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VIRTUE LIES IN MODERATION: THE DEPARTMENT OF DEFENSE'S OVERBROAD DNA CRIMINAL INDEXING SYSTEM

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I. Introduction

A young Airman on her first assignment in Japan spends a weekend night out with friends and loses track of time. Looking at her watch she realizes that it is now moments past curfew and trudges back to the base gate. After checking her military identification, guards temporarily detain her and take her statement, in which she admits to having been with friends at the local bar. They take her fingerprints, swab her cheeks for a deoxyribonucleic acid (DNA) sample and then release her to her first sergeant, who drops her off at her dormitory. The "investigation," if it can be called that, consisted of filing her written statement with that of the guard who recorded her late arrival. She likely will never be tried or convicted for this offense,[1] but instead will receive some form of administrative

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discipline to remind her of the importance of orders.[2] Nevertheless, because she violated a general order establishing a curfew, her DNA sample will be submitted to the national DNA criminal index,[3] where it will remain in perpetuity unless expunged.[4]

The DNA sample is more than a mere fingerprint—it has been called the "'nuclear weapon' of identifying technologies"[5] because it is the persistent personal identification of the individual[6] that reveals information about health risks, ancestry/ethnicity, parentage, and familial connections.[7]

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[1] A curfew violation can be an offense under the Uniform Code of Military Justice (UCMJ). *See* UCMJ art. 92(1) (1950) (failure to obey a lawful general order). The assertion that curfew violations, standing alone, do not ordinarily, result in trial by courts-martial is based on the authors' recent professional experiences.

[2] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(c), 401(c)(2)(A) (2019) [hereinafter MCM]. Administrative actions are corrective in nature, not punitive, and may include measures ranging from verbal counseling to administrative separation (that is, discharge from the military). *Id.* R.C.M. 306(c)(2) and discussion. "Nonjudicial punishment is a disciplinary measure more serious than administrative [actions], but less serious than trial by court-martial." *Id.* pt. V, ¶ 1.b. It is designed as an efficient and prompt way of addressing minor offenses under the UCMJ in order to "maintain[] good order and discipline and . . . promote[] positive behavior changes in Servicemembers." *Id.* pt. V, ¶ 1.c.

[3] That a military member's DNA will be taken for a curfew violation or similar offense is not fanciful. Between 24 March 2019 and 24 September 2019, violating a lawful general order was the most common reason DNA was seized, constituting the basis for taking 659 of 6,143 samples. *See* Letter from Chester Longcor, Dir., U.S. Army Crime Recs. Ctr., to authors (Oct. 30, 2019) (on file with authors); CRIM. INVESTIGATION COMMAND, U.S. DEP'T OF ARMY, REPORT: COLLECTION OFFENSE STATISTICS 3, 22 (2019).

[4] Once entered into the system, a DNA record will not be removed unless expunged. To be eligible for expungement, individuals who are acquitted of all charges or whose charges are disposed of without trial may request of their commanding officer that their sample be destroyed and removed from the system. U.S. DEP'T OF DEF., INSTR. 5505.14, DEOXYRIBONUCLEIC ACID (DNA) COLLECTION REQUIREMENTS FOR CRIMINAL INVESTIGATIONS, LAW ENFORCEMENT, CORRECTIONS, AND COMMANDERS 14–16 (Dec. 22, 2015) (C1, Mar. 9, 2017) [hereinafter DODI 5505.14].

[5] Vera Eidleman & Jay Stanley, *Rapid DNA Machines in Police Departments Need Regulation*, AM. CIV. LIBERTIES UNION (Oct. 2, 2019, 3:45 PM), https://www.aclu.org/blog/privacy-technology/medical-and-genetic-privacy/rapid-dna-machines-police-departments-need.

[6] Raymond Keogh, *DNA & The Identity Crisis*, PHIL. NOW, Aug.–Sept. 2019, at 16.

[7] The explosion of DNA use in all biological sciences is ingrained in the popular mind; it is understood to provide information regarding a person's genetic relatives, identify a person's ethnicity, and predict a person's predisposition to disease, among other uses. *See* Jacque Wilson, *5 Cool Things DNA Testing Can Do*, CABLE NEWS NETWORK (Apr. 25, 2013, 6:53 AM), https://www.cnn.com/2013/04/25/health/national-dna-day-tests/index.html; Ian Murnaghan, *The Importance of DNA*, EXPLOREDNA (Jan. 7, 2019), http://www.exploredna.co.uk/the-importance-dna.html.

While only a fraction of the DNA taken will be indexed, the Government will store the remaining sample containing all of the individual's genetic information.[8]

This article describes the legal defects inherent in the Department of Defense's (DoD) law enforcement DNA indexing program. It highlights the Government's weak constitutional interest in taking DNA samples from Service members. Factors that set the DoD's program apart from its constitutionally approved civilian forebear are explored: the military does not have a system of bail, does not have difficulty identifying a suspect, does not use DNA to assess criminal risk, and does not use DNA to ensure availability for trial. Part II describes the historical background of DNA indexing, the legal environment governing the DoD's DNA collection, and the instruction at issue. Part III argues that many of the reasons upon which the Supreme Court relied to uphold DNA indexing in the civilian context do not apply in the military context, thus weakening the authority to take criminal indexing DNA in most instances. Part IV takes issue with specific provisions of the DoD's DNA indexing program as being unconstitutionally written, while Part V provides additional prudential reasons to narrow the scope of DoD DNA indexing.

II. Background

A. A Brief History of DNA Profiling

Forensic DNA profiling compares patterns in DNA extracted from crime scene samples of blood, hair, or semen with DNA taken from suspects.[9] Sir Alec Jeffreys, a geneticist at the University of Leicester in Britain, introduced the technique in the 1980s, with the first use in the legal

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[8] *See* EMILY J. HANSON, CONG. RSCH. SERV., R41800, THE USE OF DNA TESTING BY THE CRIMINAL JUSTICE SYSTEM AND FEDERAL ROLE: BACKGROUND, CURRENT LAW, AND GRANTS 5 (2020) ("Most jurisdictions retain the DNA sample used to generate the profile placed in CODIS. DNA samples are usually retained for quality assurance purposes, such as confirming a hit made using the NDIS, and it allows jurisdictions to retest the sample if new technology is developed in the future."); FED. BUREAU OF INVESTIGATION, NATIONAL DNA INDEX SYSTEM (NDIS) OPERATIONAL PROCEDURES MANUAL 79–81 (2020) [hereinafter NDIS OPMAN]; Letter from Longcor to authors, *supra* note 3.

[9] Sheila Jasanoff, *Just Evidence: The Limits of Science in the Legal Process*, 34 J.L., MED. & ETHICS 328, 330 (2006).

system occurring in a 1985 immigration case in the United Kingdom.[10] A year later saw its debut in the criminal justice arena, with DNA profiling used to clear one suspect and catch the true perpetrator of the rape and murder of two 15-year-old girls in Leicestershire.[11] By the end of 1986, DNA profiling was in use the world over,[12] and is now generally accepted in the forensic field as an accurate way to identify a person.[13] It has been heralded as possessing the "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."[14]

B. The DNA Identification Act of 1994 and Participating Jurisdictions Today

Soon thereafter, people in the United States recognized the utility of a national system for DNA profiling. The DNA Identification Act of 1994 (the Act)[15] authorized the Director of the Federal Bureau of Investigation (FBI) to create "an index of (1) DNA identification records of persons convicted of crimes; (2) analyses of DNA samples recovered from crime scenes; and (3) analyses of DNA samples recovered from unidentified human remains."[16] State and local law enforcement agencies were allowed to submit DNA records to and access the index, provided their sampling

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[10] Rana Saad, *Discovery, Development, and Current Applications of DNA Identity Testing*, 18 BAYLOR U. MED. CTR. PROC. 130, 130 (2005).
[11] *Id.* at 131.
[12] *Id.*
[13] While this article does not discuss the science underlying DNA identification, many sources do so in detail. *See, e.g.*, Saad, *supra* note 10; Lutz Roewer, *DNA Fingerprinting in Forensics: Past, Present, Future*, INVESTIGATIVE GENETICS 2–4 (Nov. 18, 2013), https://investigativegenetics.biomedcentral.com/track/pdf/10.1186/2041-2223-4-22.pdf; Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L., MED. & ETHICS 248, 249–50 (2006).
[14] Dist. Att'y's Off. for the Third Jud. Cir. v. Osborne, 557 U.S. 52, 55 (2009). In keeping with the idea of freeing the wrongfully convicted, Barry Scheck and Peter Neufeld founded the Innocence Project in 1992 based on a simple premise: "If DNA technology could prove people guilty of crimes, it could also prove that people who had been wrongfully convicted were innocent." *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), https://innocenceproject.org/dna-revolutionary-role-freedom. As of November 2020, the Innocence Project has successfully exonerated 375 people and identified 137 real perpetrators using DNA profiling. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states (last visited Nov. 23, 2020).
[15] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 210301–210306, 108 Stat. 1796, 2065–71 (codified as amended at 34 U.S.C. §§ 12591–12593).
[16] *Id.* § 210304(a)(1)–(3).

and analysis methods complied with the FBI's quality assurance and privacy standards.[17] The scope of the index—known as the National DNA Index System (NDIS)[18]—has since expanded to include DNA records of persons charged with a crime in an indictment or information and of "other persons whose DNA samples are collected under applicable legal authorities."[19] All fifty states, Puerto Rico, the District of Columbia, and Federal civilian and military law enforcement participate in NDIS, which uses the Combined DNA Index System (CODIS) program.[20]

The Act allows participating jurisdictions to set their own limits on law enforcement collection of DNA. The National DNA Index System will accept DNA records of samples collected from crime scenes, persons charged with or convicted of crimes, or "other persons whose DNA samples are collected under applicable legal authorities."[21] To increase the scope of collection, Federal grants are available to assist states in collecting DNA from arrestees.[22] While all fifty-four participating jurisdictions have

[17] *Id.* § 210304(b)–(c). Of course, the DNA Identification Act of 1994 (the Act) incentivized states to participate by offering grants for them to establish and improve their DNA sampling laboratories. *Id.* § 210302 (codified at 34 U.S.C. § 40701).

[18] *Combined DNA Index System (CODIS)*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis (last visited Nov. 23, 2020).

[19] 34 U.S.C. § 12592(a)(1)(B)–(C). Federal grants to states expanded as well, offering money to those that chose to implement a process for collecting DNA from arrestees in addition to convicts. *Id.* § 40742.

[20] *Combined DNA Index System (CODIS)*, *supra* note 18. As of September 2020, NDIS contained over 19,500,000 DNA profiles collected from convicts, detainees, arrestees, and crime scenes. *CODIS – NDIS Statistics*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (last visited Nov. 23, 2020).

[21] 34 U.S.C. § 12592.

[22] *Id.* § 40742.

some form of DNA collection law,[23] only thirty-one collect DNA samples upon arrest.[24]

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[23] 10 U.S.C. § 1565 (military); 34 U.S.C. § 40702 (Federal Government generally); ALA. CODE § 36-18-25 (LexisNexis 2018); ALASKA STAT. § 44.41.035 (2018); ARIZ. REV. STAT. § 13-610 (LexisNexis 2018); ARK. CODE ANN. § 12-12-1006 (2018); CAL. PENAL CODE § 296 (Deering 2018); COLO. REV. STAT. § 16-23-103 (2018); CONN. GEN. STAT. § 54-102g (2018); DEL. CODE ANN. tit. 29, § 4713 (2018); D.C. CODE § 22-4151 (LexisNexis 2018) (defining only qualifying offenses, while substantive collection authority exists at 34 U.S.C. § 40703); FLA. STAT. ANN. § 943.325 (LexisNexis 2018); GA. CODE ANN. § 35-3-160 (2018); HAW. REV. STAT. ANN. § 844D-31 (LexisNexis 2018); IDAHO CODE ANN. § 19-5506 (2018); 730 ILL. COMP. STAT. ANN. 5/5-4-3 (LexisNexis 2018); IND. CODE ANN. § 10-13-6-10 (LexisNexis 2018); IOWA CODE §§ 81.2, 901.5(8A)(b) (2018); KAN. STAT. ANN. § 21-2511 (2018); KY. REV. STAT. ANN. § 17.170 (LexisNexis 2018); LA. REV. STAT. ANN. § 15:609 (2018); ME. REV. STAT. ANN. tit. 25, § 1574 (2018); MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2018); MASS. ANN. LAWS ch. 22E, § 3 (LexisNexis 2018); MICH. COMP. LAWS SERV. § 750.520m (LexisNexis 2018); MINN. STAT. § 299C.105 (2006), *invalidated by In re* Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006); MISS. CODE ANN. §§ 45-33-37, 45-47-1, 47-5-183 (2018); MO. REV. STAT. § 650.055 (2018); MONT. CODE ANN. § 44-6-103 (2017); NEB. REV. STAT. ANN. § 29-4106 (2012), *invalidated in part by* Shepard v. Houston, 289 Neb. 399 (2014); NEV. REV. STAT. ANN. §§ 176.09123, .0913 (LexisNexis 2018); N.H. REV. STAT. ANN. § 651-C:2 (LexisNexis 2018); N.J. REV. STAT. § 53:1-20.20 (2018); N.M. STAT. ANN. §§ 29-3-10, -16-6 (LexisNexis 2018); N.Y. EXEC. LAW § 995-c (Consol. 2018); N.C. GEN. STAT. §§ 15A-266.3A to .4 (2018); N.D. CENT. CODE § 31-13-03 (2017); OHIO REV. CODE ANN. § 2901.07 (LexisNexis through file 56, 133d Gen. Assembly); OKLA. STAT. tit. 74, § 150.27a (2018); OR. REV. STAT. § 137.076 (2018); 44 PA. CONS. STAT. § 2316 (2018); P.R. LAWS ANN. tit. 34, § 4006 (2018); 12 R.I. GEN. LAWS § 12-1.5-8 (2018); S.C. CODE ANN. § 23-3-620 (2018); S.D. CODIFIED LAWS §§ 23-5A-5 to -5.2 (2018); TENN. CODE ANN. § 40-35-321 (2018); TEX. GOV'T CODE ANN. § 411.1471 (2018); UTAH CODE ANN. §§ 53-10-403 to -406 (LexisNexis 2018); VT. STAT. ANN. tit. 20, § 1933 (2018); VA. CODE ANN. §§ 19.2-310.2, .2:1 (2018); WASH. REV. CODE ANN. § 43.43.754 (LexisNexis 2018); W. VA. CODE ANN. § 15-2B-6 (LexisNexis 2018); WIS. STAT. § 165.76 (2018); WYO. STAT. ANN. § 7-19-403 (2018).

