

United States Senate

WASHINGTON, DC 20510

October 30, 2019

The Honorable William P. Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave, N.W.
Washington, DC 20530

Kevin K. McAleenan
Acting Secretary
Department of Homeland Security
3801 Nebraska Avenue, N.W.
Washington, DC 20528

Dear Attorney General Barr and Acting Secretary McAleenan,

We write to express concern about the civil rights and privacy implications of a new Trump administration proposal mandating forced DNA collection from migrants — including children over the age of thirteen and, apparently, asylum-seekers — entering the United States. This new policy is unnecessary, unjustified, and invasive, and we urge you to abandon it.

On October 22, 2019, the Department of Justice (DOJ) published a proposed rule in the Federal Register that would require the Department of Homeland Security (DHS) to collect DNA samples from all migrants crossing the border into the United States at legal ports of entry and taken into custody.¹ This policy change reflects a significant broadening of existing rules governing DNA collection from migrants. The biometric data collected from migrants under the new policy would be added to a DNA database maintained by the Federal Bureau of Investigation (FBI) and used by federal and state law enforcement nationwide.

Under current law, the Secretary of Homeland Security can exempt DHS from DNA sample-collection directives when it is not feasible “because of operational exigencies or resource limitations.”² According to the proposed rule, that exemption, which has been in place since March 2010, is no longer needed because of “fundamental changes in the cost and ease of DNA-sample collection.”³ But under DOJ’s own analysis, the proposed rule would require DHS to conduct nearly 755,000 DNA tests annually, compared to only 7,000 under the current policy.⁴ Within three years, that would annually result in more than 62,000 additional DHS work hours, more than \$4 million in additional DNA sample-collection kits, and an extra \$5.1 million in

¹ DNA-Sample Collection from Immigration Detainees, 84 FR 56397 (proposed Oct. 22, 2019) (to be codified at 28 C.F.R. pt. 28), <https://www.regulations.gov/document?D=DOJ-OAG-2019-0004-0001>.

² *Id.* at 53698.

³ *Id.*

⁴ *Id.* at 56400.

software costs.⁵ On March 29, 2019, before the release of the new proposal, then-Secretary of Homeland Security Kirstjen Nielsen wrote to Congress requesting “emergency resources” because “agents and officers are stretched too thin” and DHS faced a “system-wide meltdown.”⁶ That state of affairs described by the Secretary of Homeland Security cannot be squared with the proposed rule’s assertion that there are no longer “operational exigencies or resource limitations” precluding widespread DNA collection.

Rather, the real rationale for this new policy appears to be the Trump administration’s unending desire to vilify and stigmatize immigrants, and to erect any and all possible obstacles to immigration to the United States. And the consequence of this new policy will be to place in the hands of the federal government voluminous biometric data taken without consent from hundreds of thousands of migrants — including children as young as 14 years of age — who have done nothing other than seek a better life in our country. The Trump administration has previously used data collected on migrants for enforcement purposes.⁷ This new rule raises serious concerns that DHS will use this new DNA data to carry out enforcement actions — not just against those subjected to collection, but also against family members who may share similar DNA characteristics.

We therefore request that, by November 20, 2019, you respond in writing to the following questions:

1. Please explain the statutory and regulatory basis for DOJ proposing a rule that requires DHS to expand the population subject to DNA-sample collection. Please also explain the basis for the timing of the issuance of the proposed rule, including, if relevant, the departure of any DHS officials opposed to it.
2. Has DOJ or DHS conducted any cost-benefit analysis of the new policy? If so, what has that analysis concluded? If not, why not? For example, is there any empirical evidence that the proposed rule will keep Americans safer?
3. The proposed rule explains that the collection of DNA samples “furthers the interests of justice and public safety.” It then justifies this view by stating, “Aliens who are apprehended following illegal entry have likely committed crimes under the immigration laws,” citing illegal entry and reentry under 8 U.S.C. §§ 1325(a) and 1326. Yet a significant body of research has shown that immigrants are less likely to commit crimes than native-born Americans.⁸ What other crimes, if any, are aliens apprehended following

⁵ *Id.* at 56401.

⁶ Letter from Secretary of Homeland Security Kirstjen M. Nielsen to the U.S. House of Representatives and U.S. Senate (Mar. 29, 2019), https://www.dhs.gov/sites/default/files/publications/19_0328_Border-Situation-Update.pdf.

⁷ Geneva Sands, *ICE arrested 170 potential sponsors of unaccompanied migrant children*, CNN (Dec. 10, 2018), <https://www.cnn.com/2018/12/10/politics/ice-potential-sponsors-arrests/index.html>.

⁸ See Richard Pérez-Peña, *Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. Times (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html?module=inline>.

illegal entry likely to have committed, and what evidence does DOJ or DHS have to support that finding?

4. According to press reports, the new policy will apply to asylum-seekers presenting themselves at legal ports of entry, and therefore may have committed no crimes under immigration laws.⁹ Are these press reports accurate, and, if so, what is the justification for collecting DNA samples from asylum-seekers? Why is this population not subject to the first exception outlined in the rule: “aliens lawfully in, or being processed for lawful admission to, the United States?”
5. How is the nonconsensual collection of DNA from immigrants seeking to enter the United States consistent with rights to due process and against unreasonable searches and seizures that U.S. courts have afforded immigrants under the U.S. Constitution?
6. Will any biometric data collected under the proposed rule be made available to or shared with U.S. Immigration and Customs Enforcement or any other law enforcement agency for immigration enforcement purposes?
7. Has DOJ or DHS determined whether the FBI is prepared and able to handle and protect from breaches the massive influx of data that will be flowing into its database? If so, what steps is the FBI taking? If not, why not?
8. A contractor working on behalf of Customs and Border Protection recently suffered a data breach that affected up to 100,000 individuals. Under the proposed rule, will a contractor or DHS itself be responsible for DHS’ collection of migrants’ DNA?

Thank you in advance for your attention to these requests. If you have any questions, please contact Andrew Cohen of my staff at andrew_cohen@markey.senate.gov.

Sincerely,



EDWARD J. MARKEY
United States Senator



ELIZABETH WARREN
United States Senator




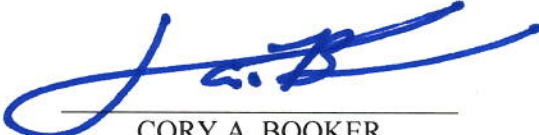
PATRICK LEAHY
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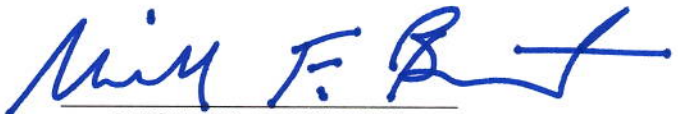
RICHARD BLUMENTHAL
United States Senator

⁹ See, e.g., Colleen Long, *US takes step to require DNA samples from asylum-seekers*, AP (Oct. 21, 2019), <https://www.apnews.com/9e9f240525444c798ac2bd0e64feef93>.


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