

TAKING DNA FROM THE INNOCENT

Bill would be a major step toward Big Brother government

KEY FACTS: • The North Carolina General Assembly is considering a bill (HB 1403) that would require law enforcement agencies to collect DNA samples from individuals arrested for certain felonies.

- If passed, the state of North Carolina would, for the first time, require innocent people to provide DNA to the government.
- The fundamental tenet of our criminal justice system is that individuals are presumed innocent until proven guilty. Collecting DNA samples from all arrestees would turn this principle on its head.
- If the state were to collect DNA from some innocent people, then there would be no basis against collecting DNA from every citizen.
- There are vast differences between collecting fingerprints and collecting DNA samples. Fingerprints are used for identification purposes—proving that John Doe really is John Doe. DNA can provide information about susceptibility to diseases, predisposition to behaviors, and other very personal insights that individuals do not even know about themselves.
- The United States government has a long history of taking personal information from and about Americans and using it for horrible purposes.
- Poor protection of DNA data by the government is a more likely problem than its misuse of this sensitive personal information.
- Many proponents of HB 1403 presumably oppose big government. A person cannot simultaneously be against big government and in favor of Big Brother.
- The bill likely violates the Fourth Amendment to the United States Constitution.
- Benjamin Franklin said “Anyone who trades liberty for security deserves neither liberty nor security.” The General Assembly needs to heed these important words and choose liberty.

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The North Carolina General Assembly is considering a bill (HB 1403) that would require law enforcement agencies to collect DNA samples from individuals arrested for certain felonies.¹ The state would not be required to have a warrant to collect the sample and would have carte blanche to invade an individual's privacy even if no basis exists to suspect that DNA from the individual was necessary to solve a specific crime.²

Under existing state law, DNA samples already are collected from convicted felons.³ This new law would take the collection of DNA to a disturbing new level. For the first time, North Carolina would require that innocent people provide DNA to the government. The DNA samples would be maintained by the state, and the data acquired from the DNA analysis would go into a state database as well as sent to a national database called the Combined DNA Indexing System (CODIS).⁴

This *Spotlight* argues that collecting DNA from arrested individuals runs counter to the principles of our American justice system, violates individual privacy and principles of liberty, and likely is unconstitutional.

Brief Background

There has been a recent movement to collect DNA samples from arrestees. In 2009, the federal government began collecting samples from arrestees.⁵ The majority of states have not adopted this practice, but 21 states have.⁶

The practice is primarily designed to collect as much data as possible to assist law enforcement in solving crimes. The DNA information collected from arrestees can be matched against DNA found at past crimes scenes.

Arrestees v. Convicted Felons

The fundamental tenet of our criminal justice system is that individuals are presumed innocent until proven guilty. Collecting DNA samples from all arrestees would turn this principle on its head.

When someone has been convicted of a crime, a reasonable argument can be made that the individual has lost certain expectations of privacy. No such argument applies to arrestees, however. Getting arrested is not conclusive evidence of wrongdoing.

Many arrestees are innocent. Each of them is just as innocent as a person who has never been arrested. To assume otherwise is to believe that getting arrested is some evidence of guilt, which is exactly the opposite of how our justice system works.

Some argue that if people stay out of trouble, then they need not worry about DNA being taken from arrestees. This argument is inaccurate. Many people who lead honest, law-abiding lives still find themselves victims of wrongful arrest.

No Different from Collecting DNA on Every Citizen

Law enforcement already is able to collect DNA samples from convicted felons. It also can collect DNA samples from arrestees, if there is a warrant (or consent). HB 1403 would require law enforcement, *without* a warrant, to collect DNA on arrestees.⁷

Victims groups offer powerful stories in favor of collecting DNA from the innocent because some of the additional samples may help to solve crimes.⁸ Policymakers should nevertheless develop policy based on principle, not emotion.

