



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

September 23, 2005

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
United State Senate
Washington, DC 20510

Re: Senator Kyl's amendment to the Violence Against Women Act of 2005 (S. 1197)

Dear Senators Specter and Leahy:

I am writing to express the concerns of the National Association of Criminal Defense Lawyers (NACDL) regarding Senator Kyl's amendment to the Violence Against Women Act of 2005 (S. 1197) that would expand the federal Combined DNA Index System (CODIS) database and federal authority to collect DNA samples. NACDL strongly believes that the CODIS database should not contain DNA samples from detainees, arrestees, and persons who have been charged but not convicted of a qualifying offense.

The Justice For All Act of 2004 greatly expanded the scope of state-collected DNA records that may be included in the CODIS. Wisely, however, the Act contained two exceptions, excluding DNA profiles from (1) arrestees who have not been charged in an indictment or information with a crime and (2) persons who voluntarily submit DNA samples solely for elimination purposes. Senator Kyl's amendment would repeal these recently enacted provisions and also would permit federal authorities to collect DNA samples from "arrested or detained" individuals.

By allowing for the inclusion of DNA profiles from those who have not been convicted of a crime, Senator Kyl's amendment flouts the presumption of innocence, misallocates resources, and encourages racial profiling. Expanding DNA databases to include profiles from detainees and arrestees will produce an identification system that reflects and possibly exacerbates racially disparate detention and arrest rates, in part because it will provide an incentive for pretext and race-based stops and arrests for the purpose of DNA sampling. In cities such as Miami, Charlottesville, Baton Rouge, Wichita, Omaha, and San Diego, DNA "sweeps" or "dragnets" based on racial profiles have aggravated racial tensions while failing to yield suspects.

In a haphazard effort to expand the CODIS, the amendment would undermine the effectiveness of DNA technology as an investigative tool. The U.S. National Commission on the Future of DNA Evidence, in 2002, recommended against including samples from arrestees on the grounds that there were already hundreds of thousands of samples waiting to be analyzed, and state crime laboratories do not have the capacity to process more samples. Indiscriminate expansion of the CODIS will exacerbate these backlogs, burying DNA samples from those convicted of serious violent offenses under a mountain of DNA samples from arrestees and law-abiding citizens. It is particularly difficult to find any justification for eliminating the exception for persons who voluntarily submit their DNA to be cleared of a crime; the obvious effect of this measure will be to discourage cooperation with criminal investigations.

Senator Kyl's amendment also would create an illogical double standard with respect to expungement of DNA profiles from the CODIS. Unlike the current provision regarding expungement of state-collected DNA, there is no authority for expungement when federal *charges* are *dismissed* -- only when federal *convictions* are *overturned*. So, dismissed state charges can result in expungement, but dismissed federal charges cannot. Similarly, law-abiding persons who are wrongfully arrested or detained, but never charged, are unable to expunge their DNA from the CODIS. In this context, it makes no sense to treat differently those charged and acquitted and those wrongfully arrested and never prosecuted. Furthermore, the burden to initiate expungement should be on the state and federal governments, not the wrongfully arrested and/or prosecuted individuals.

Sec. 1005 of Senator Kyl's amendment effectively repeals the "John Doe" warrant procedure enacted as part of the Justice For All Act. While NACDL has no position on John Doe warrants, we note that they do have advantages over abolishing the statute of limitation because the warrants provide for judicial supervision and some protection against wrongful accusations. This approach also forces the police and prosecutors to complete the DNA analysis within reasonable time limits, which benefits everyone, especially victims.

Overall, NACDL is deeply concerned about the unnecessary expansion of the CODIS database. With the collection of an individual's DNA comes the potential for gross misuse of that data. DNA samples can reveal extremely sensitive, private information regarding physical and mental traits and the likelihood of the occurrence of genetic conditions and diseases. And as Justice Brennan wrote in his concurrence in *Whalen v. Roe*, "The central storage and easy accessibility of computerized data vastly increases the potential for abuse of that information." While we recognize that DNA evidence is unparalleled in its scientific ability to identify the guilty and protect the innocent, its treatment is subject to human error and thus must be thoughtfully and strictly regulated to prevent mishandling, contamination, and abuse.

Thank you for considering our concerns. Our hope is that the legislation will be amended so as to exclude this counterproductive amendment. If you have any questions or would like further information regarding NACDL's position, please contact Legislative Director Kyle O'Dowd: (202) 872-8600 x226 or kyle@nacdl.org.

Sincerely,



Barbara Bergman
President

cc: Members, Senate Judiciary Committee