[24] 28 C.F.R. § 28.12(b) (2018) (implementing 34 U.S.C. § 40702 and imposing the collection requirement on all Federal agencies, including the Department of Defense); ALA. CODE § 36-18-25(c) (LexisNexis 2018); ALASKA STAT. § 44.41.035(b)(6) (2018); ARIZ. REV. STAT. § 13-610(K) (LexisNexis 2018); ARK. CODE ANN. § 12-12-1006(a)(2) (2018); CAL. PENAL CODE § 296(a)(2) (Deering 2018); COLO. REV. STAT. § 16-23-103(1)(a) (2018); CONN. GEN. STAT. § 54-102g(a) (2018); FLA. STAT. ANN. § 943.325(7) (LexisNexis 2018); 730 ILL. COMP. STAT. ANN. 5/5-4-3(a-3.2) (LexisNexis 2018); IND. CODE ANN. § 10-13-6-10(a)(1), (b) (LexisNexis 2018); KAN. STAT. ANN. § 21-2511(a) (2018); LA. REV. STAT. ANN. § 15:609(A) (2018); MICH. COMP. LAWS SERV. § 750.520m(1)(a) (LexisNexis 2018); MISS. CODE ANN. § 45-47-1(1) (2018); MO. REV. STAT. § 650.055(1)(2) (2018); NEV. REV. STAT. ANN. § 176.09123(1)–(2) (LexisNexis 2018); N.J. REV. STAT. § 53:1-20.20(a)–(b), (d), (e) (2018); N.M. STAT. ANN. § 29-3-10(A) (LexisNexis 2018); N.C. GEN. STAT. § 15A-266.3A(a) (2018); N.D. CENT. CODE § 31-13-03(1) (2017); OHIO REV. CODE ANN. § 2901.07(B)(1)(a) (LexisNexis through file 56, 133d Gen. Assembly); OKLA. STAT.

Whether the DNA sample is collected on arrest, charging, or conviction, the resulting process is largely the same. A laboratory in the state[25] will test the sample and generate a DNA profile.[26] The laboratory compares that profile against profiles in the state database.[27] The database generally contains two different indices.[28] The first—the Offender Index—contains the DNA profiles of people who have been arrested for or convicted of a qualifying offense under state law, or who have had a sample drawn under other applicable legal authority.[29] The second—the Forensic Index—contains the DNA profiles of samples collected from crime scenes.[30] If there is a match between collected and indexed samples, the laboratory will follow procedures to confirm the match.[31]

To make this more concrete, consider the example the FBI uses to explain the matching process at the state level.[32] Assume a person reports a sexual assault and undergoes a forensic examination. The state laboratory receives the examination kit and uses the swabs it contains to develop profiles for anyone whose DNA is present, to include the suspected perpetrator. The laboratory will compare that profile to the Offender and Forensic Indices in the state database. If the profile matches a profile in the Offender Index and the match is confirmed, the laboratory will have identified the suspected perpetrator. If the profile matches a profile in the Forensic Index (say, a profile from another sexual assault) and the match is confirmed, the laboratory will have linked two crimes together, though the perpetrator would remain unidentified.

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tit. 74, § 150.27a(A)(3) (2018); 12 R.I. GEN. LAWS § 12-1.5-8(b) (2018); S.C. CODE ANN. § 23-3-620(A) (2018); S.D. CODIFIED LAWS § 23-5A-5.2 (2018); TENN. CODE ANN. § 40-35-321(e)(1) (2018); UTAH CODE ANN. § 53-10-403(1)(d) (LexisNexis 2018); VA. CODE ANN. § 19.2-310.2:1 (2018); WIS. STAT. § 165.76(1)(gm) (2018).

[25] The Federal Government relies on the U.S. Army Criminal Investigation Laboratory (USACIL) for samples that the Department of Defense collects, DODI 5505.14, *supra* note 4, at 1, and the FBI's own laboratory for samples that all other Federal agencies collect, *CODIS – NDIS Statistics*, *supra* note 20.

[26] *See Frequently Asked Questions on CODIS and NDIS*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Nov. 23, 2020) [hereinafter *CODIS FAQ*].

[27] *Id.*

[28] *See id.*

[29] NDIS OPMAN, *supra* note 8, para. 5.1. The definitions for the indices named can be found in the Manual's glossary. *Id.* glossary at 95.

[30] *Id.* para. 5.1.

[31] *CODIS FAQ*, *supra* note 26.

[32] *See id.*

Regardless of whether there is a match in the state database, the laboratory may upload a DNA identification record to NDIS.[33] The record contains only the following information: (1) the DNA profile; (2) an identifier specific to the submitting agency; (3) an identification number unique to the DNA profile; and (4) points of contact assigned to the DNA analysis.[34] Though the state may know the identity of the person who provided the sample, personally identifiable information is excluded from the NDIS record.[35] That information remains at the laboratory, along with the DNA sample itself.[36]

The FBI subjects DNA profiles to a comparison at the national level.[37] Each day, NDIS staff compare each new and modified DNA record to all other records in NDIS.[38] If there is a match between a new or modified record and a record already in NDIS, the FBI notifies the laboratories that submitted the matching records.[39] The laboratories must confirm the match using procedures prescribed by the FBI before they can exchange personally identifying information.[40] Once the match is confirmed, the law enforcement agencies involved may coordinate to develop additional leads in their respective cases.[41] The match may serve as probable cause to seize an evidentiary DNA sample from the suspected perpetrator.[42]

C. The Supreme Court Finds Law Enforcement DNA Collection of Arrestees to Be Constitutional—*Maryland v. King*

This very scenario played out in Maryland in 2009, which set the stage for the Supreme Court of the United States to weigh in on the DNA profiling system.

Alonzo King was arrested in Wicomico County, Maryland, for first- and second-degree assault for menacing a group of people with a shotgun.[43] During the booking process at the county jail, law enforcement personnel

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[33] See NDIS OPMAN, *supra* note 8, for an in-depth explanation of the NDIS process.
[34] *Id.* para. 3.1.4.
[35] *Id.*
[36] *Id.*
[37] *See* HANSON, *supra* note 8, at 2.
[38] NDIS OPMAN, *supra* note 8, para. 5.2.
[39] *Id.* para. 5.4.
[40] *See generally id.* ch. 6.
[41] *CODIS FAQ*, *supra* note 26.
[42] *Id.*
[43] Maryland v. King, 569 U.S. 435, 440 (2013).

took a DNA sample from him in accordance with the Maryland DNA Collection Act.[44] His DNA profile was matched to a sample collected from an unsolved 2003 rape.[45] Based solely on the match between the sample collected during booking and the DNA found at the scene of the 2003 rape, a grand jury indicted King for the rape.[46] The police obtained a search warrant and took another DNA sample from King, which also matched the evidence from the rape.[47]

King moved to suppress the DNA match, arguing that the Maryland DNA Collection Act violated the Fourth Amendment of the U.S. Constitution.[48] The trial judge disagreed, and King was convicted and sentenced to life in prison without the possibility of parole.[49] The Maryland Court of Appeals reversed, finding that taking a buccal swab from King during booking without a warrant was an unreasonable search because his expectation of privacy outweighed the state's interest in using DNA to identify him.[50]

When the case reached the U.S. Supreme Court, all nine justices agreed that swabbing the inside of a person's cheek to obtain a DNA sample constituted a search under the Fourth Amendment.[51] They divided sharply on whether it was constitutional to do so as part of routine booking

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[44] *Id.* at 441. The sample was taken by swabbing the inside of King's cheek with a cotton swab or filter paper (known as a "buccal swab"). *Id.* at 440. The Maryland DNA Collection Act in force at the time remains largely the same today. MD. CODE ANN., PUB. SAFETY §§ 2-501 to -514 (LexisNexis 2018); 2016 Md. Laws 49 (stylistic changes); 2012 Md. Laws 66 (stylistic changes). The only major change involves the provisions regarding arrestees, which were set to expire on 31 December 2013; the Maryland legislature abrogated the sunset clause effective 1 October 2013. 2013 Md. Laws 431.

[45] *King*, 569 U.S. at 441.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* (quoting King v. State, 42 A.3d 549, 556 (Md. 2012), *rev'd*, 569 U.S. 435). The Maryland Court of Appeals decided that the statute was unconstitutional as applied to King but declined to hold it facially unconstitutional "because there are conceivable, albeit somewhat unlikely, scenarios where an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on record) and the State may secure the use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, *but not for investigatory purposes*, in any event." *King*, 42 A.3d at 580 (emphasis added).

[51] *King*, 569 U.S. at 446.

procedures when a person has been arrested for, but not yet convicted of, an offense.[52]

The narrow majority concluded that the practice of warrantless, suspicionless DNA sampling as part of routine booking procedures was constitutional.[53] The lack of a warrant did not trouble the majority because King "was already in valid police custody for a serious offense supported by probable cause," and the law enforcement officers involved had no discretion in the decision to sample his DNA.[54] Rather, Maryland law required them to take samples from all persons arrested for certain serious crimes.[55] Thus, "in light of the standardized nature of the [searches] and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate," and a warrant was not required.[56] However, the Fourth Amendment still required that the search be reasonable, both in its scope and its manner of execution.[57] To determine whether it was reasonable, the majority employed a simple balancing test, weighing the degree to which the search intrudes on a person's privacy against the promotion of legitimate government interests.[58]

Two factors influenced the majority's assessment of the infringement on an arrestee's privacy interests: (1) the strength of the arrestee's

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[52] *See generally id.* at 466–82 (Scalia, J., dissenting).

[53] *Id.* at 465–66 ("When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is . . . a legitimate police booking procedure that is reasonable under the Fourth Amendment.").

[54] *Id.* at 448. The majority stated that, "in some circumstances, such as '[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found certain general, or individual, circumstances may render a warrantless search or seizure reasonable.'" *Id.* at 447 (alteration in original) (quoting Illinois v. McArthur, 531 U.S. 326, 330 (2001)). However, it did not specify whether it was special needs, a diminished expectation of privacy, or the fact that the intrusion was minimal that made King's presence in valid police custody a key factor in finding that a warrant was not required. *See id.* at 447–48. Considering the totality of the majority's opinion, all three bases likely played a part.

[55] *Id.*

[56] *Id.* at 448 (quoting Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 622 (1989)).

[57] *Id.* The Fourth Amendment to the U.S. Constitution 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." U.S. CONST. amend. IV.

[58] *King*, 569 U.S. at 448 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

expectation of privacy and (2) the invasiveness of the search.[59] As for the former, the opinion emphasized that, "in considering those expectations . . . the necessary predicate of a valid arrest for a serious offense is fundamental."[60] A person's expectation of privacy vis-à-vis the police is "necessarily . . . of a diminished scope" in those circumstances.[61] After all, the police may perform a fairly extensive search of the arrestee's person as part of the booking process, even going so far as to force him to lift his genitals for examination.[62] Compared to the intimate nature of the search police could perform as part of the booking process, a "negligible" swab inside an arrestee's mouth seems insignificant.[63] The fact that the swab does not break the skin and involves "virtually no risk, trauma, or pain" was a "crucial factor" in determining that such a search is only a minor intrusion on an arrestee's already diminished privacy interest.[64]

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[59] *Id.* at 463 ("The reasonableness inquiry here considers two . . . circumstances in which the Court has held that particularized suspicion is not categorically required: 'diminished expectations of privacy [and] minimal intrusions.'" (alteration in original) (quoting *McArthur*, 531 U.S. at 330)). The majority went out of its way to disclaim reliance on the "special needs" doctrine, which allows law enforcement to conduct searches without individualized suspicion so long as the searches serve some purpose other than "detect[ing] evidence of ordinary criminal wrongdoing." *Id.* at 462–63 (first quoting Indianapolis v. Edmond, 531 U.S. 32 (2000) (stopping motorists at a checkpoint); and then citing Chandler v. Miller, 520 U.S. 305 (1997) (testing political candidates for illegal narcotics)). The distinguishing feature is the strength of the privacy interests at issue. *Id.* A special-needs search "intrude[s] upon substantial expectations of privacy," whereas someone who "has been arrested on probable cause for a dangerous offense that may require detention before trial" has a reduced expectation of privacy. *Id.* at 463. Therefore, while the majority felt the special-needs cases were "in full accord with the results reached here," that doctrine was not the basis for the decision in *King*.

[60] *Id.* at 461.

[61] *Id.* at 462 (quoting Bell v. Wolfish, 441 U.S. 520, 557 (1979)).

[62] *Id.* (citing Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 334 (2012)).

[63] *Id.* at 463 ("[B]y contrast to the approved standard procedures incident to any arrest . . . a buccal swab involves an even more brief and still minimal intrusion").

[64] *Id.* at 464. The majority went on to note that the testing of an arrestee's DNA sample did not make the search so intrusive as to be unconstitutional. *Id.* at 464–65. It based that determination on three factors. First, the alleles tested for identification purposes do not reveal any of the arrestee's genetic traits; they can only be used to identify the person who provided the sample. *Id.* at 464. Second, the majority found that even if these alleles could reveal other information (such as private medical information), law enforcement practice was to test only for identification purposes. *Id.* It is debatable that law enforcement's self-restraint would be a sufficient constitutional safeguard, but science had not at that time progressed to the point where that issue was considered. Third, the statutory prohibition against testing DNA samples for any purpose other than identification was sufficient to

The government interest on the other side of the balance was the "well established . . . need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody."[65] The majority stressed that a search of an arrestee as part of formally processing him into police custody is not done to find contraband or evidence of a crime.[66] Rather, such searches are done as part of "subjecting the body of the accused to [the law's] physical dominion," and different interests are at stake.[67] The majority set forth five such interests, which serve as pillars supporting the constitutional framework for this DNA collection scheme, determining that DNA identification played a "critical role in serving" each.[68]

The first interest is in identifying the arrestee.[69] According to the majority, a person's true identity means more than just his name and Social Security number.[70] Rather, identification "necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him," to include his criminal record.[71] Because an individual could falsify his identification documents or give a false name, the "irrefutable identification" possible through DNA matching is another way to associate public records to him.[72]

A second interest is in "[e]nsuring that the custody of the arrestee does not create inordinate 'risks for facility staff, for the existing detainee population, and for [the] new detainee.'"[73] Knowing the person's criminal history, as well as if he has a record of violence or mental disorder, allows law enforcement to make informed decisions about the conditions of his detention to minimize risks of harm.[74]

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allay any privacy concerns that may exist if the alleles could reveal other personal information. *Id.* at 465.