If we collect DNA from some innocent people, then there would be no basis against collecting DNA from every citizen. The idea of expanding the DNA database to cover everyone is not some extreme scenario devised to highlight the specific concerns of collecting DNA from arrestees. The United States Department of Justice's National Institute of Justice, in a 2000 report, warned:

Inevitably, there will be the increasing possibility of broadening the database to include the general public. There would be many advantages, such as identification of persons or body parts after accidents, or discovery of kidnapped or lost people. At the same time, the risk to individual privacy would be enhanced and protection of anonymity would be harder. Balancing benefits and risks of population databases will continue to be a contentious issue in the future.⁹

Fingerprints v. DNA Samples

Collecting fingerprints is vastly different from collecting DNA samples. A fingerprint is used for identification purposes only—to know that John Doe really is John Doe.

DNA samples¹⁰ provide much more information than just identification. They can provide information about individuals that the individuals do not even know about themselves. They can provide information far beyond the scope of information necessary for law enforcement purposes. According to the federal government's Human Genome Project:

DNA profiles are different from fingerprints, which are useful only for identification. DNA can provide insights into many aspects of people and their families including susceptibility to particular diseases, legitimacy of birth, and perhaps predisposition to certain behaviors and sexual orientation. This information increases the potential for genetic discrimination by government, insurers, employers, schools, banks, and others.¹¹

Since DNA can tell something about family members, the innocent arrestees are not the only ones whose rights may be violated. Law enforcement can search a DNA database to learn about family members of arrestees. Some states allow these familial searches to help solve crimes.¹²

A Pennsylvania district court, one of just two district courts that have addressed the constitutional question of collecting DNA from arrestees, captures the DNA and fingerprint distinction this way:

... to compare the fingerprinting process and the resulting identification information obtained therefrom with DNA profiling is pure folly. Such oversimplification ignores the complex, comprehensive, inherently private information contained in a DNA sample. DNA samples may reveal private information regarding familial lineage and predisposition to over four thousand types of genetic conditions and diseases; they may also identify genetic markers for traits including aggression, sexual orientation, substance addiction, and criminal tendencies.¹³

Destroying DNA Samples and Information

The state wants to throw out a big net and get whatever DNA information it can collect. The original version¹⁴ of HB 1403 provided no means for arrestees who are not charged or convicted from having their DNA samples destroyed and profiles removed from all government databases.

The latest version of the bill does, however, provide limited protection for innocent arrestees. The process by which innocent individual could have the samples destroyed and their DNA records removed from the state database would be burdensome for the individual.¹⁵ Furthermore, nothing in the bill expressly clarifies whether the removed DNA data would also be removed from the national database—that outcome is merely assumed in the bill, which is inappropriate considering how sensitive those data are.¹⁶

Even with those protections, the collection of DNA samples still is problematic. The government never should possess DNA information of innocent people, regardless of the duration of time. This information could be misused or improperly protected while in the government's possession.

The bill also is designed to make it unlikely that *all* innocent arrestees would take action to have their DNA in-

formation eliminated. Many individuals would not have the time, resources, or knowledge to go through the red tape to get rid of the information. As a result, the government will still possess a significant amount of DNA information on innocent people.

Misguided Trust in the Government

Proponents presume that the government is simply to be trusted with this sensitive information. One does not have to be paranoid about the government to understand that a healthy dose of skepticism about the government is necessary.

This country was founded on this healthy distrust of government power. The checks and balances and separation of powers exist because the founders understood that power can be abused.

Learning From History

The United States government has a long history of taking personal information from and about Americans and using it for horrible purposes. President Franklin Delano Roosevelt used Census Bureau data on Japanese-Americans as one means to help round up almost 110,000 Japanese-Americans and put them into internment camps following Japan's attack on Pearl Harbor.¹⁷ During the Red Scare of 1919-1920, the federal government compiled detailed information on alleged communists, often deporting or imprisoning these individuals.¹⁸

Learning from the Present

One current practice of using personal information, which is very questionable, is data mining. Data mining is a practice whereby an individual or entity "mines" data from various databases to seek out patterns and relationships among the data. The federal government uses this practice extensively, gaining a significant amount of personal information on Americans.

