Collection from Immigrant Detainees* (Nov. 12, 2019), <https://www.eff.org/document/eff-comments-doj-proposed-rule-collect-dna-immigrant-detainees-november-2019>.

<sup>29</sup> Jeremiah Goulka et al., *Toward a Comparison of DNA Profiling and Databases in the United States and England*, RAND (2010), at 1, [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2010/RAND\\_TR918.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf).

<sup>30</sup> See Sarah B. Berson, *Debating DNA Collection*, National Institute of Justice Journal 264 (Nov. 2009), <https://www.ncjrs.gov/pdffiles1/nij/228383.pdf>. (discussing the DNA Fingerprint Act of 2005 and state court decisions grappling with the collection of DNA from persons not yet convicted of any crime, prior to *Maryland v. King*, *supra* n.5); Stephen Mercer & Jessica Gabel, Article: *Shadow Dwellers: the Underregulated World of State and Local DNA Databases*, 69 NYU Ann. Surv. Am. L. 639, 674 (2014) (noting that “the risk of misidentification increases when degraded, partial, or irrelevant crime scene profiles are stored in databases.”).

<sup>31</sup> Merrit Kennedy, National Public Radio, *Trump Administration Poised to Start Collecting DNA from Immigration Detainees* (March 6, 2020), <https://www.npr.org/2020/03/06/812940401/trump-administration-poised-to-start-collecting-dna-from-immigration-detainees>

<sup>32</sup> See Lindzi Wessel, *Scientists concerned over US plans to collect DNA from immigrants*, Nature (Oct. 7, 2019), <https://www.nature.com/articles/d41586-019-02998-3>.

<sup>33</sup> Paige St. John & Joel Rubin, *Must Reads: ICE held an American man in custody for 1,273 days. He’s not the only one who had to prove his citizenship*, L.A. Times (Apr. 27, 2018), available at <https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmistory.html>.

## Conclusion

The recent rule expanding the authority of DHS to collect DNA samples from detained immigrants who have minimal to no contact with the criminal legal system is especially troubling in these times of heightened immigration enforcement. The law providing for the collection of DNA from detained immigrants, although passed in 2005, had previously not been implemented, and presents serious concerns including the normalization of sensitive biometric collection, the potential for being implicated for crimes, and the increased criminalization of immigrants. We will continue monitoring the implementation of this rule and related policies, for their impact on immigrant communities.

Please do not hesitate to contact Cristina Velez at [cristina@nipnl.org](mailto:cristina@nipnl.org) or Saira Hussain at [saira@eff.org](mailto:saira@eff.org) if you have any questions or need any further information.