Congress of the United States
Washington, DC 20515

November 12, 2019

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

Re: *DNA-Sample Collection From Immigration Detainees* Proposed Rulemaking (84 FR 56397)

Dear Attorney General Barr:

The following comments are submitted on behalf of Members of Congress who object to the Department of Justice's (DOJ) proposed rulemaking demanding that the Department of Homeland Security (DHS) begin DNA collection from all detainees under DHS's care. DOJ's proposed rule, *"DNA-Sample Collection from Immigration Detainees"* (84 FR 56397), is unnecessary, unjustified, and invasive. We urge you to abandon it.

This proposed rulemaking provides the Attorney General unilateral authority to direct DHS to collect DNA samples from non-US citizens it detains. Moreover, it removes the DHS Secretary's existing discretion to work with DOJ when determining whether sample collection is feasible due to operational exigencies or resource limitations. This change in policy disregards DHS's unique ability to determine what is best for the agency and those under its purview, and subjects DHS to the DNA-collection requirement irrespective of its resource limitations and operational demands.

Further, the rule creates unnecessary costs at a time when DHS has repeatedly requested supplemental funding to address existing needs. According to DOJ's own analysis for the proposed rulemaking, the rule will require DHS to conduct nearly 755,000 DNA tests annually, compared to only 7,000 under current policy.[1] Within three years, this will annually result in more than 62,000 additional work hours at DHS, more than $8 million in additional DNA sampling kits from the FBI, and an extra $5.1 million in software costs.[2] Yet, just months ago, on March 29, 2019, then-Secretary Kirstjen Nielsen wrote to Congress requesting "emergency resources" because "agents and officers were stretched too thin" and DHS faced a "system-wide meltdown."[3] It is difficult to reconcile the state of affairs described so recently by DHS with DOJ's claim that there are no longer "operational exigencies or resource limitations" precluding widespread DNA collection from all DHS detainees. This is an irresponsible directive that comes

[1] DNA-Sample Collection from Immigration Detainees, 84 FR 56397, 56400 (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 56401.
[3] 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.

at great fiscal expense to the U.S. government and personal expense to the individuals affected by this change in policy.

The Administration's attempt to justify DNA collection from detainees by characterizing people in immigration detention as the perpetrators of past unsolved violent crimes is morally objectionable and factually baseless. Peer-reviewed publications and several studies confirm that immigrants are less likely to commit crimes than native-born Americans, and that immigration rates have no effect on crime rates.[4] Additional claims that bulk DNA testing is required to verify the authenticity of familial units are equally without merit. Despite repeated assertions by both former Secretary Nielsen and Acting Secretary McAleenan that there is widespread presentation of "fraudulent" families at the southern border, DHS's own Fiscal Year 2019 data confirms that, at the very most, approximately one percent of all families could conceivably be considered "fraudulent." And, even this one percent is fraught with as-yet unresolved questions, as DHS has not clarified whether any fraudulent family units included groups with a child traveling with a relative other than their parent, such as a cousin, uncle, or grandparent.

The potential for harmful consequences from the implementation of this rule are very real, including the start of a *de facto* national DNA database that places voluminous biometric data taken without consent from thousands of migrants — including children — who have done nothing more than seek a better life in our country, and who are among the least able to protect their civil and privacy rights. This precedent could be used to support the creation of a DNA database full of profiles from every individual who lives in or traverses the United States. Such a database would subvert basic notions of freedom, autonomy, and presumed innocence, and instead cast everyone as an object of suspicion meriting government surveillance.

All non-citizens must already provide fingerprints and photographs for identification purposes, making it unnecessary to also collect DNA samples, especially given DHS's existing resource limitations and the absence of increased incidents of fraudulent family units. In addition, the FBI describes the Combined DNA Index System (CODIS) as "a tool for linking violent crimes to known offenders," yet the DNA that DHS will collect is primarily from individuals who are entering the United States for the first time and therefore may have committed no crimes under our immigration laws. Under this Administration's prejudicial lens, DHS presages criminalizing any noncitizen who enters the country by capturing their data and placing it in a far-reaching criminal record system. This is a blatantly xenophobic measure; a manifestation of the Administration's drive to miscast immigrants as inherently dangerous.

This proposed rulemaking also appears to represent a DOJ power-grab. The rule would ensure that the DHS Secretary's discretionary powers no longer interfere with the Administration's vilification and stigmatization of immigrants, and its repeated construction of obstacles to legal immigration to the United States.

This Administration's DHS has previously used data collected from migrants for enforcement purposes. We have serious concerns that the Administration will use collected data not only

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[4] *See, e.g.*, Mears, D. (2002). Immigration and Crime: What's the Connection? *Federal Sentencing Reporter, 14*(5), 284-288. doi:10.1525/fsr.2002.14.5.284.

against those subject to collection, but also against family members and anyone who may share similar DNA characteristics.

We therefore urge DOJ to abandon this proposed rule, and instead continue to work in tandem with DHS to develop a transparent and objective DNA collection policy.

Sincerely,

MARK TAKANO
Member of Congress

EDWARD J. MARKEY
United States Senator

PATTY MURRAY
United States Senator

BONNIE WATSON COLEMAN
Member of Congress

EMANUEL CLEAVER
Member of Congress