The Government Accountability Office (GAO) found that 52 federal departments or agencies were using or were going to implement data mining programs.¹⁹ The federal government was analyzing data from other agencies and even obtaining data from private organizations. The government looked through information such as credit card transactions, bank account numbers, and credit reports.²⁰

In its report, GAO points out:

Mining government and private databases containing personal information creates a range of privacy concerns. Through data mining, agencies can quickly and efficiently obtain information on individuals or groups by exploiting large databases containing personal information aggregated from public and private records. Information can be developed about a specific individual or about unknown individuals whose behavior or characteristics fit a specific pattern.²¹

Data Breaches

While government misuse of DNA data certainly is a concern, a more likely problem is the government's poor protection of sensitive personal information. In one of the more infamous examples, in 2006 a Department of Veterans Affairs employee put sensitive data on a laptop at his house. The laptop was subsequently stolen. This sloppiness resulted in the personal information of 26.5 million veterans being put at risk.²²

That incident is far from unique (except for its scope). A 2006 House Committee on Government Reform report made a staggering finding of 788 incidents between 2003 to mid-2006 where personally identifiable information had been lost or stolen. Every federal department and agency surveyed had suffered at least one such breach of data.²⁴

A Big Government Proposal

Many proponents of HB 1403 presumably oppose big government, including President Barack Obama's health care bill (for example, most of the sponsors of HB 1403 are Republicans).²⁵ Yet they do not seem to mind giving government an unprecedented amount of information on its citizens, and DNA data contains individual health information that even a patient's doctors never would possess. If information is power, which it is, the government would become far more powerful. A person cannot simultaneously be against big government and in favor of Big Brother.

Fourth Amendment

The United States Supreme Court has not issued an opinion on the government collecting DNA from either convicted felons or arrestees. Many federal circuit courts of appeal have held that it is constitutional for the government to collect DNA from convicted felons.²⁶ As of now, however, no federal circuit court has ruled on whether collecting DNA from arrestees is constitutional.²⁷

Two federal district courts have addressed the issue, each drawing different conclusions as to whether the collection of DNA is constitutional.²⁸ Two federal circuit courts have heard appeals to these cases, but have not yet made their decisions.²⁹

The fundamental constitutional issue is whether taking a DNA sample from individuals that have been arrested violates the Fourth Amendment to the United States Constitution.

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³⁰

The collection of DNA would be considered a search for Fourth Amendment purposes.³¹ The search is not based upon a warrant; however, that by itself does not mean it is unconstitutional. There are exceptions to the requirement.³²

Without delving into too much legal analysis, courts would likely determine the reasonableness of the search using a balancing test referred to as "totality of the circumstances."³³ Courts would look at the arguments on both sides, particularly the privacy interests compared with the governmental interests.

If courts properly recognize that being arrested is not some "event" that drastically lessens the privacy expectations of individuals when it comes to DNA collection, and the courts understand the difference between fingerprinting and DNA, then taking the DNA of arrestees would be found unconstitutional. Most courts likely would recognize these basic points.

Conclusion

In a free society, there will be some risks posed by crime. If we want to preserve freedom and liberty, then we must accept this reality. The government could be given incredible powers to improve our safety, and it may even work, but those powers would come at the expense of liberty.

Benjamin Franklin famously said "Anyone who trades liberty for security deserves neither liberty nor security."³⁴ This quote is often referenced, but the truth of Franklin's insight fails to resonate with policymakers or even many in the public. Far too often, security trumps liberty, as it would if DNA was collected from arrestees. The North Carolina General Assembly needs to heed these important words and choose liberty.