[65] *Id.* at 449.

[66] *Id.*

[67] *Id.* at 450 (quoting People v. Chiagles, 142 N.E. 583, 584 (N.Y. 1923)).

[68] *Id.* at 450–61 (discussing the five interests in detail).

[69] *Id.* at 450.

[70] *Id.*

[71] *Id.* at 451.

[72] *Id.*

[73] *Id.* at 452 (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012)).

[74] *Id.*

Third, the government has an interest in ensuring that the arrestee is available for trial.[75] The majority speculated that "[a] person who has been arrested for one offense but knows that he has yet to answer for some past crime *may* be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses."[76] This also serves a safety interest, because a person who flees from custody poses a risk not only to law enforcement officers who may attempt to apprehend him but also to the general public.[77]

Fourth, there is an interest in providing a court with more information with which to make an appropriate decision on whether the arrestee should be released on bail.[78] The ability to link the arrestee to past violent offenses using DNA identification gives the court "critical information" to assess the threat the arrestee may pose to the community or particular victims of his crimes.[79] A final governmental interest exists in identifying arrestees as the perpetrators of past crimes to ensure the release of any person wrongfully imprisoned for that same offense.[80]

After describing those interests, the majority noted that DNA identification was a significant advance on the other techniques law enforcement had used to identify arrestees, from photography to the Bertillon method of identification to fingerprinting.[81] To the majority, DNA identification was simply a more sophisticated evolution of those constitutionally approved methods.[82] The majority saw "little reason to question 'the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he

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[75] *Id.*
[76] *Id.* at 453 (emphasis added).
[77] *Id.*
[78] *Id.*
[79] *Id.* To further support this rationale, the majority cited examples of eleven cases in three locations in the United States where felony arrestees committed additional crimes after release because DNA identification was not used to match them to previous crimes. *Id.* at 454 (noting such in Denver, Colorado; Chicago, Illinois; and Maryland).
[80] *Id.* at 455–56.
[81] *Id.* at 456–57. Alphonse Bertillon's system of identification consisted of several standardized measurements of the arrestee's body, along with an analysis of his or her facial features and precise locations of any distinguishing bodily features. *Id.* at 457.
[82] *See id.* at 456–61 ("Just as fingerprinting was constitutional for generations prior to the introduction of [the FBI's Integrated Automated Fingerprint Identification System], DNA identification of arrestees is a permissible tool of law enforcement today.").

flees prosecution.'"[83] Accordingly, the majority put "great weight" on the significance of the government interest at stake and DNA identification's potential to serve that interest.[84]

That weight was more than enough to tip the balance, especially in light of the minimal intrusion on already diminished privacy interests that DNA identification entailed.[85] It is important to note that the majority's ruling was grounded firmly in the context of "an arrest supported by probable cause to hold for a serious offense[, where the police] bring the suspect to the station to be detained in custody."[86] In that context, the majority held the practice of taking and analyzing a cheek swab of the arrestee's DNA without a warrant or particularized suspicion is a reasonable—and thus constitutional—search under the Fourth Amendment.[87] In sum, *King* held that the taking of DNA from arrestees is a reasonable search because the significant governmental interest in obtaining DNA information far outweighed the intrusion on the arrestee's diminished expectation of privacy in those circumstances.

Figure 1[88]

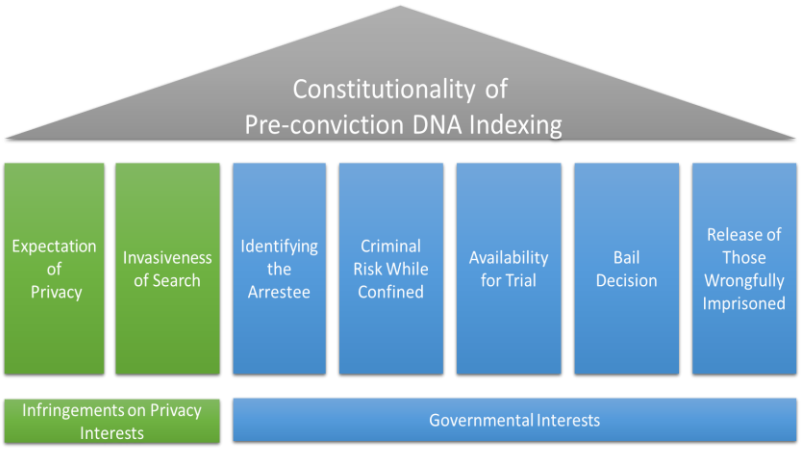

Figure 1: Constitutional Foundation of the Maryland DNA Collection Act.

[83] *Id.* at 461 (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c) (5th ed. 2012)).
[84] *Id.*
[85] *Id.* at 465.
[86] *Id.*
[87] *Id.* at 465–66.
[88] The authors created this figure to graphically represent the legal framework underpinning DNA collection as devised by the *King* court.

D. Collection of DNA in the Federal Government and Department of Defense

Deoxyribonucleic acid profiling in the U.S. military follows substantially the same process used by many state laboratories, although the DoD is subject to two separate DNA collection requirements. The first is a statutory requirement under Title 10 of the U.S. Code that is specific to the military, which provides, in pertinent part, the following:

> The Secretary concerned shall collect a DNA sample from each member of the armed forces under the Secretary's jurisdiction who is, or has been, convicted of a qualifying military offense . . . . The Secretary concerned shall furnish each DNA sample collected . . . to the Secretary of Defense. The Secretary of Defense shall carry out a DNA analysis on each DNA sample in a manner that complies with the requirements for inclusion of that analysis in CODIS; and furnish the results of each such analysis to the Director of the [FBI] for inclusion in CODIS. . . . [A qualifying military offense is defined as a]ny offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed[, and a]ny other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under [34 U.S.C. § 40702]).[89]

There are three key points to note from this requirement. The first is that DNA profiling only triggers upon conviction for a qualifying offense, not at some earlier point in the investigative or judicial process.[90] Once the sample is collected, it must be analyzed and uploaded to CODIS.[91] The second is that only offenses under the Uniform Code of Military Justice (UCMJ) qualify.[92] The third is that the resulting DNA profile must be included in CODIS.[93]

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[89] 10 U.S.C. § 1565(a)–(b), (d). The UCMJ is the criminal code that applies to the U.S. military. *See generally id.* §§ 801–946a.
[90] *Id.* § 1565(a)(1).
[91] *Id.* § 1565(b).
[92] *Id.* § 1565(d).
[93] *Id.* § 1565(b)(2).

The second requirement, which is regulatory in nature, is found at 28 C.F.R. § 28.12.[94] This regulation was issued in accordance with the Attorney General's authority to "direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General"[95] under the Federal DNA profiling statute, 34 U.S.C. § 40702. The regulation provides, in pertinent part, as follows:

> Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted . . . . Each agency required to collect DNA samples under this section shall . . . [f]urnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System . . . .[96]

There are two notable differences between the regulatory mandate, which applies to all Federal agencies of the United States, and the Title 10 mandate, which applies only to the DoD. The first is that the Attorney General's regulatory mandate requires collection when a person is arrested or facing charges, in addition to the conviction trigger under Title 10.[97] The second involves which offenses qualify for collection. Only conviction for certain offenses under the UCMJ triggers collection under the Title 10 mandate.[98] In contrast, being arrested for, charged with, or convicted of any felony or certain other offenses under Federal law triggers the regulatory mandate.[99] The latter sweeps more broadly and includes all of the

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[94] 28 C.F.R. § 28.12 (2018).
[95] 34 U.S.C. § 40702(a)(1)(A). This section authorizes the Attorney General to "collect DNA samples from individuals who are arrested, facing charges, or convicted," presumably of a qualifying Federal offense. *Id.*
[96] 28 C.F.R. § 28.12(b), (f)(2) (2019).
[97] *Compare id.* § 28.12(b), *with* 10 U.S.C. § 1565(a)(1).
[98] 10 U.S.C. § 1565(a)(1), (d).
[99] *See* 28 C.F.R. § 28.12(b) (2019). Although neither 34 U.S.C. § 40702 nor 28 C.F.R. § 28.12 actually prescribe that the individual must be arrested for, charged with, or convicted of a qualifying Federal offense, the text of each implies such. *See* 34 U.S.C. § 40702(d); 28 C.F.R. § 28.2 (2019).

qualifying military offenses from the more limited Title 10 mandate within its scope.[100]

E. Requirements for Collection of DNA Under Department of Defense Instruction 5505.14

The DoD combined these separate Federal mandates into one regulation applicable to its components: Department of Defense Instruction 5505.14 (the DoDI).[101] The DoDI sets out five instances in which its defense criminal investigative organizations ("DCIOs") and other DoD law enforcement agencies collect DNA profiling samples for submission to CODIS: (1) when a military subject is under investigation for a qualifying offense and the investigator opines that probable cause exists to believe the subject committed the offense;[102] (2) when a court-martial charge for a qualifying offense is preferred in accordance with Rule for Courts-Martial 307;[103] (3) when a Service member is ordered into pretrial confinement for a qualifying offense;[104] (4) when a Service member is confined to a military correctional facility or temporarily housed in a civilian facility as a result of a conviction for a qualifying offense at a general or special court-martial;[105] or (5) when

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[100] *See* 28 C.F.R. § 28.2(a) (2019) ("Felony means a Federal offense that would be classified as a felony under 18 U.S.C. 3559(a) or that is specifically classified by a letter grade as a felony."). By that definition, a Federal offense punishable by more than one year of imprisonment is a felony. 18 U.S.C. § 3559(a). Although the UCMJ does not classify offenses as misdemeanors or felonies, the UCMJ's punitive articles are Federal offenses. Therefore, offenses under the UCMJ that are punishable by more than one year's imprisonment likely would be considered felonies. *See id.*

[101] DoDI 5505.14, *supra* note 4, at 1. While the DoDI cites 42 U.S.C. §§ 14132, 14135, and 14135a as part of its statutory authority in paragraph 1.b, those provisions were editorially reclassified as 34 U.S.C. §§ 12592, 40701, and 40702, respectively. This article cites to the current statutory provisions, even if the cited source refers to the original provision.

[102] *Id.* at 13. The investigator may collect a DNA sample from the subject at any time but may not forward it to USACIL for analysis and submission to CODIS until he or she has consulted with a judge advocate and made a probable cause determination. *Id.*

[103] *Id.* Preferral is the formal act of swearing that an accused committed an offense and is typical initiated by an accused's immediate commander.

[104] DoDI 5505.14, *supra* note 4, at 13. This condition is met only after the confined military member's commander decides that pretrial confinement will continue in accordance with Rule for Courts-Martial 305(h)(2)(A) and if a DNA sample has not already been submitted. *Id.*

[105] *Id.* The triggering mechanism is a military member's confinement "as a result of any general or special court-martial conviction" for a qualifying offense. *Id.* The requirement also applies to those instances where a military member does *not* receive confinement as a result of a general or special court-martial conviction for a qualifying offense. *Id.* The clear

a commander conducts or directs a command-level investigation or inquiry for a qualifying offense, if no criminal investigation was conducted by a DCIO, other DoD law enforcement agency, or the Coast Guard Investigative Service.[106]

Three of those five DNA collection triggers[107] go far beyond the constitutionally permissible rationale for DNA indexing as articulated in *King*. It is the inherent differences between military and civilian criminal justice processes, where terms like "arrest" and "facing charges" hold different meanings,[108] which set the stage for discord. The most commonly encountered trigger is the law enforcement investigation trigger (the investigative trigger), which often begins with the apprehension of a suspect. The preferral and command-level investigation triggers suffer from the same flaws as the investigative trigger. Additionally, the command-level investigation trigger is wholly discretionary—a fatal defect which has long been held unconstitutional under the Fourth Amendment.[109] The pretrial confinement and conviction triggers are not at issue in this article. In fact, the pretrial confinement trigger is most analogous to the arrest and booking scenario the Supreme Court addressed in *King*, as will be discussed below. As such, comparison between it and the three offending

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meaning of this portion of the DoDI is that a DNA sample must be collected upon conviction for a qualifying offense by a general or special court-martial and not by a summary court-martial. The military justice system has three different levels of court-martial: general, special, and summary. UCMJ art. 16 (1950). A conviction at a general or special court-martial is a Federal conviction; a finding of guilt at a summary court-martial is not. *See* United States v. Blair, 72 M.J. 720, 724 (A. Ct. Crim. App. 2013) (referring to a general court-martial conviction as a Federal conviction); United States v. Van Vliet, 64 M.J. 539, 543 (A.F. Ct. Crim. App. 2006) (same); United States v. Kebodeaux, 570 U.S. 387 (2013) (treating a special court-martial conviction as a Federal conviction); UCMJ art. 20(b) (1950) (stating that a finding of guilty by summary court-martial does not constitute a criminal conviction).

[106] DODI 5505.14, *supra* note 4, at 14.

[107] The DoDI also directs the collection of DNA samples from civilians who are detained and within the military's custody if there is probable cause to believe the civilian committed a qualifying Federal offense, as defined by 34 U.S.C. § 40702. *Id.* at 16.

[108] For example, a military "arrest" is defined as "the restraint of a person by an order . . . directing him to remain within certain specified limits." UCMJ art. 9(a) (1950). The ability to arrest is based on the military rank of both the member making the arrest and the member being arrested; law enforcement personnel are not necessarily empowered to arrest other military members. *Id.* art. 9(b)–(c). The military equivalent of a civilian arrest is "apprehension," which is simply "the taking of a person into custody." *Id.* art. 7(a). Military members performing law enforcement duties may apprehend any person subject to the UCMJ. MCM, *supra* note 2, R.C.M. 302(b)(1).

