IRLI IMMIGRATION REFORM LAW INSTITUTE

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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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November 12, 2019

David J. Karp
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United States Department of Justice
950 Pennsylvania Ave. NW
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Washington, DC 20530

VIA Federal eRulemaking Portal

DOJ Docket No. OAG-164: DNA-Sample Collection From Immigration Detainees

Dear Mr. Karp:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment to the Office of the Attorney General, United States Department of Justice (OAG), in response to the agency's notice of proposed rulemaking (NPRM) published in the Federal Register. 84 Fed. Reg. 56397 (October 22, 2019).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI also provides expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public.

Summary

The statutory authority of the Office of the Attorney General (OAG) to undertake the proposed rulemaking is undisputed. However, if the NPRM is implemented without amendments providing for DNA sample collection from the estimated five million "non-U.S. persons" detained by DHS between August 2011 and the present, IRLI concludes that the final rule would likely risk judicial *vacatur* in an Administrative Procedure Act (APA) challenge, on the ground that it was arbitrary, capricious and *ultra vires*.

The failure of the NPRM to address the seriously adverse findings by the Office of Special Counsel (OSC), as documented in public OSC case files, is in itself grounds for *vacatur*, as the agency has deliberately omitted discussion or even a mention of this highly relevant investigation in the NPRM. The failure of DHS to comply with the one-year exemption on sample collection authorized by the Attorney General, the intentional resistance to implementation of the DNA Fingerprint Act of 2005 ("Act") or its 2009 regulations, and the disingenuous and unreasonable actions of relevant DHS executives on stone-walling the OSC investigation, and the lack of any legal justification for the failure to comply with the Act starting in August 2011, are hallmarks of arbitrary and capricious agency action.

Comments and analysis

The NPRM would amend 8 C.F.R. § 28.12 (Collection of DNA Samples) by deleting one of four classifications of non-citizen "non-arrestees" who may be exempted from DNA sample collection by the Department of Homeland Security (DHS). The clause to be deleted reads,

> (4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that collection of DNA samples is not feasible because of operational exigencies or resource limitations.

8 C.F.R. § 28.12(b)(4).

As noted in the NPRM Supplemental Information, the DNA Fingerprint Act of 2005 authorized the Attorney General to collect (and directed other federal agencies to collect) DNA samples from individuals who are arrested, facing charges, or convicted, and also from non-United

States persons who are detained under the authority of the United States. 84 Fed. Reg. 56398, citing 34 U.S.C. § 40702(a)(1)(A).

The NPRM correctly states that the fourth regulatory exemption to the 8 C.F.R. § 28.12 collection requirements—that DHS is exempt from collection of DNA samples when it is "not feasible because of operational exigencies or resource limitations"—is now "at odds with the treatment of all other Federal agencies, which may adopt exceptions … based on operational exigencies or resource limitations only with the Attorney General's approval." 84 Fed. Reg. 56398.

Former Secretary of Homeland Security Janet Napolitano invoked 8 C.F.R. § 28.12(b)(4) in a letter to then-Attorney General Eric Holder dated March 22, 2010. Secretary Napolitano explained:

> DHS typically processes over 750,000 non-U.S. Persons in administrative proceedings annually … the Collection of DNA samples from this class would create significant operational exigencies that would diminish the ability of this agency to accomplish its primary mission. … We intend **to phase-in implementation over the next year, with certain DHS Components to begin the process more quickly** than others. DHS wishes to pursue further discussions with DOJ regarding training options for DHS law enforcement officers and agents, as training **is needed in the initial stage** of broader DHS implementation of this process (emphases added).

Letter to then-Secretary Kirstjen Nielsen from Sen. Charles E. Grassley, Chairman, Senate Judiciary Committee (citing March 2010 Napolitano letter) (Nov. 20, 2018).