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End Notes

1. North Carolina House Bill 1403, 2009, <http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H1403v2.pdf>.
2. *Ibid.*
3. NC. Gen. Stat. § 15A 266.
4. *Op. cit.*, note 1.
5. “Compulsory DNA Collection: A Fourth Amendment Analysis,” Congressional Research Service, January 23, 2009, p.1, <http://www.fas.org/sgp/crs/misc/R40077.pdf>.
6. “Why the Demand for DNA Testing is Increasing,” DNA Initiative, <http://www.dna.gov/backlog-reduction/increasing-demand>. The DNA Initiative is a working group comprising a broad cross-section of federal, state, and local criminal justice and forensic science experts, created by the U.S. National Institute of Justice.
7. *Op. cit.*, note 1.
8. “Why Pass this Law?” DNA Saves, 2009, http://dnasaves.org/dna_law.php; “DNA on Felony Arrest,” Surviving Parents Coalition, <http://spcoalition.org/legislation.html>.
9. “Future of Forensic DNA Testing,” National Institute of Justice, November 2000, <http://www.ncjrs.gov/pdffiles1/nij/183697.pdf>.
10. While DNA profiles are created using “junk DNA,” this information is still believed to be capable of providing sensitive information. As the Human Genome Project has stated “single tandem repeated DNA bases (STRs), which are not known to code for proteins, in the future this information may be found to reveal personal information such as susceptibilities to disease and certain behaviors.” Further, the DNA samples themselves still are available for more extensive DNA analysis.
11. See Human Genome Project Information website “DNA Forensics,” June 16, 2009, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml.
12. Nakashima, Ellen, “From DNA of family, a tool to make arrests,” *The Washington Post*, April 21, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/20/AR2008042002388.html>.
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14. North Carolina House Bill 1403 original version, 2009, <http://www.ncga.state.nc.us/Sessions/2009/Bills/House/PDF/H1403v0.pdf>.
15. *Op. cit.*, note 1, adding §15A-266.3A(f).
16. *Ibid.*
17. See, e.g., “The Census and Privacy” webpage, Electronic Privacy Information Center, <http://epic.org/privacy/census>.
18. See, e.g., “The Red Scare,” Paul Burnett, University Of Missouri-Kansas City (UMKC) School Of Law, <http://www.law.umkc.edu/faculty/projects/frials/saccov/redscare.html>; “The Red Scare,” Online Highways, <http://www.u-s-history.com/pages/h1343.html> (Online Highways is an internet travel and history guide); “The Palmer Raids,” Center for History and New Media at George Mason University, 1997, <http://chnm.gmu.edu/courses/hist409/red.html>.
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20. *Ibid.*
21. *Ibid.*, p. 6.
22. Bosworth, Martin H., “VA loses data on 26 million veterans,” *Consumer Affairs*, May 22, 2006, http://www.consumeraffairs.com/news04/2006/05/va_laptop.html.
23. “Agency Data Breaches Since January 1, 2003,” United States House Committee on Government Reform, October 13, 2006, <http://oversight.house.gov/images/stories/documents/20061013145352-82231.pdf>.
24. *Ibid.*
25. See sponsors listed at <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=h+1403>.
26. *Op. cit.*, note 5, p. 9, and also footnote 66.
27. *Op. cit.*, note 5, p. 10, and also footnote 69.
28. *United States v. Mitchell*, No. 2:09cr105, W.D. Pa. 2009, http://www.denverda.org/DNA_Documents/Mitchell.pdf; *United States v. Pool*, No. S-09-0015 EJG, E.D. Cal. 2009, <http://www.docstoc.com/docs/6591987/us-v-pool>.
29. The Ninth Circuit Court of Appeals heard the oral argument in *United States v. Pool* in December, 2009; see <http://www.personal.psu.edu/dhk3/blogs/DoubleHelixLaw/2009/11/dna-on-arrest-the-score-is-tied.html>. The court has not yet issued an opinion. The Third Circuit Court of Appeals’ decision in *United States v. Mitchell* is pending; see Alatheia Porter and John Reinstein, “Open wide and say, ‘DNA’ a 4th Amendment concern,” *Rhode Island Lawyers Weekly*, May 10, 2010, <http://www.allbusiness.com/crime-law/law-arrests-arrest-warrants/14451127-1.html>.
30. U.S. Constitution, Amendment 4.
31. *United States v. Kincaid*, 379 F.3d 813, 821 n. 15 (9th Cir. 2004) (*en banc*).
32. *Op. cit.*, note 13, at 3.
33. *United States v. Pool*, No. S-09-0015 EJG, E.D. Cal. 2009, p. 5, <http://www.docstoc.com/docs/6591987/us-v-pool>.
34. “Benjamin Franklin Quotes,” Think Exist, http://thinkexist.com/quotes/benjamin_franklin.