[109] *See infra* note 183.

triggers will highlight the deficiencies of the DNA collection scheme the DoDI has established.

F. The Military Justice System—Brief Overview for Non-Practitioners

As a final introductory matter, it is important to discuss how criminal charges are disposed of in the military. Commanders, not lawyers or law enforcement, decide what outcome is appropriate for given misconduct.[110] The range of outcomes include, in order of increasing severity: no action; administrative action, which encompasses written admonishment or counseling, demotion, or separation from the service; nonjudicial punishment; and trial by court-martial.[111] The facts and circumstances of the misconduct itself are but one factor that weighs into the decision of which outcome is appropriate. Another is the subject's history of misconduct[112]—a repeat offender likely faces more severe discipline than a first-time offender. The commander also considers factors uniquely within his or her purview, such as the misconduct's effect on the morale, welfare, and good order and discipline of the command; the offender's potential for continued service; the impact of each disposition option on the offender's ability to continue to serve; and the commander's responsibilities with respect to justice and good order and discipline.[113] Commanders generally do not decide which outcome is appropriate until an investigation is complete and they have reviewed its findings.

Because the disposition decision is not made until after the investigation is complete, law enforcement cannot know with certainty how the case will be handled. The UCMJ does not distinguish between felonies and misdemeanors.[114] While each offense under the UCMJ has a prescribed maximum punishment,[115] the signal for whether an offense is considered "minor" or "major" is the manner in which the commander decides to dispose of it after considering all relevant circumstances.

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[110] At the time of writing, legislation to alter which entity ultimately possesses the power to initiate court-martial proceedings is pending. *See generally* 166 CONG. REC. S3413–14 (daily ed. June 25, 2020) (statement of Sen. Gillibrand proposing the "Military Justice Improvement Act of 2020" as an amendment to the National Defense Authorization Act for Fiscal Year 2021).
[111] MCM, *supra* note 2, R.C.M. 306(c).
[112] *Id.* app. 2.1, ¶ 2.1(l).
[113] *Id.* ¶ 2.1(c), (n).
[114] *E.g.*, Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 FED. SENT'G REP. 220, 221 (2003).
[115] MCM, *supra* note 2, app. 12.

To illustrate, let's return to our hypothetical curfew violator. If this is her first time getting in any sort of trouble, her commander may choose to issue her an administrative sanction, such as a written admonition or counseling, to remind her of the importance of obeying orders. However, if she has a short history of misconduct, from being late to work to violating the curfew order, her commander may choose to impose nonjudicial punishment, which could demote her to a lower grade or direct forfeiture of some pay. If she is regularly insubordinate, fails to follow orders, or has been disciplined several times, the commander may choose to prefer charges for trial by court-martial, hoping that this may finally get her attention and bring her back in line with expected standards of conduct. As this example demonstrates, the facts and circumstances of the particular incident under investigation are not the sole factor in determining the appropriate disposition.

As military law enforcement officers cannot predict what disposition will occur for a particular offense, their only consideration when making a probable cause determination under the investigative trigger for DNA collection[116] is whether the UCMJ offense itself is listed as a qualifying offense under the DoDI.[117] If the offense is listed and the investigator has probable cause to believe the subject committed it,[118] the investigator will collect DNA no matter how seemingly innocuous the incident was or what its likely disposition will be. For our curfew violator, it does not matter if she broke curfew by five minutes because the train was delayed or if she was hours late, heavily intoxicated, and belligerent with local police officers who delivered her to the front gate of base in handcuffs. In either case, she failed to obey a lawful general order, and so her DNA will be collected in accordance with the DoDI. With that background, we now address how the majority's rationale in *King* is inapposite to the military justice system.

III. The Rationale Underlying *King* Does Not Apply in the Military Context

Unlike civilian criminal justice systems, military members are usually not incarcerated before conviction.[119] Thus, *King*'s bedrock assumption—arrests for serious offenses result in confinement and processing for

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[116] DODI 5505.14, *supra* note 4, at 13.
[117] *Id.* at 8–12.
[118] An investigator makes such a determination only after consulting with a judge advocate. *Id.* at 13.
[119] *See, e.g.*, *infra* notes 141, 187–188.

confinement with its attendant loss of privacy—is not applicable to the military context. As most military apprehensions are much less invasive than their civilian equivalents, military members retain a greater degree of privacy to be free from warrantless searches and seizures—and should be free from those that do not fall within the factual scenario upon which *King* was decided.

While Service members do forfeit some constitutional rights upon their induction,[120] they retain Fourth Amendment protections against unreasonable search and seizure.[121] Though application of the Fourth Amendment may differ in the military context, military appellate courts have consistently upheld Fourth Amendment warrant requirements and reasonableness standards when analyzing searches and seizures by military authorities and law enforcement.[122] As Service members are protected from unreasonable searches and seizures, they are also protected from constitutionally impermissible seizures of DNA. The key assumptions supporting the holding in *King* generally do not hold true in the military context. Thus, the effects of the *King* holding must be adapted to the unique circumstances of military investigations and criminal procedures, rather than copied blindly from the civilian context.

A. *King*'s Arrest and Custody Scenarios Rarely Occur in the Military

The Government interests in DNA indexing present in the civilian context are virtually absent from the military context. The Government's interests depend on the arrestee's imminent incarceration and the utility that additional information gained from DNA sampling would provide the confinement facility and the judge responsible for making a bail decision.[123]

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[120] *See, e.g.*, United States v. Curtis, 44 M.J. 106, 130 (C.A.A.F. 1996) (stating that Service members have no right to indictment by grand jury), *rev'd on other grounds*, 46 M.J. 129 (C.A.A.F. 1997).

[121] United States v. Long, 64 M.J. 57, 61 (C.A.A.F. 2006) ("The Fourth Amendment of the Constitution protects individuals, including servicemembers, against unreasonable searches and seizures.").

[122] See United States v. Eppes, 77 M.J. 339 (C.A.A.F. 2018) (reaffirming the strong judicial preference for warrants and finding that inevitable discovery would have resulted in the search of bags mentioned in an affidavit but omitted in a warrant), and United States v. Gurczynski, 76 M.J. 381 (C.A.A.F. 2017) (evidence of child pornography possession found on thumb drive suppressed where warrant only sought communications with child victim), for recent cases favoring Government efforts to secure warrants and disfavoring dragnet searches.

[123] *See* Maryland v. King, 569 U.S. 435, 449–56 (2013).

The Government's interests are correspondingly weaker under military law for three main reasons: the military justice system does not provide for bail,[124] an apprehended Service member generally does not undergo processing for immediate confinement, and Service members and their criminal histories can be readily identified without DNA testing.

Military members seldom are confined before trial. Military law enforcement agencies generally do not need to "ensure that the custody of [the subject of the investigation] does not create inordinate 'risks for facility staff, for the existing detainee population, and for a new detainee'"[125] because the military suspect is not incarcerated during the typical investigation. The rare case when a military suspect is put into pretrial confinement is its own trigger for DNA collection and submission to CODIS.[126] Thus, the investigative trigger for DNA collection does not serve the law enforcement interest of making informed decisions about the suspect's confinement because the military suspect is not being confined at this stage. If he or she is, the pretrial confinement trigger would apply.

1. There Is No Bail in the Military

None of the DoDI triggers, especially the investigative trigger, serve the interest of protecting society through the bail process because the military does not have a bail system. In the civilian criminal context, "bail is the release of an individual following his promise—secured or unsecured; conditioned or unconditioned—to appear at subsequent judicial proceedings."[127] Federal law requires that a person arrested under Federal authority be brought before a magistrate judge for an initial appearance without unnecessary delay.[128] At this hearing, the magistrate decides whether the arrestee will remain in detention pending trial or will be released and, if so, under what conditions.[129] The magistrate has four options: (1) release the individual on personal recognizance or upon execution of an

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[124] *See* Levy v. Resor, 37 C.M.R. 399, 402–03 (C.M.A. 1967) (quoting United States v. Hangsleben, 24 C.M.R. 130, 133 (C.M.A. 1957) ("[I]n the military bail is not available.")).
[125] *King*, 569 U.S. at 452 (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012)).
[126] DODI 5505.14, *supra* note 4, at 13.
[127] CHARLES DOYLE, CONG. RSCH. SERV., R40221, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW (2017) at summary; *see Bail*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To obtain the release of (oneself or another) by providing security for a future appearance in court.").
[128] FED. R. CRIM. P. 5(a).
[129] *Id.* 5(d)(3).

unsecured appearance bond; (2) release the individual subject to conditions; (3) detain the individual to allow proceedings for revocation of conditional release, deportation, or exclusion to run their course; or (4) detain the individual pending trial.[130]

When making such a decision, a magistrate's prime consideration is whether the conditions imposed will reasonably assure the arrestee's appearance at future proceedings and will adequately protect the safety of any other person or of the community.[131] Using DNA to determine if the arrestee has a criminal history—even connecting the arrestee to unsolved cases or "the defendant's unknown violent past"—arguably arms the magistrate with useful information in assessing the flight risk or threat to safety posed by the arrestee.[132] As the governing statute and procedural rules make clear, the default in the civilian criminal justice system is arrest and immediate confinement—even if of brief duration—followed by a bail hearing to decide if confinement continues.

The default position of the military justice system is the inverse. Rather than immediate confinement followed by a decision on release, the military investigator interviews the subject, conducts a minimal booking, and returns the subject to his or her command.[133] In this common scenario, the military subject is not confined for any period of time. Thus, DNA collection at this stage does not serve the interests identified by the majority in *King*: helping the relevant authorities make informed decisions about continued confinement and risk management in a detention facility. Those

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[130] 18 U.S.C. § 3142(a).

[131] *Id.* § 3142(b), (c)(1)(B), (d)(2), (e)(1).

[132] Maryland v. King, 569 U.S. 435, 452–55 (2013) (discussing the third and fourth interests identified by the Court). This argument is much more limited than it initially appears. While the DNA sampling scheme may link an individual with a previously unidentified forensic specimen, thus connecting an individual to an unsolved crime, it is unlikely to unearth prior offenses committed under different names. When a sample is taken from an arrestee, it is compared to the Forensic Index (unsolved crimes), not the Offender Index. The first time a person is arrested, DNA will be submitted to the Offender Index and compared to the Forensic Index. If the same individual reoffends under a false identity, when arrested his sample will be submitted to the Offender Index under the alias and compared to the Forensic Index. It will not be compared to the Offender Index where the original profile resides, which would have alerted law enforcement that the same person was reoffending under an alias. *See* NDIS OPMAN, *supra* note 8, para. 5.1 (showing that samples in the Offender Index are not compared to other samples in the Offender Index).

[133] *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTR. 31-115, LAW AND ORDER OPERATIONS, chs. 7, 8 (18 Aug. 2020) (containing identical language to the U.S. Air Force's now-superseded Instruction 31-118, Security Forces Standards and Procedures).

decisions are made only after the Service member is ordered into pretrial confinement, which is its own trigger for DNA collection.[134] The bail system simply does not exist; the default is to release the subject, with pretrial confinement occurring only when there is probable cause to believe (1) the subject committed an offense triable by court-martial, and (2) confinement is necessary because less severe forms of restraint are inadequate to prevent the subject from committing further serious criminal misconduct or to compel the subject's attendance at future proceedings.[135]

2. The Military Equivalent of "Arrest?"

In both practice and law, military members suspected of offenses rarely face confinement prior to conviction. Military law allows pretrial incarceration only when it is foreseeable that the accused either will not appear at trial or will engage in serious criminal misconduct and that no lesser form of restraint can prevent such malfeasance.[136] These restraints are not in the form of incarceration, but rather in requirements a commander imposes that may reduce the individual's freedom to some degree while allowing continued performance of his or her duties.[137] If restraints are imposed, they are not physical but moral, such as orders not to consume alcohol or not to return to a family home where domestic disturbances could occur.[138]

The military analogue to a civilian arrest is "apprehension," which in most contexts does not result in any confinement.[139] "Apprehension" is merely the taking of a person into custody based on probable cause until proper authority is notified and can act accordingly.[140] Suspects are

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[134] DODI 5505.14, *supra* note 4, at 13.

[135] MCM, *supra* note 2, R.C.M. 305(d), (h)(2)(B). *See also id.* R.C.M. 304; 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 4-20.00 (4th ed. 2015).

[136] These lesser forms of restraint include restrictions on liberty and "arrest." "Arrest" is a term of art defined as a requirement to remain within specified limits and not synonymous with civilian arrest. MCM, *supra* note 2, R.C.M. 304(a)(1), 305(h)(2)(B)(iii)–(iv).

[137] *Id.* R.C.M. 304; GILLIGAN & LEDERER, *supra* note 135.

[138] GILLIGAN & LEDERER, *supra* note 135.

[139] MCM, *supra* note 2, R.C.M. 302. "'[A]pprehension' refers to the initial taking or seizing of a person into custody" and was chosen by the UCMJ drafters to eliminate confusion created by differing terms in the Articles of War. MIL. JUST. REV. GRP., U.S. DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 183 (2015).

[140] MCM, *supra* note 2, R.C.M. 302(a)(1) discussion. "Apprehension" is a statutory term not coterminous with "investigative detentions," which do not require probable cause and do not authorize an extensive search of the person.

temporarily held—usually not in a confinement facility—until they can be picked up by an authority figure from their unit who will then assume responsibility for them, often returning them to their place of duty or home. Only in the most egregious cases, where suspects are likely to flee or commit further serious misconduct, are they held in pretrial confinement.[141] A suspect may be apprehended by a military law enforcement official[142] or by a commissioned, warrant, petty, or noncommissioned officer.[143] Apprehension occurs by notifying the person to be apprehended that they are in custody, and it can even be implied by the circumstances.[144] Apprehension is not required in every case and does not itself create criminal jurisdiction.[145] In the case of our curfew violator, the apprehension occurred when the guard told her to wait in his office while he called her supervisor.

B. Apprehended Military Members Are Rarely Processed for Confinement and Therefore Experience Little Deprivation of Privacy Due to Law Enforcement Detention

As in the example of our curfew violator who was intercepted by the gate guard on her way into base, apprehension may involve some level of procedure: identification via military identification, a possible search for weapons or evidence of a crime, requesting a statement, and a minimal booking to collect fingerprints and DNA, if required. The subject will then be returned to his or her command, not confined.