Four months later, then-Attorney General Holder conditionally granted DHS's request for exemption from sample collection, but only with respect to administrative detainees. Holder wrote that collection from

> immigration detainees would not be feasible at the present time. …. The principal Department of Justice investigative agencies … are collecting DNA samples from their arrestees. All federal agencies that have not already done so, including DHS

> agencies, should complete their implementation of arrestee DNA sample collection as expeditiously as possible.

Letter from Attorney General Holder to DHS Secretary Napolitano (July 22, 2010).

DHS was **never exempted** from the mandate to all federal agencies that sample collection from criminal arrestees begin "as expeditiously as possible." *Id*. In other words, DHS was the only federal agency to ever claim that "operational exigencies and resource limitations" prevented it from compliance with the 2005 Act. The only "operational exigencies" ever disclosed to the Attorney General were the need in 2010 for "training options … in the initial stage of broader DHS implementation" and the need to negotiate unspecified changes in "working conditions" with ICE and CBP unions.

Over the ensuing decade since delivery of Attorney General Holder's July 2010 letter, DHS never requested or received approval from the Office of the Attorney General for any renewal or extension of the clause (b)(4) exemption, nor disclosed any other form of permission, authority or legal justification to defer agency compliance with the clear and specific DNA collection requirements of the 2005 Act or its 2009 regulations.

> According to an August 2019 report to the President from the Office of Special Counsel, after the one-year exemption period lapsed, CBP [Customs and Border Patrol sub-agency] did not start collecting samples from individual detained by the agency …. [I]n the intervening decade since the exemption period lapsed, despite efforts to come into compliance, DNA collection from criminal subjects has yet to occur ….

Letter from U.S. Special Counsel Henry J. Kerner to the President, *Re: OSC File Nos. DI-18-3920, DI-18-3924, and DI-18-3931* (August 21, 2019). Special Counsel Kerner states that the findings he is reporting to the President are "the strongest possible step that OSC can take to rebuke the agency's failure to comply with the law." *Id.* at 7.

Kerner found specifically that

(1) "CBP has failed to fulfill its responsibilities under that law and in so doing has compromised public safety. The failure to collect DNA clearly inhibits law enforcement's ability to solve cold cases and to bring violent criminals to justice." *Id.* at 6.

(2) "Although CBP was granted a one-year exemption, as stated in the language of the exemption itself, CBP was supposed to use that period to begin complying with DNA collection. The passage of a decade without compliance is unacceptable." *Id.*

(3) "CBP's decision not to comply has had a negative effect on law enforcement's ability to solve crimes. This is evidenced by the FBI's regular and independent assessment of federal DNA collection efforts, which detail violent crimes likely to be committed by suspects who were repeatedly detained by CBP and ICE but released without detection. … Many cold cases might have been solved—and victims of violent crimes granted closure—by now if CBP had complied with its obligations under the law." *Id.*

(4) "[The] assertion that ICE collects DNA from persons transferred to its custody thereby obviating CBP's obligation is refuted by data published by the FBI. … To justify this failure as the result of inadequate resources is also disingenuous. The FBI maintains a robust infrastructure for receiving and analyzing DNA samples, and advance[s] in technology have simplified and protected the collection process and chain of custody. … CBP staffing and budget levels have also increased significantly since the passage of the DNA Fingerprint Act. *Id.*

(5) "CBP's conduct in this [OSC] matter, and … its findings appear unreasonable. Given the significant public safety and law enforcement implications at issue…," the President was advised to "urge the Department of Justice to review status and continued applicability of the 2010 correspondence that CBP uses as a basis for its inaction.' *Id.*

The findings of the Special Counsel constitute an official allegation that failure to collect an estimated five million DNA samples between 2011 and the present constitutes an impermissibly arbitrary and capricious action by the federal agency Congress charged with independently investigating agency corruption and malfeasance. Such actions are barred by the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

First, the notable failure of the NPRM to include any mention of the report to the President by the Office of Special Counsel, or the extensive (and public) record of its investigation of the DHS exemption and its lack of legal justification, constitutes a distinct basis for finding the NPRM

arbitrary and capricious. Letter from Henry J. Kerner, Special Counsel, to Donald J. Trump, President of the United States, *available at* https://osc.gov/Documents/Public%20Files/FY19/DI-18-3920,%20DI-18-3924,%20and%20DI-18-3931/Redacted%20DI-18-3920,%20DI-18-3924,%20DI-18-3931%20Letter%20to%20the%20President.pdf (Aug. 21, 2019). A reasoned analysis by the agency "indicating that prior policies and standards are being deliberately changed, not casually ignored" has long been required. *See, e.g,. Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (citation omitted). "Failing to supply such analysis renders the agency's action arbitrary and capricious." *Id.*

While the authority of the Attorney General to terminate the authority of DHS to exempt itself from DNA sample collection, as exercised in the NPRM, is not in itself *ultra vires*, the timing and scope of this agency action are clearly contrary to law. The NPRM purports to formalize the termination of a regulation allowing DHS to exempt non-U.S. civil detainees from a screening for crime-related activity. Here, the likelihood is almost one-in-five that DNA samples collected from such persons will connect them to reported criminal activity. But that exemption clearly expired before August 2011, making the agency's position, in the careful phrasing of the Office of Special Counsel, "a failure to fulfill its responsibility under law" and "unacceptable" and "[having had a negative effect on law enforcement's ability to solve crimes" and "disingenuous" and "unreasonable."

In administrative law, such findings in the record, reported by no less than the most senior federal investigative agency, are hallmarks of impermissible agency action. *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 209 (D.C. Cir. 2015) (an agency action would normally be arbitrary and capricious "if the agency has … entirely failed to consider an important aspect of the problem … .") The OSC findings make the NPRM in effect an extra-statutory amnesty for as many as one million aliens whose criminal conduct would have made them inadmissible or removable.

Under the Immigration and Nationality Act (INA), relief from removal or other immigration benefits granted to a non-U.S. person detained pursuant to U.S. immigration law are generally conditioned upon disclosure of any criminal acts by the alien in his or her application or

petition. Thus, the harm caused by the willful resistance of DHS to begin DNA sample collection within the timeframe contemplated by Congress and the Department of Justice is ongoing.

Many members of IRLI's non-profit education and advocacy affiliate, the Federation for American Immigration, have suffered murder, manslaughter or violent attacks on their family members by aliens who, but for the agency's unlawful resistance, would to a statistical certainty have been identified as suspects or persons of interest in predecessor criminal activity to the heinous crimes committed against their family members. Both IRLI and FAIR have been forced to divert significant organizational resources—human, educational, and financial—to defending cooperative efforts to remove criminal aliens from American communities. Some of those resources could instead have been allocated to essential public education on the environmental or economic issues related to mass immigration but for this unlawful resistance from DHS.

The dilemma created by the legacy of DHS resistance to compliance with the 2005 Act is that to **not** implement the NPRM would be impermissible, but to implement the NPRM **without providing for** remedial DNA sample collection from the five million-strong demographic of aliens detained between August 2012 and the present would also be arbitrary and contrary to law.

To avoid judicial *vacatur*, the final rule must include amendments to 28 C.F.R. § 28.12 providing that: until the requisite DNA sample has been provided to and analyzed by the FBI, the agency may not approve or process any pending application or petition(including generally requests for relief, changes, renewals or adjustment of status, or naturalization)from an alien or his or her sponsor who was detained during the period of unlawful agency resistance to the collection mandate of the 2005 Act.

The regulation could provide for voluntary submission of a DNA sample by a relevant non-citizen who wanted to eliminate delay or uncertainty as to his possible criminal inadmissibility in advance of filing an actual application or petition. Subsequent arrests or immigration detentions would of course also present the opportunity to obtain a sample. All other members of the class would expect to provide the sample during the application or petition adjudication process. There would be no need for special registration or agency searches.

On the other hand, the more complete the DNA-sample collection process becomes, the greater the public safety, fraud, identity theft and illegal immigration prevention benefits would be.

Respectfully submitted,

Immigration Reform Law Institute

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