The *King* majority saw the invasiveness of the civilian booking process for custodial confinement as a key factor supporting the constitutionality

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[141] Military members apprehended on suspicion of very serious offenses such as possession of child pornography or sexual assault are routinely returned to their unit without any pretrial confinement. *See, e.g.*, United States v. Mitchell, 76 M.J. 413, 415 (C.A.A.F. 2017) (suspect facing allegations of sexually assaulting his wife and stalking was questioned for posting nude photos of her online before being escorted back to his unit); United States v. Christian, 63 M.J. 205, 209 (C.A.A.F. 2006) (suspect of multiple child molestations returned to his home unit and restricted to quarters); United States v. Brown, ARMY 20180176, 2019 CCA LEXIS 313, at *2 (A. Ct. Crim. App. July 31, 2019) (accused attempted to kill wife with a knife and was released to his unit after departing the military police station); United States v. Suarez, ARMY MISC 20170366, 2017 CCA LEXIS 631, at *2 (A. Ct. Crim. App. Sept. 27, 2017) (unpublished) (suspected offender was apprehended for possession of child pornography, interrogated, then released back to his unit).

[142] MCM, *supra* note 2, R.C.M. 302(b)(1).

[143] *Id.* R.C.M. 302(b)(2).

[144] *Id.* R.C.M. 302(d).

[145] *Id.* R.C.M. 302(a)(1) discussion.

of DNA testing incident to arrest.[146] The majority viewed the testing as inherently reasonable because the arrestee suffers a diminished expectation of privacy from the outset, pointing out that an arrestee is subject to such invasive searches as the lifting of genitalia or squatting and coughing.[147] However, the conditions present in a routine civilian police booking that diminish the expectation of privacy do not exist in the military investigative context because virtually all those apprehended or investigated will not be processed for confinement. Detention incident to apprehension is disfavored, as evidenced by current military law enforcement regulations, which provide for detention of apprehended military members only when necessary.[148] The default mode of the military justice system is that military members will remain at liberty while under investigation; if apprehended, they generally will be released to their respective commander.[149] Pretrial

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[146] *See* Maryland v. King, 569 U.S. 435, 461–64 (2013). "Booking" is the process of recording an arrestee's identifying information shortly after arrest in preparation for confinement. *See Book*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[147] *King*, 569 U.S. at 462.

[148] Army law enforcement "may detain personnel for identification and remand custody of persons to appropriate civil or military authority as necessary." U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS para. 4-11 (1 Nov. 2005). Detention is conducted "only when necessary [to p]revent escape[, e]nsure that the detained individual is safe[, and e]nsure that [law enforcement] and other personnel are safe." U.S. DEP'T OF ARMY, TECHNIQUES PUB. 3-39.10, POLICE OPERATIONS para. 3-81 (26 Jan. 2015). Army Technique Publication 3-39.10 requires a thorough search of any detained person for weapons and contraband but notes the limited nature of any detention, as "detention of military personnel typically will not exceed 24 hours," *id.*, and reminds law enforcement that "normally, military personnel awaiting trial remain under the control of their units," *id.* para. 3-86. Historically, the Air Force provides its Security Forces with discretion to apprehend as "apprehension considerations," which call for handcuffing and conducting a search of the suspect and area under their immediate control for weapons and evidence they could remove or destroy. "This emphasizes the safety of [Security Forces] members and the apprehended individual." U.S. DEP'T OF AIR FORCE, INSTR. 31-118, SECURITY FORCES STANDARDS AND PROCEDURES para. 6.1 (5 Mar. 2014) (C1, 2 Dec. 2015). Detention after apprehension is not required, only that a form of "booking" occurs, which is the administrative formality of collecting fingerprints and DNA for indexing "with the goal of establishing criminal records for offenders" which is unrelated to confinement itself. *Id.* para. 9.4. After reviewing the successor instruction, Air Force Instruction 31-115, the authors conclude that policy and practice are unchanged. *See* source cited *supra* note 133. Marine Corps policy is that apprehended personnel are to be detained "only when necessary to prevent escape, to ensure their safety, or the safety of others . . . ." U.S. MARINE CORPS, ORDER 5580.2B, LAW ENFORCEMENT MANUAL para. 11802.2 (27 Aug. 2008) (C2, 30 Dec. 2015). In the event it is required, apprehended or detained persons are generally not held longer than 8 to 24 hours. *Id.* paras. 11802.2.a, 11803.1–.2. Those held in such facilities are "thoroughly searched" prior to detention. *Id*. para. 11804.2.j.

[149] MCM, *supra* note 2, R.C.M. 302.

confinement occurs infrequently;[150] most military offenders are not incarcerated unless convicted and sentenced to a period of confinement, which means they are not processed for incarceration until after the complete adjudication of their case.

C. The Governmental Interest at Stake in *King*: "Identification" Does Not Exist in the Military Context

The concept of "identity" was central to the *King* majority's reasoning; that concept meant more to the majority than verifying that an arrestee was who he claimed to be.[151] The majority considered a person's criminal history an integral part of that identity. Although the majority identified five different government interests served by DNA sampling on arrest,[152] the first four are so intertwined that they can be summarized into a single interest: the government has an interest in knowing a person's criminal history so law enforcement officers and the courts can make informed decisions about pretrial detention and bail.

However, the DoD is already well situated to learn the true identity of its Service members. Unlike the civilian world, the military is a closed community that maintains voluminous personnel records that provide a wealth of information about an individual's identity and history.[153] Much of an individual's pre-service identity will already be known and accessible through background and security clearance checks.[154] In light of the

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[150] *See supra* note 141 and accompany text.

[151] *See King*, 569 U.S. at 450–52.

[152] *See id.* at 450–56; *see also supra* text accompanying notes 68–80.

[153] The Defense Biometric Identification System monitors access to facilities using facial recognition and fingerprint and iris scans, and it tracks law enforcement warrants. *Defense Manpower Data Center Announces the Global Release of Defense Biometric Identification System (DBIDS) Version 5*, U.S. DEP'T OF DEF. (Mar. 19, 2018), http://dbids.dmdc.mil/docs/DBIDS%205%20Press%20Release.pdf. The Defense Enrollment Eligibility Reporting System requires frequent updating in order to access medical care. *Defense Enrollment Eligibility Reporting System*, TRICARE, https://tricare.mil/deers (Nov. 9, 2020). There are also service-specific records repositories such as the Air Force's Master Personnel Record Group. *See, e.g.*, *Military Personnel Record or Official Document Requests*, U.S. DEP'T OF AIR FORCE (Sept. 22, 2017), https://www.arpc.afrc.af.mil/News/Article-Display/Article/1321740/military-personnel-record-or-official-document-requests.

[154] All military members undergo a criminal background check as part of entrance processing, which includes Federal, state, county, and local law enforcement records. U.S. DEP'T OF DEF., INSTR. 1304.23, ACQUISITION AND USE OF CRIMINAL HISTORY RECORD INFORMATION FOR MILITARY RECRUITING PURPOSES 2, 5 (Oct. 7, 2005). Many military members hold a

expansive personnel records systems available to military law enforcement and the possibility of tapping into the human remains database, identification is not at issue. As explained below, there is little benefit to utilizing CODIS as an additional dragnet for what are often minor infractions. Military members' DNA samples are submitted to CODIS only to find evidence of a crime that investigators have no reason to believe the subject committed (i.e., no probable cause), not for identification.[155]

While it could be argued that the DoD has an additional need to learn about the "identity" of its military members to ensure the safety and integrity of its units—which manifests when members become suspected of offenses, calling into question their general character and the possibility that they may have been involved in other crimes—such a heightened "identity" argument is untenable. The DoDI does not claim heightened safety or security as a rationale for taking DNA samples; rather, the purposes for collection are "similar to those for taking fingerprints," and for "generating evidence to solve crimes."[156]

The value in indexing military offenders' DNA to ferret out an undiscovered rapist or murderer is hypothetical. Despite the submission of over 130,000 samples to CODIS,[157] the authors were unable to discover

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security clearance requiring an extensive background investigation with a periodic reinvestigation. *See* 50 U.S.C. § 3341.

[155] *See supra* note 140.

[156] DODI 55051.14, *supra* note 4, at 1. One could argue DNA sampling helps the DoD satisfy its "overriding obligation to maintain complete and accurate identifying data regarding [its] servicemembers." United States v. Fagan, 28 M.J. 64, 69 (C.M.A. 1989). However, the purpose behind the obligation is "to identify combat casualties and aircraft-disaster victims for the purpose of notifying next of kin and assisting dependents." *Id.* The DNA sampling scheme is too narrow to meet that need because it only collects samples from those who run afoul of military justice, not from all Service members. Furthermore, the DoD collects DNA samples from all new recruits during induction to meet this need. Douglas J. Gillert, *Who Are You? DNA Registry Knows*, U.S. DEP'T OF DEF. (July 13, 1998), https://archive.defense.gov/news/newsarticle.aspx?id=41418 [https://web.archive.org/web/20150924005339/http://archive.defense.gov/news/newsarticle.aspx?id=41418]. *See also Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR)*, HEALTH.MIL, https://www.health.mil/Military-Health-Topics/Research-and-Innovation/Armed-Forces-Medical-Examiner-System/DoD-DNA-Registry/Repository-of-Specimen-Samples-for-the-Identification-of-Remains (last visited Nov. 27, 2020) ("The Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR) maintains a DNA reference specimen collection for all active duty and reserve service members and an automated database to assist in their retrieval for human remains identification.").

[157] The FBI reports all U.S. military CODIS statistics as coming from the U.S. Army, as the samples come from an Army lab. *See CODIS – NDIS Statistics*, *supra* note 20.

any instance in which a Service member's CODIS sample uncovered a hitherto unknown crime.[158] As explained below, the DoD's collection program has been the least helpful in aiding investigations generally, so there is unlikely any additional safety value to be wrung out of continued widespread collection.

The imagined safety value in collecting a large number of military "arrestee" samples must be contrasted against the very real administrative costs and burdens in collecting and disposing of the samples and in the resultant deprivation of privacy which occurs both when the sample is collected and maintained. Consider that the DoDI acknowledges the ongoing privacy interest of individuals whose samples have been taken but who were never convicted.[159] If the individuals had no ongoing privacy interest in their sample, there would be no reason to allow expungement. Once the Government possessed a sample, it could hold it in perpetuity, but such is not the case. Safety does not dictate that we needlessly retain a sample that is basically worthless in the hope that eventually a DNA sample might match.

The Combined DNA Index System is not a continuous DNA dragnet for arrestees;[160] it is meant for those likely to be convicted of a serious crime.[161] As most of the DoD's submissions are from those cases which are unlikely to result in conviction,[162] collecting and submitting military apprehendee samples is a worthless legal sleight of hand.[163] If the military truly had a heightened safety need that required a continuous DNA dragnet, the proper means would be legislative action making provision of DNA for continuous criminal indexing a condition of military accession and altering CODIS legislation to allow such submissions.

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[158] The figure provided by the FBI (229 U.S. Army "investigations aided"), *CODIS – NDIS Statistics*, *supra* note 20, is unhelpful in this regard as it provides no information about whether nature of investigation, whether the investigation was aided by a forensic sample or offender sample, and in what where the investigation was aided.

[159] *See* DoDI 5505.14, *supra* note 4, at 14–16.

[160] The Combined DNA Index System requires the "prompt" expungement of samples when charges have resulted in an acquittal, have been dismissed, or, most importantly, have not been filed. *See* 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[161] *See* 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[162] *See infra* app.

[163] The U.S. Code establishing CODIS requires the prompt expungement of arrestee samples in which no conviction has occurred or can occur. *See supra* note 161. Collecting samples for cases which will almost never result in conviction and then placing the onus to initiate their removal on individual Service members contains an element of disingenuousness, even if inadvertent and well-intentioned.

IV. Significant Omissions in the DoDI that Weigh Against Its Constitutionality

The DoDI has three significant failings that take it outside the constitutionally permissible realm set by the *King* decision: (1) the information taken from the DNA samples collected under the DoDI has no express limitations on its use, and there are no sanctions for those who might choose to use the DNA samples for purposes beyond CODIS identification; (2) the command-directed investigation trigger empowers commanders to choose whether DNA samples will be collected, rather than imposing a non-discretionary requirement; and (3) the preferral trigger authorizes DNA collection based solely on the commander's decision to recommend trial by court-martial, rather than on any heightened restriction on the accused's liberty or reduction of his privacy interests.

A. There Are No Express Limitations on the Use of Collected DNA

The DoDI is a potential blank check to those wishing to use the collected DNA for purposes beyond identification, as it provides no guarantee against expanded governmental use of the information collected. In upholding the Maryland DNA Collection Act, the *King* majority observed that the Maryland Act expressly limited the ability to use collected DNA to guard against further invasions of privacy[164] and criminalized any use of the collected DNA beyond the identification of the individual.[165] The DoDI lacks any of the express limitations that were favored by the *King* court. The Maryland DNA Collection Act required that "*only* DNA records that directly related to the identification of individuals be collected and stored."[166] On its face, the DoDI makes no such limitation, which allows for the collection and storage of an entire genome. Though the DoDI's ostensible purpose for the collection of DNA is positive identification and database searching, it provides no safeguards similar to those imposed by the Maryland DNA Collection Act.

Deoxyribonucleic acid contains a wealth of information that is ripe for exploitation, which the *King* majority recognized when it endorsed the statutory limitations on its use and associated criminal penalties for

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[164] Maryland v. King, 569 U.S. 435, 465 (2013).
[165] *Id.* (citing MD. CODE ANN., PUB. SAFETY § 2-512(c) (2011) ("A person may not willfully test a DNA sample for information that does not relate to the identification of individuals . . . .")).
[166] *Id.*

exceeding those limitations as a significant safeguard against an unnecessary invasion of the arrestee's privacy.[167] These protections were undoubtedly a strong factor in the majority's conclusion that the Maryland DNA Collection Act was constitutional.[168] The DoDI contains no express limitation on the uses of the collected DNA and provides no sanctions for those who use the DNA for purposes other than criminal indexing.[169] While the stated purpose of the DoDI's DNA collection process is to gather DNA for identification and to solve crimes through database searches, there is nothing explicitly limiting the collected DNA to these uses.[170] The statutory safeguards that protect CODIS submission samples from abuse would not protect samples collected under the DoDI should the DoD later authorize other uses of the samples beyond indexing.[171]

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[167] *Id.*

[168] "[I]n light of the scientific and statutory safeguards," the invasion of privacy involved in Maryland's DNA collection and STR analysis was permissible under the Fourth Amendment. *Id*.

[169] *See* DoDI 5505.14, *supra* note 4. Simply inserting limiting language into the DoDI would not be enough to protect collected DNA against misuse for two reasons. First. nothing stops the DoD from amending the DoDI at any time to remove whatever procedural safeguards it might insert. *See infra* note 175. Second, penal enforcement of those safeguards would be limited to military members. While they could be charged under Article 92, UCMJ, for violating any safeguards, the DoDI cannot be criminally enforced against civilian personnel who violate those safeguards. At worst, civilians could lose their jobs. As discussed in Section VI, the strongest way to limit the use of collected DNA to criminal indexing only is to amend the authorizing statutes to expressly state that DNA samples collected under those authorities can only be used for the purposes stated in 34 U.S.C. § 12592(b)(3)(A)–(D). Those limitations could then be criminally enforced under 34 U.S.C. § 40706.

[170] DoDI 5505.14, *supra* note 4, at 13. While the statute establishing CODIS, 34 U.S.C. § 12592, requires that agencies collecting and analyzing DNA for submission to CODIS use the DNA collected only for law enforcement identification, judicial proceedings, and as a database for identification research and protocol development, it provides no penal sanction against misuse. 34 U.S.C. § 12592(b)(3). At worst, DoD's access to CODIS would be subject to possible cancellation if it authorized uses for the collected DNA beyond criminal identification. *Id.* § 12592(c).

[171] The law prohibiting expanded use of the DNA information under the Maryland DNA Collection Act was firm and clear, while any prohibitions on expanded use under the DoDI are subject to interpretation. 34 U.S.C. § 40706(c) protects samples collected under § 40702 from misuse and provides that "[a] person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than $250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection." 34 U.S.C. § 40706(c). While this would prevent a rogue analyst from misusing data, it would not guard against an official, and thus authorized determination that DoD samples should be used beyond CODIS entries. The DoD derives its authority to seize pre-conviction DNA

The *King* majority refused to speculate about the permissibility of a DNA collection system that did not contain procedural safeguards akin to the Maryland DNA Collection Act.[172] The lack of safeguards in the DoDI are an open invitation to such speculation. Ambiguously protected information is always a temptation. Though obtained for a limited purpose, executive agencies may perceive other utilitarian uses for such information—and have recently been caught doing so.[173] The greater the possible value of information, the stronger the temptation to mine and extract it. The DNA information collected under the DoDI is potentially of immense value,[174] while the framework that controls it shifts with the stroke of a pen.[175] For example, military members are not covered by the Genetic Information Nondiscrimination Act,[176] so there is no legal impediment to amending the DoDI to allow analyzing the more than 121,500 collected samples[177] for genetic markers of disease and then choosing to separate from service those members who might have genetic indicators of disease.

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samples from 34 U.S.C. § 40702, which does not expressly limit the uses of seized DNA. *See id.* § 40702.

[172] Maryland v. King, 569 U.S. 435, 465 (2013).

[173] The FBI has been chastised by a Foreign Intelligence Surveillance Act court for abusing NSA mass surveillance data for domestic investigations. Trevor Aaronson, *A Declassified Court Ruling Shows How the FBI Abused NSA Mass Surveillance Data*, INTERCEPT (Oct. 10, 2019, 7:00 AM), https://theintercept.com/2019/10/10/fbi-nsa-mass-surveillance-abuse (describing the FBI's improper use of surveillance data collected in 2017 and 2018 under the Foreign Intelligence Surveillance Act).

[174] As DNA is better understood, its value grows. For example, its growing utility in diagnosing susceptibility to deadly diseases could be valuable information for insurance companies. *See A Brief Guide to Genomics*, NAT'L HUMAN GENOME RSCH. INST., https://www.genome.gov/about-genomics/fact-sheets/A-Brief-Guide-to-Genomics (Aug. 15, 2020) (explaining that DNA science is moving beyond identification of hereditary diseases and being used to treat complex diseases such as cancer and cardiovascular disease). Some DNA databases have demonstrated the ability to identify distant relatives in order to solve crimes. Heather Murphy, *Sooner or Later Your Cousin's DNA is Going to Solve a Murder*, N.Y. TIMES (Apr. 25, 2019), https://www.nytimes.com/2019/04/25/us/golden-state-killer-dna.html. Autocratic governments have already recognized the power of DNA databases in their efforts to control subject populations. *China: Minority Region Collects DNA from Millions*, HUMAN RTS. WATCH (Dec. 13, 2017, 10:48 AM), https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions.

[175] Literally, as the DoD is not subject to the rule making procedures—namely, notice and comment—set forth in the Administrative Procedure Act. *See* 5 U.S.C. § 553(a)(1) (exempting military functions of the United States from the rule making procedures).

[176] The Genetic Information Nondiscrimination Act protects employees from employment discrimination. *See generally* 42 U.S.C. §§ 2000ff to 2000ff-11.

[177] *Id.*; *Genetic Discrimination*, NAT'L HUMAN GENOME RSCH. INST., https://www.genome.gov/about-genomics/policy-issues/Genetic-Discrimination (Sept. 16, 2020).

B. Allowing Command-Level Investigators to Take DNA Is a Violation of the Fourth Amendment as It Vests in Government Actors Discretion to Seize DNA

A command-level investigation or inquiry occurs when the command learns of an allegation of misconduct that is not being investigated by a law enforcement agency and the commander decides he or she needs additional facts. This usually occurs when offenses fall outside threshold requirements for law enforcement involvement, law enforcement resources are limited, or the offenses are better suited to be investigated by someone with subject matter expertise within the command.[178] Examples of cases ripe for command investigation could include, for example, inventory loss or workplace sexual harassment.

The decision to initiate a command-directed investigation is discretionary; commanders generally are not required to conduct such an investigation.[179] Not only do commanders have discretion to choose if they will conduct an investigation, but the DoDI also gives them discretion to decide if DNA will be collected from the subject, regardless of whether the allegation is substantiated.[180] The trigger *allows* commanders to collect DNA when they conduct or direct a command investigation into a covered offense, but only *requires* collection if the member is convicted by a general or special court-martial.[181]

Commander discretion must be removed from the DNA collection process to satisfy the Fourth Amendment. The majority in *King* noted that the constitutionally approved Maryland Act was a routine booking procedure that did not vest discretion or judgment to conduct a warrantless

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[178] Commanders have the inherent authority to investigate matters under the command unless preempted by higher authority. MCM, *supra* note 2, R.C.M. 303 discussion; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF AIR FORCE, COMMANDER DIRECTED INVESTIGATION (CDI) GUIDE para. 1.2 (2018); *see* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 4-1 (1 Apr. 2016); U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. 2 (26 June 2012) (C2, 26 Aug. 2019).

[179] *But see* 10 U.S.C. § 1561 (requiring commanders to conduct an investigation into sexual harassment allegations).

[180] DODI 5505.14, *supra* note 4, at 14.

[181] *Id.* The mandatory trigger is cumulative with the requirement to collect upon a general or special court-martial conviction, *id.* at 13, so the discretionary trigger *must* be an additional grant of authority. Otherwise, it is mere surplusage without effect.

search in law enforcement officers.[182] Granting a commander discretion to seize DNA in this manner runs afoul of the principle of arbitrariness in warrantless searches: the reasonableness of a warrantless search is correlated to the degree of discretion held by the official conducting the search—the greater the discretion, the more unreasonable the search.[183] As the DoDI vests discretion to seize DNA for indexing at any time during the course of an investigation, which is itself discretionary, it creates a constitutionally unreasonable search from the beginning.

C. Seizing DNA Based Solely on the Act of Preferral Violates *King*

The DoDI mandates that DNA samples be collected from Service members upon the preferral of charges from those who had not yet had samples taken.[184] Preferral is nothing more than the formal act of accusing a Service member of a crime.[185] It is the first procedural step to a trial by court-martial. It is merely the acts of signing a charge sheet, which swears to the truth of the charge, and notifying the accused that a criminal charge has been alleged.

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[182] Maryland v. King, 569 U.S. 435, 448 (2013) ("The arrestee is already in valid police custody for a serious offense supported by probable case. The DNA collection is not subject to the judgment of officers whose perspective might be 'colored by their primary involvement in . . . ferreting out crime.'" (quoting Terry v. Ohio, 392 U.S. 1, 12 (1968))).

[183] *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667 (1989) (drug testing programs for covered employees do not require a warrant as there are no discretionary determination to be made); Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978) ("The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers."); South Dakota v. Opperman, 428 U.S. 364, 382–83 (1976) (allowing warrantless inventories of seized automobiles because officers must follow established procedures and do not make a discretionary determination to search); United States v. Ortiz, 422 U.S. 891 (1975) (warrantless searches at a traffic checkpoint held unconstitutional when officers "exercise[d] a substantial degree of discretion in deciding which cars to search," resulting in a 3% search rate for vehicles passing through the checkpoint).

[184] DODI 5505.14, *supra* note 4, at 13.

[185] Any person subject to the UCMJ may prefer charges by asserting, under oath, that he or she "has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and the matters set forth in the charges and specifications are true to the best of the knowledge and belief of [that person]." MCM, *supra* note 2, R.C.M. 307(a)–(b). Following preferral, the accused is informed of the charge as soon as practicable. *Id.* R.C.M. 308(a). A charge states which article of the UCMJ the accused allegedly violated, and "[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." *Id.* R.C.M. 307(c)(2)–(3).

Unless suspected military offenders are apparent flight risks or likely to commit further serious misconduct, they are left to continue to perform their duties as they did during the investigation. For the rare suspect who poses a flight risk or is likely to commit further serious misconduct, pretrial confinement is available. Those suspects would be processed for confinement of more than passing duration and would be subject to the intrusive searches that accompany the subjugation of a human body to the "physical dominion" of a jailor.[186] The act of preferral alone does not result in incarceration.[187] The coercive and binding power of the command structure usually is sufficient to ensure that those accused of a crime continue performing their duties and do not reoffend while the military justice process runs its course. Even for an offense as grave as sexual assault, most accused remain at liberty up to the day a court-martial sentences them to confinement.[188] The complete lack of any accompanying booking procedure or incarceration makes preferral a constitutionally improper stage at which to seize DNA.

V. Seizing and Storing DNA from the Broadest Possible Pool of Military Offenders Is Unwise Policy

Instead of seeing that only those reasonably suspected of a violent offense or those whose guilt was proven beyond a reasonable doubt be

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[186] *King*, 569 U.S. at 449. The DoDI makes pretrial confinement a trigger for DNA sampling. DODI 5505.14, *supra* note 4, at 13.

[187] One principal reason the military does not routinely confine suspected offenders is that the mission cannot afford it. Congress controls the size of the American military to ensure national security in the event of two major regional contingencies. 10 U.S.C. § 691(a). The authorized end-strength is not designed to absorb the loss of personnel from routine incarceration only because they are suspected of committing an offense. As of the enactment of the National Defense Authorization Act for Fiscal Year 2020, the total authorized end-strength of the active duty armed forces was 1,339,500. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 401–402, 133 Stat. 1198, 1334 (2019).

[188] For example, the Judicial Proceedings Panel, a Federal advisory committee, found in fiscal years 2012 to 2014, of 1,270 cases across all services in which at least one charge alleging a penetrative or contact sexual offense was referred to trial, only 175 (13.8%) involved pretrial confinement. Cassia Spohn, Sexual Assault in the Military: Case Characteristics, Case Outcomes and Punishments, at slide 13 (Jan. 22, 2016), http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20160122/Case_Charact_Outcomes_Punish_20160122_Spohn.pdf. As sexual assault is undoubtedly one of the most severe categories of offenses, this should serve as a good indicator that the less severe categories of offenses are treated with even more circumspection regarding pretrial confinement.

subject to DNA indexing, the DoDI ensures that a vast number of Service members—those who are never processed for confinement and whose offenses are adjudicated through administrative means—will have their DNA indexed in perpetuity. Though of only limited assistance to law enforcement, the DoDI has been written to nearly maximize DNA indexing collection with the potential to result in unintended harms to those whose DNA has been seized. The extent of DNA indexing collection is one of policy, which ought to consider second order effects in pursuit of a happy medium where collection is narrowed to serious offenders.[189]

A. The Utility of U.S. Military CODIS Submissions Is Questionable

Assuming, for the sake of argument, that the military has a need to ensure security in its ranks by using CODIS to continually surveil those members that have had an encounter with the law, it has gained little practical good for its expansive collection efforts and has only created extra work and trouble in the process.

Popular support for CODIS indexing draws strength from DNA's perceived utility in solving crimes.[190] However, the breadth and sweep of DNA indexing—that is, under what circumstances DNA indexing is the right fit for the right group of persons—was not addressed in *King*.[191] On its face, the DoDI sweeps broadly in terms of the categories it seeks to include; it is not aimed solely at violent or serious offenders and has met with little obvious success thus far.[192] There are no reported military cases indicating that CODIS matches have generated identifications relating to prior

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[189] The *King* court validated only the collection of DNA in the context of "serious" and "dangerous" offenses. *See King*, 569 U.S. at 435 (describing the offenses or the offender as "serious" approximately twelve times).

[190] According to a Gallup poll, 85% of the American public surveyed in October 2005 thought that DNA evidence was "very" or "completely reliable." *Crime*, GALLUP, https://news.gallup.com/poll/1603/crime.aspx (last visited Nov. 28, 2020). During this time, there was a positive relationship noted between viewing crime television (such as CSI) and a belief in the reliability of DNA and between local news consumption and support for DNA databases. *See* Paul R. Brewer & Barbara L. Ley, *Media Use and Public Perceptions of DNA Evidence*, 32 SCI. COMMC'N 93, 109 (2010).

[191] Though not a part of its holding, the language in *King* seemed to envision DNA indexing for serious and dangerous offenses and dangerous offenders. *See King*, 569 U.S. at 453 ("identification of a suspect in a violent crime"); *id.* at 460 ("a serious offender"); *id.* at 461 ("valid arrest for a serious offense"); *id.* at 463 ("a dangerous offense").

[192] The DoD was mandated to collect samples for submission to CODIS starting not later than 17 June 2001. *See* DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 5(c), 114 Stat. 2726, 2733.

crimes, so there is yet no reported benefit to the military justice system. As of November 2020, the FBI has received from the U.S. military over 32,000 offender profiles, nearly 95,000 arrestee DNA submissions, and nearly 4,400 forensic profiles.[193] That pool of over 131,000 profiles has resulted in only 239 "investigations aided."[194] These 239 "investigations aided" are non-specific, in that it is unknown whether these matches are to military offenders, military arrestees, or to forensic evidence submissions.[195]

Figure 2[196]

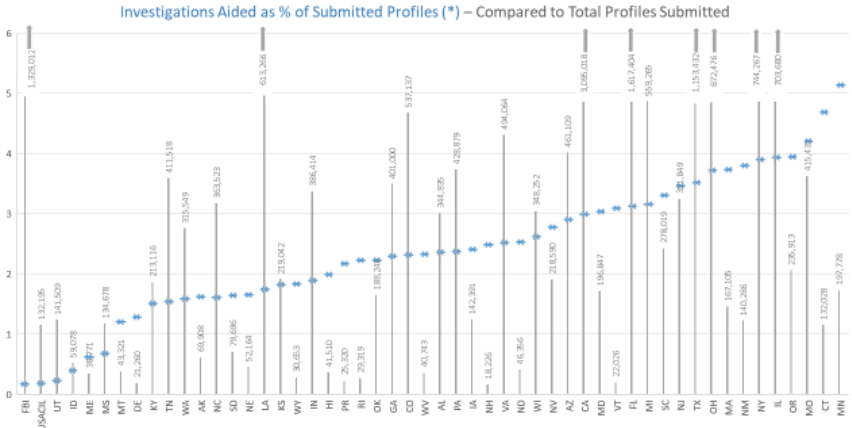

Figure 2: U.S. Military (USACIL) DNA Submissions Have Been Among the Least Effective in Aiding Investigations (based on Oct 2020 NDIS statistics).

[193] Specifically, the U.S. Army has submitted on behalf of all services 32,842 offender profiles, 94,955 arrestee profiles, and 4,398 forensic profiles. *CODIS – NDIS Statistics*, *supra* note 20.

[194] *Id.* This means that 0.18% of submissions have contributed in some way to investigations nationally.

[195] "The procedure used for counting hits gives credit to those laboratories involved in analyzing and entering the relevant DNA records into CODIS. The system's hits are tracked as either an offender hit (where the identity of a potential suspect is generated) or as a forensic hit (where the DNA profiles obtained from two or more crime scenes are linked but the source of these profiles remains unknown). These hits are counted at the state and national levels. CODIS was established by Congress to assist in providing investigative leads for law enforcement in cases where no suspect has yet been identified; therefore a CODIS hit provides new investigative information on these cases. The hits are reported as 'Investigations Aided.'" *CODIS FAQ*, *supra* note 26.

[196] The authors created this figure based on data derived from the FBI's publically released CODIS statistics. *See CODIS – NDIS Statistics*, *supra* note 20.

A cursory analysis of the data may suggest that the effectiveness of DNA samples in aiding investigations is more closely linked to the submission of offender profiles than arrestee profiles.[197] The military is one of only a few jurisdictions that have managed to collect more arrestee than offender profiles (having collected almost three times as many arrestee profiles).[198] While the available data is generic, it appears that there is little utility for the military in collecting arrestee DNA insofar as the stated goal of the DNA collection program is to solve crimes; despite its large ratio of arrestee (military apprehendees) to offender samples, it is one of the smallest contributors to investigations aided.[199] This ineffectiveness is depicted in Figure 2, which shows the U.S. military (via the U.S. Army Criminal Investigation Laboratory (USACIL)) as being the second least helpful jurisdiction statistically. Overall, collecting samples from military apprehendees has done little but consume the time of investigators and analysts and incur expenses associated with unnecessarily collecting, testing, and storing the DNA.

B. Unforeseen Problems Warrant a Cautious Approach to Avoid Overcollection

1. The Innocent May Be Erroneously Implicated

Deoxyribonucleic acid is collected and indexed under the benign assumption that the samples will be used to ensure that the guilty are brought to justice. However, there is a risk that samples entered into the system could be incorrectly linked to offenses, resulting in erroneously implicating the innocent. Contamination, interpretation errors, and other human factors involved in the processing of DNA evidence have led to the misidentification and improper convictions of suspects.[200] As DNA is

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[197] If the effectiveness of a DNA collection program is measured by dividing the number investigations aided by the number of submitted samples, the average effectiveness of all jurisdictions is 2.39%. Of the thirty jurisdictions that collect both arrestee and offender profiles, the seventeen that are of above average effectiveness that collect both have substantially larger collections of offender profiles, while only one state (North Dakota) with above average effectiveness has more arrestees than offenders. *Id.*

[198] Only Colorado, Kansas, Louisiana, North Dakota, South Dakota, USACIL, and the FBI have collected more arrestee than offender profiles. *Id.*

[199] Despite the fact that USACIL ranks thirty-seventh of fifty-three in total CODIS submissions, only Puerto Rico has fewer absolute numbers of investigations aided. *See id.*

[200] Deoxyribonucleic acid samples can create false positives in a number of ways; background DNA (deposited before the crime took place and unrelated to it), secondary transfer, and contamination have been proven instances of DNA testing leading to miscarriages of

constantly innocuously transferred from individuals to their environment, the smaller sample size now required for DNA testing has resulted in individuals wrongly implicated in serious offenses due to DNA transference.[201] At least one Federal district court has recognized that the methodology for analyzing samples of so called "touch DNA," in which small fragments from multiple contributors are found together, fails to satisfy the *Daubert* standard of scientific reliability.[202]

While DNA evidence is given strong public credence, developed around the testing of larger sample sizes—a good indicator of the degree of contact between the subject and object—it would be easy to overestimate the value of a smaller sample.[203] Overconfidence in the promise of forensic techniques once widely touted as sound and reliable has resulted in the miscarriage of justice.[204] Does our curfew violator really deserve to face even the remote risk of being erroneously suspected or tried for an offense she may not have committed? Overcollection unnecessarily increases the risk that DNA samples may lead to wrongful conviction[205] and thus violates that axiom of American criminal justice that it is better that one hundred guilty men go free then an innocent man be convicted.[206]

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justice. *See* P. Gill, *DNA Evidence and Miscarriages of Justice*, FORENSIC SCI. INT'L, Jan. 2019, at e1, e1 to e3; Matthew Shaer, *The False Promise of DNA Testing*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747 (last visited Nov. 28, 2020) (identifying flaws inherent to DNA testing that have led to wrongful convictions and arrests).

[201] Shaer, *supra* note 200; Clive Thompson, *The Myth of Fingerprints*, SMITHSONIAN MAG., https://www.smithsonianmag.com/science-nature/myth-fingerprints-180971640 (Apr. 26, 2019) (referencing a deadlocked murder trial where the jury suspected that DNA contamination by the police resulted in the suspect's DNA making its way onto the victim's body).

[202] United States v. Gissantaner, No. 1:17-cr-130, 2019 U.S. Dist. LEXIS 178848, at *47 (W.D. Mich. Oct. 16, 2019) (complex statistical interpretation software did not pass *Daubert* test for small samples of DNA taken from three-person mixture as quantity was below the threshold that had been validated by the laboratory).

[203] *See* Shaer, *supra* note 200.

[204] Bullet lead examination, latent fingerprints, hair analysis, and bite-mark analysis have come under scrutiny for being far less certain than once believed. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 27–29 (2016).

[205] The larger the DNA database, the higher the risks of false positive matches. *See* Shaer, *supra* note 200.

[206] Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *quoted in* Alexander Volokh, *Aside:* n *Guilty Men*, 146 U. PA. L. REV. 173, 175 (1997).

Overcollection can also potentially endanger military operations. The DoD warned its Service members against the use of consumer ancestry or health screening DNA kits because their results can compromise military readiness and limit career advancement.[207] This warning noted that DNA tests "could expose personal and genetic information, and potentially create unintended security consequences and increased risk to the joint force and mission."[208] While USACIL maintains many security precautions,[209] housing DNA of numerous Service members creates an unnecessary risk, even if remote, for exploitation by adversaries.[210]

2. Developments in DNA Technology Merit Additional Caution

The *King* court noted that "CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits . . . . [S]cience can always progress further, and those progressions may have Fourth Amendment consequences."[211] The court accepted that these loci were noncoding "junk" DNA—which would limit their use to identification purposes only—ensuring that DNA indexing was constitutional.[212] However, it is possible that advances in DNA technology will increase the pressure to use what was claimed to be informationally limited DNA for purposes beyond individual identity.

Scientists have recently demonstrated that the thirteen CODIS loci at issue in *King* have greater potential information than initially assumed, and can be analyzed to predict ancestry and ethnicity.[213] The Combined

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[207] Heather Murphy & Mihir Zaveri, *Pentagon Warns Military Personnel Against At-Home DNA*, N.Y. TIMES (Dec. 24, 2019), https://www.nytimes.com/2019/12/24/us/military-dna-tests.html.

[208] *Id.*

[209] For example, USACIL allows only those with security clearances to access DNA samples that are protected by continuous electronic security and cypher lock. Letter from Longcor to authors, *supra* note 3.

[210] *See, e.g.*, *Cybersecurity Incidents*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/cybersecurity/cybersecurity-incidents (last visited Nov. 28, 2020).

[211] Maryland v. King, 569 U.S. 435, 464 (2013). The CODIS loci were not at that time revealing information beyond identification. The *King* majority also found persuasive the fact that law enforcement officers analyzed DNA for the sole purpose of identity.

[212] *Id.* at 445.

[213] Ancestry information is contained in CODIS loci that could potentially be used for race and ethnic phenotyping. *See generally* Bridget F.B. Algee-Hewitt et al., *Individual Identifiability Predicts Population Identifiability in Forensic Microsatellite Markers*, 26 CURRENT BIOLOGY 935 (2016). *But see* Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. FORENSIC SCIS.

DNA Index System now collects more genetic information than at the time of *King*, as the FBI recently increased the number of core loci required to be reported to CODIS from thirteen to twenty.[214] Thus, the possibility for additional, unforeseen information being unintentionally gathered has increased.[215] The same Federal district court judge that found problems with "touch DNA" analysis warned: "[a]dvancements in [DNA testing technology] are accompanied with unique concerns when life, liberty and justice are at stake."[216] While these developments alone would not yet tilt the constitutional balance in favor of privacy interests, they argue in favor of a limited approach to collection. The curfew violator does not deserve the risk of exposure to future invasions of genetic privacy because of developments in technology.

3. A Looming Problem: Parking Samples in CODIS for Cases that Will Never Proceed to Court-Martial

Apart from reaping only sparse reward for indexing its apprehendees' DNA, the DoD is quickly creating a heavy administrative burden for itself. Many of the DNA samples submitted to CODIS will soon have no business being there,[217] but by making Service member-initiated expungement the means of removal, the DoD is allowing a large pool of samples to remain in CODIS contrary to the law's intent. The DoD does not contend that it is entitled to keep samples from those whose offenses did not result in a conviction.[218] Between the DoDI's publication in late 2015 and October

S169 (2013) (stating that, as of 2013, CODIS profiles provide no sensitive or biomedically relevant information).

[214] This additional requirement was undertaken to facilitate greater discrimination, assist in missing person investigations, and encourage international data sharing efforts by having more loci in common with other countries for comparison purposes. *See Combined DNA Index System (CODIS)*, *supra* note 18.

[215] Seth Augenstein, *CODIS Has More ID Information than Believed, Scientists Find*, FORENSIC SCI. MAG. (May 15, 2017), https://www.forensicmag.com/news/2017/05/codis-has-more-id-information-believed-scientists-find (discussing findings that the thirteen CODIS loci had enough predictive power about the whole genome that they could be linked to other genome data sets that had no shared markers); Michael D. Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 PROC. NAT'L ACAD. SCIS. 5671 (2017).

[216] United States v. Gissantaner, No. 1:17-cr-130, 2019 U.S. Dist. LEXIS 178848, at *47 (W.D. Mich. Oct. 16, 2019).

[217] Combined DNA Index System indexing is not intended for those acquitted of charges or for those cases in which no charges have been filed in the applicable time period. 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[218] DODI 5505.14, *supra* note 4, para. 5.

2019, USACIL has submitted 45,696 profiles to CODIS but processed only 383 requests for expungement.[219] Of those profiles, only a small percentage of the offenses for which DNA was seized will ever result in a court-martial or conviction.[220] Nonetheless, samples are routinely taken from offenders who will almost certainly receive only administrative punishment—and it was foreseeable at the time of their offense that they would never receive more than administrative punishment.

As maintaining a CODIS profile and retaining a DNA sample on the basis of administrative punishment alone is invalid, it stands to reason that most of the USACIL CODIS samples should be expunged without Service member request. Those individuals will likely never face criminal charges because it is either not prudent to charge them or not possible to do so due to the expiration of the statute of limitations.[221] Indeed, the CODIS legislation and operating procedures themselves require "prompt" removal of arrestee DNA[222] when it is established that "no charge was filed within the applicable time period."[223] Accruing tens of thousands of DNA samples for those who receive only administrative punishment and then requiring the offender to meet the DoD's obligations to "promptly" remove the improperly retained DNA is an enormous administrative burden in the making—someone must invest significant time and energy to determine how many of those samples are no longer legitimately in CODIS and seek

[219] This information is accurate as of 24 October 2019, when USACIL answered the authors' Freedom of Information Act request. The authors specifically requested to know, *inter alia*, the number of samples prepared for CODIS submission since 22 December 2015 (the date of the revised DoDI) and the number of expungement requests processed by USACIL. *See* Letter from Longcor to authors, *supra* note 3. Presumably, additional requests have been made, but their numbers are not publically available.

[220] The services reported to Congress that in fiscal year 2018 (i.e., 30 September 2017 to 1 October 2018), there were 1,636 general and special courts-martial with 742 cases referred and awaiting trial, with these figures including acquittals and cases arraigned but not tried. JOINT SERV. COMM. ON MIL. JUSTICE, U.S. DEP'T OF DEF., REPORTS OF THE SERVICES ON MILITARY JUSTICE FOR FISCAL YEAR 2018 (2019). The services similarly reported approximately 1,708 general and special courts-martial for Fiscal Year 2017 (i.e., 30 September 2016 to 1 October 2017). *Id.* Even with an overestimation of courts-martial that have occurred since the DoDI was published (for example, 2,000 per each of the four fiscal years), more than 37,500 samples have been taken that will never result in a court-martial conviction.

[221] The statute of limitations for most UCMJ offenses is five years (except sexual assaults, murder, desertion and certain child abuse offenses). UCMJ art. 43 (1950).

[222] 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[223] 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

their removal.[224] This overcollection is further cause for removing investigation as a trigger for DNA seizure, as there is no necessity for and little utility in seizing DNA prior to conviction.

VI. Proposal

The flaws in the DoD's DNA collection scheme can be fixed, but the DoD cannot do it alone. Both the DoD and Congress need to act. The DoD can amend the DoDI to remove the three offensive triggers, limiting DNA collection to only those areas in line with the *King* rationale. Meanwhile, Congress must enact penal sanctions for those who use DNA samples for purposes other than those for which they were collected.

The DoD should amend the DoDI to remove the investigative, preferral, and command-directed investigation triggers for DNA collection.[225] Once amended, DNA would be collected only when the subject is ordered into pretrial confinement for, or convicted of, a qualifying offense.[226] Collecting DNA when a Service member is ordered into pretrial confinement meets the need identified in *King*: to enable confinement personnel to make informed decisions about risk management in the detention facility.[227] Collecting DNA on conviction serves the same purpose if the accused is sentenced to confinement and can be considered a reasonable condition of release in the event confinement is not adjudged.

Striking the three offending triggers removes what is, in the military context, a warrantless search for evidence of crimes that law enforcement has no reason to believe the subject has committed (that is, without probable cause). Removing the command-directed investigation trigger has the added constitutional benefit of limiting command discretion as to whether a DNA sample should be taken. In addition to protecting Service members' privacy interests consistent with the Fourth Amendment, abolishing the dragnet approach to DNA collection also alleviates the administrative and financial burden associated with taking, analyzing, and

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[224] As no charges will have been filed during the applicable time period, most investigative samples will be maintained invalidly after that point.
[225] DoDI 5505.14, *supra* note 4, at 13–14.
[226] *See id.*
[227] *See* Maryland v. King, 569 U.S. 435, 449–55 (2013).

processing DNA samples that have a vanishingly small chance of connecting the subject with an unsolved crime.[228]

Amending the DoDI alone is insufficient to prevent wrongful use of collected samples.[229] First, the DoD cannot establish a criminal offense that can be enforced against its civilians.[230] At worst, a civilian employee might be fired for using collected DNA for an improper purpose, which falls short of the criminal sanction approved by the Supreme Court in *King*.[231] Second, the DoDI can be amended at any time without following the rule-making procedures required by the Administrative Procedure Act.[232] Nothing prevents the DoD from adding procedural safeguards now, and later amending the DoDI to remove those safeguards.

Thus, Congress must enact statutory safeguards against abuse. A criminal sanction already exists in 34 U.S.C. § 40706, which imposes a fine or imprisonment for using or disclosing DNA samples for unauthorized purposes. However, there are two flaws. The first is that an unauthorized purpose is "a purpose [not] specified in[, *inter alia*, § 40702]."[233] But § 40702 does not specify the purposes for which collected samples may be used or disclosed. The second flaw is that § 40706 does not impose any sanctions for misuse of DNA samples the DoD collects pursuant to its authority under 10 U.S.C. § 1565.

This deficiency is easily remedied. Congress should amend 34 U.S.C. § 40702 and 10 U.S.C. § 1565 to direct that collected DNA samples may be disclosed and used only for the purposes specified in 34 U.S.C. § 12592(b)(3)(A)–(D), the statute creating CODIS.[234] This would add

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[228] *See supra* Section V.A.
[229] *See supra* note 182.
[230] A common mechanism to criminalize violation of a service regulation is to insert language stating that violations are punishable under Article 92, UCMJ. However, only individuals subject to the UCMJ can enforce such a provision; such a category generally does not include civilian employees of the DoD or service departments. *See* UCMJ art. 2 (1950).
[231] *See King*, 569 U.S. at 465 (citing MD. CODE ANN., PUB. SAFETY § 2-512(c) (2011)).
[232] *See supra* note 175.
[233] 34 U.S.C. § 40706(a).
[234] The permissible disclosures are "to criminal justice agencies for law enforcement identification purposes; in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes." *Id.* § 12592(b)(3)(A)–(D).

substance to § 40706's criminal sanction by specifying purposes for which DNA samples collected under § 40702 could be used. In addition, § 40706 should be amended to include 10 U.S.C. § 1565 in its scope, making it a crime to use samples collected under § 1565 for purposes not authorized in that section. This would ensure that anyone—civilian or military—who misused a DNA sample collected under either the Title 10 or Title 34 authority could be prosecuted and subject to the same penalty.

This two-step approach—removing the three offensive triggers from the DoDI and adding statutory criminal sanctions for misusing samples—would bring the DoD's DNA collection scheme in line with the constitutional rationale endorsed in *King*, as applied to the military environment.[235]

VII. Conclusion

There are multiple defects with many of the collection triggers contained in the DoDI. These triggers suffer from constitutional concerns as the Government has only a weak interest in taking DNA indexing samples from Service members: the military does not have a system of bail, does not have difficulty identifying a suspect, does not use DNA to assess criminal risk, and does not use DNA to ensure availability for trial.

In order to ensure that the DoDI is unquestionably constitutional and reasonably calibrated, the Secretary of Defense should eliminate the investigative, preferral, and command-directed investigation triggers, thus ensuring only those who have entered pretrial confinement or been convicted of a qualifying offense have their DNA collected and indexed. In addition, Congress should enact criminal penalties to prevent and punish the misuse of collected DNA.

[235] See *infra* app., for proposed language.

Appendix

What follows are the proposed amendments to the regulatory and statutory language described in Part VI. The original text for each source is provided, with proposed deletions struck through and additions underlined.

Administrative Provisions

DoDI 5505.14, Enclosure 4, paragraphs 3–4

3. The DCIOs, other DoD law enforcement organizations, DoD correctional facilities, CGIS and commanders will take DNA samples from Service members and expeditiously forward them to USACIL in accordance with Reference (e) and the Manual for Courts-Martial (Reference (n)) when:

~~a. DNA is taken in connection with an investigation, for offenses identified in Enclosure 3 of this instruction and Commandant Instruction M5527.1 (Reference (o)), conducted by a DCIO, other DoD law enforcement organization, or CGIS, and in which the investigator concludes there is probable cause to believe that the subject has committed the offense under investigation. The investigator must consult with a judge advocate before making a probable cause determination. DNA samples may be collected, but not forwarded, before consultation. DNA will be taken from all drug suspects, except those who are apprehended or detained for the offenses of simple possession and personal use. However, DNA will be taken from those excluded suspects when charges are preferred for or the subject is convicted at special or general court-martial of simple possession or use.~~

~~b. Court-martial charges are preferred in accordance with Rule for Courts-Martial 307 of Reference (n) for an offense referenced in Enclosure 3 if a DNA sample has not already been submitted.~~

~~c.~~a. A Service member is ordered into pretrial confinement for an offense referenced in Enclosure 3 by a competent military authority after the completion of the commander's 72-hour memorandum required by Rule for Courts-Martial 305(h)(2)(C) of Reference (n) if a DNA sample has not already been submitted.

~~d.~~b. A Service member is confined to a military correctional facility or temporarily housed in civilian facilities as a result of any general or

special court-martial conviction for an offense referenced in Enclosure 3 if a DNA sample has not already been submitted in accordance with DoD Instruction 1325.07 (Reference (p)). This also applies to those instances where a Service member is not sentenced to confinement as a result of any general or special court-martial conviction for an offense identified in Enclosure 3 if a DNA sample has not already been submitted.

~~e. A commander conducts or directs a command-level investigation or inquiry when no criminal investigation was conducted by a DCIO, other DoD law enforcement agency, or CGIS, nor processed through DoD corrections authorities (e.g., no previous DNA collection), for all offenses identified in Enclosure 3. In those instances, after consultation with his or her supporting Staff Judge Advocate, the commander is responsible for collecting DNA samples from the Service member. The commander is responsible for ensuring that the Service member's DNA sample is collected in accordance with the commander's specific Military Department or U.S. Coast Guard procedures and in accordance with the DNA collection kit instructions. Commanders may obtain kits from local military law enforcement offices.~~

~~4. If a commander conducts or directs a command-level investigation or inquiry for offenses identified in Enclosure 3 of this instruction and Reference (o), the collection of DNA samples from Service members is not mandated if the Service member is punished via non-judicial punishment (e.g., Article 15 of the UCMJ) or found guilty by a summary court-martial. A commander is only mandated to collect a DNA sample if the Service member was convicted of a qualifying offense by a general or special court-martial.~~

Statutory Provisions

10 U.S.C. § 1565. DNA identification information: collection from certain offenders; use

(a) Collection of DNA Samples.—(1) The Secretary concerned shall collect a DNA sample from each member of the armed forces under the Secretary's jurisdiction who is, or has been, convicted of a qualifying military offense (as determined under subsection (d)).

(2) For each member described in paragraph (1), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that member, or if a DNA sample has been or is to be collected from that

member under section 3(a) of the DNA Analysis Backlog Elimination Act of 2000, the Secretary concerned may (but need not) collect a DNA sample from that member.

(3) The Secretary concerned may enter into agreements with other Federal agencies, units of State or local government, or private entities to provide for the collection of samples described in paragraph (1).

(b) Analysis and Use of Samples.—The Secretary concerned shall furnish each DNA sample collected under subsection (a) to the Secretary of Defense. The Secretary of Defense shall—

(1) carry out a DNA analysis on each such DNA sample in a manner that complies with the requirements for inclusion of that analysis in CODIS; and

(2) furnish the results of each such analysis to the Director of the Federal Bureau of Investigation for inclusion in CODIS.

(3) ensure that DNA samples and the results of any analysis of DNA samples are disclosed or used only for the purposes specified in section 12592(b)(3) of title 34.

(c) Definitions.—In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(d) Qualifying Military Offenses.—The offenses that shall be treated for purposes of this section as qualifying military offenses are the following offenses, as determined by the Secretary of Defense, in consultation with the Attorney General:

(1) Any offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed.

(2) Any other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d))).

(e) Expungement.—(1) The Secretary of Defense shall promptly expunge, from the index described in subsection (a) of section 210304 of the Violent Crime Control and Law Enforcement Act of 1994, the DNA analysis of a person included in the index on the basis of a qualifying military offense if the Secretary receives, for each conviction of the person

of a qualifying offense, a certified copy of a final court order establishing that such conviction has been overturned.

(2) For purposes of paragraph (1), the term "qualifying offense" means any of the following offenses:

(A) A qualifying Federal offense, as determined under section 3 of the DNA Analysis Backlog Elimination Act of 2000.

(B) A qualifying District of Columbia offense, as determined under section 4 of the DNA Analysis Backlog Elimination Act of 2000.

(C) A qualifying military offense.

(3) For purposes of paragraph (1), a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

(f) Regulations.—This section shall be carried out under regulations prescribed by the Secretary of Defense, in consultation with the Secretary of Homeland Security and the Attorney General. Those regulations shall apply, to the extent practicable, uniformly throughout the armed forces.

34 U.S.C. § 40702. Collection and use of DNA identification information from certain Federal offenders

(a) Collection of DNA samples

(1) From individuals in custody

(A) The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28 and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.

(B) The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d)) or a qualifying military offense, as determined under section 1565 of title 10.

(2) From individuals on release, parole, or probation

The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense (as determined under subsection

(d)) or a qualifying military offense, as determined under section 1565 of title 10.

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under section 1565 of title 10, the Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may (but need not) collect a DNA sample from that individual.

(4) Collection procedures

(A) The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

(B) The Attorney General, the Director of the Bureau of Prisons, or the probation office, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(5) Criminal penalty

An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be—

(A) guilty of a class A misdemeanor; and

(B) punished in accordance with title 18.

(b) Analysis and use of samples

(1) The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) shall furnish each DNA sample collected under subsection (a) to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS. The Director of the Federal Bureau of Investigation may waive the requirements under this subsection if DNA samples are analyzed by means of Rapid DNA instruments and the results are included in CODIS.

(2) DNA samples and the results of any DNA analysis samples may be disclosed or used only for the purposes specified in section 12592(b)(3) of this title.

(c) Definitions

In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(3) The term "Rapid DNA instruments" means instrumentation that carries out a fully automated process to derive a DNA analysis from a DNA sample.

(d) Qualifying Federal offenses

The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses, as determined by the Attorney General:

(1) Any felony.

(2) Any offense under chapter 109A of title 18.

(3) Any crime of violence (as that term is defined in section 16 of title 18).

(4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).

(e) Regulations

(1) In general

Except as provided in paragraph (2), this section shall be carried out under regulations prescribed by the Attorney General.

(2) Probation officers

The Director of the Administrative Office of the United States Courts shall make available model procedures for the activities of probation officers in carrying out this section.

(f) Commencement of collection

Collection of DNA samples under subsection (a) shall, subject to the availability of appropriations, commence not later than the date that is 180 days after December 19, 2000.

34 U.S.C. § 40706. Privacy protection standards

(a) In general

Except as provided in subsection (b), any sample collected under, or any result of any analysis carried out under, section 40701, 40702, or 40703 of

this title, or section 1565 of title 10, may be used only for a purpose specified in such section.

(b) Permissive uses

A sample or result described in subsection (a) may be disclosed under the circumstances under which disclosure of information included in the Combined DNA Index System is allowed, as specified in subparagraphs (A) through (D) of section 12592(b)(3) of this title.

(c) Criminal penalty

A person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than $250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection.