Order Code RL32247

CRS Report for Congress
Received through the CRS Web

DNA Testing for Law Enforcement: Legislative Issues for Congress

Updated December 23, 2004

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Summary

The analysis of deoxyribonucleic acid (DNA) evidence has been an important tool in law enforcement. DNA analysis has significantly changed the way crime scenes are investigated and how prosecutions are conducted. The Federal Bureau of Investigation (FBI) started its DNA database in 1988. Since then, the FBI has led law enforcement agencies throughout the United States to standardize DNA analyses to be submitted into the FBI's Combined DNA Index System (CODIS).

The collection of DNA for use in criminal investigations has grown much faster than the resources to analyze it. As a result, many publicly funded laboratories across the country have been experiencing difficulty in meeting the demand and reducing the backlog of requests. Meanwhile, state and federal statutory regulations have been enacted to require DNA samples to be taken from those convicted of certain criminal offenses. During the 1990s and more recently, Congressional concern over the need for federal assistance to crime labs led to the enactment of several measures.

On March 11, 2003, the Bush Administration announced a major DNA initiative, totaling more than $1 billion over five years, designed to use DNA technology to solve crimes and promote public safety. The House passed Advancing Justice Through DNA Technology Act of 2003 (H.R. 3214) on November 5, 2003. H.R. 3214 would address many of the proposals raised in the Administration's initiative. The first title focuses on rape kits and elimination of the backlog; the second on various means of making DNA analysis a more effective law enforcement tool; and the third on post-conviction testing and funding representational support for both the prosecution and defense in capital cases. The Senate Judiciary Committee ordered reported a similar bill (with an amendment in the nature of a substitute), Advancing Justice Through DNA Technology Act of 2004 (S. 1700) on September 21, 2004.

Another piece of legislation, Justice for All Act of 2004 (H.R. 5107), reported by the House Judiciary Committee on September 30, 2004, is similar to two bills. Title I of H.R. 5107 is similar to S. 2329 that passed the Senate on April 22, 2004 giving victims of crime a list of rights. Titles II through IV, the DNA portion of H.R. 5107, is similar to the House passed legislation (H.R. 3214). The House passed H.R. 5107 after adopting a manager's amendment that made a number of changes to the measure on October 6, 2004. The Senate passed H.R. 5107 without amendment by unanimous consent on October 9, 2004. On October 30, 2004, the President signed this bill into law (P.L. 108-405).

This report discusses DNA testing for law enforcement, identifies issues with such testing and the congressional and Administration response to the issues. A number of civil liberty and privacy issues have been raised in discussions regarding the expansion of the national DNA database. Among others, issues for Congress include changes in the statute of limitations, post-conviction DNA testing, and DNA standards in testing. This report will be updated as changes warrant.

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Current Developments

The House passed Advancing Justice Through DNA Technology Act of 2003 (H.R. 3214) on November 5, 2003. The Senate Judiciary Committee ordered reported a similar bill (with an amendment in the nature of a substitute), Advancing Justice Through DNA Technology Act of 2004 (S. 1700) on September 21, 2004. Another piece of legislation, Justice for All Act of 2004 (H.R. 5107), reported by the House Judiciary Committee on September 30, 2004, is similar to two bills. Title I of H.R. 5107 is similar to S. 2329 that passed the Senate on April 22, 2004 giving victims of crime a list of rights. Titles II through IV, the DNA portion of the bill, is similar to the House passed legislation (H.R. 3214). The House passed H.R. 5107 after adopting a manager's amendment that made a number of changes to the measure on October 6, 2004. The Senate passed H.R. 5107 without amendment by unanimous consent on October 9, 2004. On October 30, 2004, the President signed this bill into law (P.L. 108-405).

Introduction

Deoxyribonucleic acid, or DNA, is the fundamental building block for an individual's entire genetic makeup. DNA is a powerful tool for law enforcement investigations because each person's DNA is different from every other individuals (except for identical twins). By analyzing selected DNA sequences (called markers), a forensic laboratory can develop a profile to be used in identifying a person from a DNA sample.[1]

DNA can be extracted from a number of biological tissues, such as hair, bone, teeth, saliva, and blood. Because the human body contains so many copies of DNA, even a minuscule amount of body fluid or tissue can yield useful information. Statutory provisions authorize criminal justice officials to collect DNA samples from federal offenders[2], District of Columbia offenders[3], and military offenders.[4] Federal law also features a grant program under which DNA-identifying information

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[1] See CRS Report RL30717, *DNA Identification: Applications and Issues*, by Eric A. Fischer.

[2] 42 U.S.C. 14135a.

[3] 42 U.S.C. 14135b.

[4] 10 U.S.C. 1565.

collected by state law enforcement officials is fed into the FBI's Combined DNA Indexing System (CODIS) and available to law enforcement officials online.[5] Obtaining a DNA sample from a suspect or convicted offender does not have to be an invasive procedure; it can be as simple as a swab of the inside of the mouth with a Q-tip to obtain some saliva, if applicable law permits this method of collection.

Currently, there are backlogs in analyzing collected DNA, both in state and federal forensic laboratories. As a result, these profiles are not added into DNA databases in a timely manner. Backlogs include casework samples, which consist of DNA samples obtained from crime scenes, victims, and suspects in criminal cases; and backlogs of states' convicted offender samples, which consist of DNA samples obtained from convicted offenders who are incarcerated or under court supervision. Additionally, the FBI's Federal Convicted Offender Program (FCOP), which is responsible for processing and analyzing offender or arrestee samples from the Federal Bureau of Prisons, the Federal probation offices, and the Court Services and Offender Supervision Agency for the District of Columbia, also faces backlogs of offender DNA samples.

Although progress has been made, the National Institute of Justice (NIJ) estimates that up to 90% of the DNA samples in this country identified for testing had not yet made it to a laboratory, with new samples sitting at police stations waiting for criminalists to complete other cases.[6] NIJ also estimated that there was a backlog of over half a million total crime samples nationwide that had not been tested, with over 221,000 of those being homicide and rape cases.[7]

Some city and state forensic laboratories have been the subject of media attention due to inefficiencies and test results that have been called into question. With the backlog in samples around the country and the potential post-conviction uses of DNA testing (including the possibility of freeing prisoners who were erroneously convicted), Congress has turned its attention to DNA and its implications when used during a criminal investigation and prosecution. This report discusses possible issues that may be of concern to Congress.

Background

Few would argue that DNA has become the most significant weapon in crime detection since the introduction of fingerprinting in the early 1900s. State and federal DNA databases have proved instrumental in solving crimes, reducing the risk of convicting the wrong person, and establishing the innocence of those wrongly convicted. The FBI has chosen 13 markers to serve as the basis for entry into the federal database, the National DNA Index System (NDIS), with the intention that all

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[5] 42 U.S.C. 14131-14135.

[6] See Attorney General Report to Congress, *National Forensic DNA Study Report, Final Report,* Dec. 12, 2003, p. 3, [http://www.ojp.usdoj.gov/nij/pdf/dna_studyreport_final.pdf], visited Oct. 14, 2004.

[7] Ibid.

forensic laboratories would be equipped to handle these 13 markers. Collectively, the 13 markers provide great discriminatory power. The chance that two unrelated people would have the same profile is judged to be extremely small — less than one in hundreds of trillions.[8]

DNA evidence is used to solve crimes in two ways:

- In cases where a suspect is known, a sample of that person's DNA can be compared to biological evidence found at a crime scene. The results of this comparison may then help establish whether the suspect was at the crime scene or whether he/she committed the crime.
- In cases where a suspect is not known, biological evidence from the crime scene can be analyzed and compared to offender profiles contained in existing DNA databases to assist in identifying the perpetrator. Through the use of DNA databases, biological evidence found at one crime scene can also be connected to other crime scenes, linking them to the same perpetrator or perpetrators.

According to the FBI, more than 8,000 DNA samples from the scenes of unsolved crimes have been matched with samples taken from inmates after their imprisonment. An additional 3,000 crime-scene samples have been matched to unidentified suspects who remain at large.[9]

Current Federal Statutory Law

As early as the 1980s, states began enacting laws that required DNA samples from those offenders convicted of sexual offenses and other violent crimes. The samples were then analyzed and their profiles entered into state databases. Meanwhile, the FBI Laboratory convened a working group of federal, state and local forensic scientists to establish guidelines for the use of forensic DNA analysis in laboratories. The group proposed guidelines that are the basis of present national quality assurance standards, and it urged the creation of a national DNA database.[10] The criminal justice community began to utilize DNA analyses more often in criminal investigations and trials, and Congress enacted legislation to better define

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[8] See National Institute of Justice, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group*, NCJ 183697, Nov. 2000.

[9] John Soloman, "AP: FBI's DNA Database Gets Heavy Use," *Associated Press Online*, Mar. 9, 2004.

[10] Statement of Dwight E. Adams, Deputy Assistant Director, Laboratory Division, Federal Bureau of Investigation, in U.S. Congress, House, Government Reform Committee, Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, *How Effective are State and Federal Agencies Working Together to Implement the Use of New DNA Technologies*?, hearing, 107th Cong., 1st sess., Mar. 29, 2004, pp. 53-54. At [http://www.fbi.gov/congress/congress01/dwight061201.htm], visited Dec. 23, 2004.

how DNA could be used. During the 1990s and more recently, congressional concern over the need for federal assistance for crime labs led to the enactment of several measures. The following section summarizes current federal law as it pertains to DNA used in a criminal justice capacity.

The DNA Identification Act of 1994. The DNA Identification Act of 1994 is a subtitle of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322).[11] It was enacted to improve the capabilities and capacity of state and local forensic DNA laboratories to support the investigation and prosecution of violent crime. This law did the following: (1) provided funding to improve the quality and availability of DNA analyses for law enforcement identification purposes; (2) required quality assurance and proficiency testing standards; (3) required an FBI index to facilitate law enforcement exchange of DNA identification information; and (4) required privacy protections and proficiency standards for the FBI regarding DNA.

The Antiterrorism and Effective Death Penalty Act of 1996. Section 811(b) of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132)[12] authorized the Attorney General, in consultation with the Director of the FBI, to make grants available to eligible states in order to establish, develop, update, or upgrade the capability to analyze DNA in a forensic laboratory in ways that are compatible and integrated with the Combined DNA Identification System (CODIS)[13] of the FBI, among other things. As a condition, states were required to take DNA samples from convicted violent sexual offenders.

Crime Identification Technology Act of 1998. The Crime Laboratory Improvement Program (CLIP) was established under the Crime Identification Technology Act (CITA) of 1998 (P.L. 105-251, Title I).[14] This law authorized funding for programs to establish, develop, update, or upgrade "the capabilities of forensic science programs and medical examiner programs related to the administration of criminal justice ... including programs ... relating to the identification and analysis of DNA."

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[11] 108 Stat. 2065 (1994) (42 U.S.C. 14131-14134 (1994 ed.)).

[12] 110 Stat. 1312 (1996) (28 U.S.C. 531 note (1994 ed. & 1996 Supp.)).

[13] CODIS contains local, state and national DNA databases that are linked electronically, allowing the comparison of DNA profiles stored in differing locations and was authorized in the *DNA Identification Act of 1994* (P.L. 103-322). CODIS uses two indices to generate investigative leads in crimes where there is DNA evidence. The Convicted Offender Index contains profiles of individuals convicted of violent crimes. The Forensic Index contains DNA profiles from crime scene evidence, such as semen and blood. To ensure privacy, CODIS does not include such things as social security numbers, criminal history, or case-related information. As of Sept. 2004, the NDIS (the national component of CODIS) holds just over 1.88 million samples, at [http://www.fbi.gov/hq/lab/codis/national.htm], visited Dec. 23, 2004.

[14] 112 Stat. 1871 (1998) and (42 U.S.C. 14601(b)(11) (1994 ed. & 1998 Supp.)).

The DNA Analysis Backlog Elimination Act of 2000. The DNA Analysis Backlog Elimination Act of 2000 (P.L. 106-546) authorized the Attorney General to make grants available to states to carry out DNA analyses.[15] As a requirement to receive grant funding, recipients must enter the DNA samples taken from individuals convicted of certain crimes and crime scenes into CODIS. Under the act, the grants could be used to increase the capacity of laboratories to carry out DNA analyses. It also provided for the collection and use of DNA identification information from certain federal, District of Columbia, and armed forces offenders in custody or under federal supervision, and established submission of a DNA sample as a condition of probation, supervised release, or parole.[16]

The Paul Coverdell National Forensic Science Improvement Act of 2000. The Paul Coverdell National Forensic Science Improvement Act of 2000 (P.L. 106-561)[17] authorized funding to improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes through two sources: (1) Byrne formula grants,[18] and (2) the Paul Coverdell National Forensic Sciences Improvement Grants.

The USA Patriot Act. Section 503 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (P.L. 107-56) expanded the list of "qualified offenses" to permit DNA collection from those convicted of a federal crime of terrorism, a federal crime of violence, or of attempt or conspiracy to commit such a crime of terrorism or violence.[19]

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003. Among other provisions, the PROTECT Act (P.L. 108-21) authorizes indictments identifying an unknown defendant by a DNA profile ("John Doe/DNA indictments") in federal sex crimes.[20] If the John Doe indictment is issued within five years of the offense, there is no applicable statute of limitations and the statutory speedy trial requirements do not begin to run until after the defendant is arrested or served with a summons for the offense.

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[15] 114 Stat. 2726 (2000) and (42 U.S.C. 14132, 14135-14135e; 10 U.S.C. 1565; 28 U.S.C. 531 note.

[16] 42 U.S.C. 14135a for federal offenders; 42 U.S.C. 14135b for District of Columbia offenders; and 10 U.S.C. 1565 for military offenders.

[17] 114 Stat. 2787 (2000) and (42 U.S.C. 3751, 3753,3797j-3797o).

[18] Under the Byrne formula grant program, funds must be used to improve criminal justice systems in order to reduce violent crime, the demand for illegal drugs, or the availability of such drugs. Enhancing state and local forensic laboratories falls under the multi-purpose objective of eligible activities.

[19] 115 Stat. 364 (2001) and (42 U.S.C. 14135a(d)(2)).

[20] 117 Stat. 692 (2003) and (18 U.S.C. 3282(b)).

Major Legislation in the 108th Congress

In March 2003, the Bush Administration proposed an initiative that was designed to (1) eliminate all state and federal DNA backlogs in DNA testing; (2) expand DNA databases; and (3) upgrade testing equipment.[21] It also supported expanding the collection of DNA to people who have been arrested but not convicted of a crime and adding them to CODIS. The President's initiative would authorize one billion dollars in spending over a five-year period. Several pieces of legislation introduced in the 108th Congress incorporate (or were precursors to) elements of the Administration's DNA proposal.

Advancing Justice Through DNA Technology Act (H.R. 3214/S. 1700)

The House passed Advancing Justice Through DNA Technology Act of 2003 (H.R. 3214) on November 5, 2003. The Senate Judiciary Committee ordered reported a similar bill (with an amendment in the nature of a substitute), Advancing Justice Through DNA Technology Act of 2004 (S. 1700) on September 21, 2004. Another piece of legislation, *Justice for All Act of 2004* (H.R. 5107), reported by the House Judiciary Committee on September 30, 2004, is similar to two bills. Title I of H.R. 5107 is similar to S. 2329 that passed the Senate on April 22, 2004 giving victims of crime a list of rights. Titles II through IV, the DNA portion of the bill, is similar to the House-passed legislation (H.R. 3214). The House passed H.R. 5107 after adopting a manager's amendment that made a number of changes to the measure on October 6, 2004. The Senate passed H.R. 5107 without amendment by unanimous consent on October 9, 2004. Elements of the Advancing Justice Through DNA Technology Act (H.R. 3214/S. 1700) and the Justice for All Act of 2004 (H.R. 5107) are discussed below.

Debbie Smith/Rape Kits and Eliminating the DNA Backlog. The Administration proposed funding to increase forensic laboratory capacity at the state and local levels; to federal DNA laboratory programs to operate and improve CODIS; and to improve the infrastructure of forensic laboratories. The President's

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[21] Office of the President, *Advancing Justice Through DNA Technology*, Mar. 2003, available at [http://www.usdoj.gov/ag/dnapolicybook_cov.htm], visited Dec. 23, 2004; *Prepared Remarks of Attorney General John Ashcroft: DNA Initiative*, Mar. 11, 2003, available at [http://www.usdoj.gov/ag/speeches/2003/031102dnaremarks.htm], visited Dec. 23, 2004; *Fact Sheet: The President's Initiative to Advance Justice Through DNA Technology*, available at [http://www.ojp.usdoj.gov/pressreleases/2003/DNA-over.htm], visited Oct. 14, 2004; *Fact Sheet: Legislation to Advance Justice Through DNA Technology*, available at [http://www.usdoj.gov/ag/dnalegislation.htm], visited Dec. 23, 2004; see also, Statement of National Institute of Justice Director Sarah V. Hart, in U.S. Congress, House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, *Advancing Justice Through Forensic DNA Technology*, 108th Cong., 1st sess., (Washington: GPO, 2003), p. 7, at [http://www.house.gov/judiciary/hart071703.pdf], visited Dec. 23, 2004; and in *Department of Justice Oversight: Funding Forensic Sciences — DNA and Beyond*, hearing before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, 108th Cong., 1st sess. (2003), available at [http://judiciary.senate.gov/hearing.cfm?id=886], visited Dec. 23, 2004.

initiative is designed to eliminate the existing DNA backlog in five years. Title I of H.R. 3214/S. 1700 and Title II of H.R. 5107 would permit units of local government as well as the states to receive grants under the DNA Analysis Backlog Elimination Act of 2000 (P.L. 106-546). It would also set a formula for distribution of the grants and authorize funding of $151 million for each of the fiscal years 2005 through 2009.

Strengthening Crime Laboratory Capacity. Title I of H.R. 3214/S. 1700 and Title II of H.R. 5107 would also (1) allow states to submit DNA identifying information to CODIS for individuals indicted but not yet convicted or acquitted of a crime (entries relating to charges ending in dismissal or acquittal would be expunged); (2) enlarge the list of federal and military qualifying offenses to include all federal felonies and similar military crimes; (3) permit CODIS "keyboard searches" by authorized state or federal users (a keyboard search is an online effort to match a DNA sample that can be collected under state law but not added to CODIS (e.g., an arrest sample) with a DNA sample in CODIS (e.g., samples collected from convicted offenders or at a crime scene));[22] (4) delay or suspend any otherwise applicable federal statute of limitations until after the completion of a DNA test which implicates an actual individual (not just his or her genetic profile); (5) make grants for legal assistance under the Violence Against Women Act (42 U.S.C. 3796gg-6) available with respect to victims of dating violence; and (6) allow grants to take the form of contracts as well as vouchers to private laboratories in order to eliminate the backlog of DNA samples awaiting testing and analysis.

In addition, Title II of H.R. 3214/S. 1700 and Title III of H.R. 5107 would increase the penalties for misuse of DNA analysis. H.R. 3214 and S. 1700 would set the fine for knowingly disclosing a sample or result in an unauthorized manner at no more than $100,000. H.R. 5107 would increase fines to $250,000, or imprisonment for up to one year, or both. Each instance of disclosure, obtaining, or use constitutes a separate offense in both H.R. 3214 and S. 1700.

Stimulating Research and Development. The Administration proposed funding for DNA-related research and development, a portion of which would be administered by the NIJ to improve DNA technology, and for the FBI's DNA research and development program. In addition, funding would be provided in the Administration's DNA initiative for demonstration projects aimed at determining the scope of public safety benefits under a variety of circumstances: (1) when police personnel are trained to more effectively collect DNA and other forensic evidence; (2) when evidence is tested in a more timely manner; and (3) when prosecutors are trained to enhance their ability to present such types of forensic evidence in court.

Title II of both H.R. 3214 and S. 1700 and Title III of H.R. 5107[23] would authorize funding of $15 million for each FY2005 through FY2009 for DNA research and development purposes. The establishment of a National Forensic Science Commission would also be authorized. The task of this forensic science commission would be to develop recommendations for maximizing the use of current forensic technologies in solving crimes and protecting the public, and in identifying

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[22] See H.Rept. 108-321, p. 27.

[23] Referred to as the DNA Sexual Assault Justice Act in all three bills.

potential scientific advancements that may be used to further assist law enforcement personnel, among other things. An additional $500,000 for each FY2005 through FY2009 would be authorized for this commission.

Providing Training. The Administration proposed funding for training in the collection, handling, and use of DNA evidence, including training and education for police officers and investigators; prosecutors, defense attorneys, and judges; probation and parole officers and corrections personnel; forensic scientists; medical personnel; and victim service providers.

Title II of both H.R. 3214 and S. 1700 and Title III of H.R. 5107 would authorize funding of $12.5 million each year, FY2005 through FY2009, for training in the collection, handling, and use of DNA evidence, including training and education for police law enforcement, correctional personnel, and court officers; and $30 million a year for a grant program to provide forensic exams in sexual assault cases.

Using DNA for Missing Persons Identification. The Administration proposed funding to promote the use of DNA technology to identify missing persons. This includes the general strengthening of crime laboratory capacity which would facilitate the timely analysis of biological samples from unidentified human remains; assistance in the analysis of old and degraded biological samples; and research and development of more robust methods for analyzing old, degraded, or compromised biological samples. In addition, outreach programs and the development of educational materials and reference collection kits would be developed under the program for medical examiners, coroners, law enforcement personnel, and victims' families on the use of DNA to identify missing persons. All three bills would provide funding authorization of $2 million each year, FY2005 through FY2009, for this purpose.

Title II of both H.R. 3214 and S. 1700 and Title III of H.R. 5107 would also (1) require professional accreditation of DNA processing laboratories within two years of passage of the act; (2) authorize appropriations of $42.1 million a year for each of fiscal years 2005 through 2009 for FBI DNA programs and activities (nuclear DNA analysis, mitochondrial DNA analysis and regional laboratories, CODIS, the Federal Convicted Offender DNA program, and DNA research and development; (3) establish a program for tribal coalition grants relating to domestic violence under the Violence Against Women Act (42 U.S.C. 3796gg); (4) make Paul Coverdell Forensic Science Improvement grants (Coverdell grants) (42 U.S. C. 3797m) available for the elimination of backlogs relating to the forensic analysis of evidence including that involving firearms, latent prints, toxicology, controlled substances, pathology, documents and traces; (5) authorize appropriations of $20 million for each FY2007 through FY2009 for Coverdell grants (42 U.S.C. 3793(a)(24))(authorization for prior years already exists); and (6) require the Attorney General to report to Congress on implementation of the act within two years.

Post-Conviction DNA Testing. According to some observers, DNA is often overlooked as a tool to prove innocence as well as guilt. While they contend that post-conviction DNA testing is necessary to correct erroneous convictions imposed prior to the advent of today's DNA advances. There is also a need to ensure that

post-conviction DNA testing is appropriately used and targeted to benefit potentially innocent persons rather than merely creating a longer DNA analysis backlog, in others, as some commentators are suggesting would occur.

The Administration proposed implementing a grant program to defray the costs of post-conviction DNA testing in the state systems. According to the Administration's DNA initiative, in order to receive this funding states must require DNA testing be performed by an accredited laboratory. Each state must also develop plans to ensure that there is prompt DNA testing of people who may have been wrongly convicted and procedures are in place to discourage frivolous testing.

Title III of both H.R. 3214 and S. 1700 and Title IV of H.R. 5107 , known as the Innocence Protection Act, may be one of the most contentious sections in these three pieces of legislation. The Innocence Protection Act of all three bills would serve several purposes: (1) to create a federal post-conviction DNA preservation and analysis procedure; (2) provide funding for representational support for both the prosecution and defendants in state capital cases; (3) provide compensation for the wrongfully convicted from $50,000 to $100,000 per year of imprisonment for those "unjustly" sentenced to death. Appropriations are authorized for $5 million for each fiscal year from 2005 through 2009 to fund assistance to state post-conviction programs; and $100 million for each of those years to fund the capital representational provisions.

In Title III of both H.R. 3214 and S. 1700, the standard for granting a motion for a new trial or resentencing based on the outcomes of DNA testing would be established by "a preponderance of the evidence" that a new trial would result in an acquittal. In the manager's amendment of Title IV of H.R. 5107 adopted by the House, the threshold would be raised to instances where there was "compelling evidence."

The manager's amendment to H.R. 5107 adopted by the House would encourage defendants to apply for DNA testing promptly after their convictions by establishing a presumption only in the first three years after a convictions that tests should be ordered. A defendant's motion for new DNA testing could still be granted after the three years if a court found the applicant was incompetent at his or her trial, if there was newly discovered DNA evidence, if denying the application would result in a "manifest injustice," or "upon good cause shown."

A fourth bill, the Advancing Justice Through DNA Technology Act of 2003 (S. 1828) has been introduced by Senator Kyl, which contains most of the same elements included in Titles I (The Debbie Smith Act of 2003 in H.R. 3214 and the Rape Kits and DNA Evidence Backlog Elimination Act of 2003 in S. 1700) and II (The DNA Sexual Assault Justice Act of 2003) as H.R. 3214 and S. 1700. However, S. 1828 does not include the Innocence Protection Act. This bill has been referred to the Judiciary Committee.

Justice for All Act of 2004 (H.R. 5107)

As stated previously, the *Justice for All Act of 2004* includes similar DNA-related provisions found in H.R. 3214 and S. 1700. Additionally, H.R. 5107 would

amend current law by creating a new provision that would (1) enumerate crime victims' rights; (2) detail enforcement and limitations with respect to crime victims' rights and persons accused of a crime and cases with multiple crime victims; (3) require the Attorney General to promulgate regulations with respect to enforcing the rights of crime victims; (4) amend current law by establishing a Crime Victims Legal Assistance Grants program and would authorize appropriations for the program.[24]

Civil Liberty and Privacy Issues

While there is opposition from some civil libertarians on the broad use of DNA, proponents contend having a national DNA database, or a system that coordinates multiple databases such as CODIS, may, in some cases, actually protect those wrongfully accused or even convicted. However, there are a number of privacy issues that arise when the subject of the use of DNA analysis for law enforcement purposes is broached. The following are selected issues that have arisen in assessing the costs and benefits of using DNA in the criminal justice system.

Broadening the Database

Expanding the national database to include persons convicted of lesser crimes (or possibly arrestees) will potentially increase the number of crimes solved through its use. However, the increased use and inclusiveness of DNA databases across the country raises several concerns. If, for example, the national database was broadened to the general public, an individual's informational privacy, security and anonymity would be more difficult to protect. Proponents of such a system respond that the information included in the profiles could be restricted to particular markers that are relevant only for identification.

Although there are currently no plans to develop a national DNA database containing profiles of all citizens, such a development is not impossible. In fact, in the military context, such a universal system has existed since 1991.[25] To facilitate identification of unknown soldiers killed in future battles, the Department of Defense created a blood sample database of all active service members and military recruits. Although the use of the database is primarily used for the identification of remains,[26] a federal or military court order could allow both the FBI and civilian police to access samples.[27]

While broadening the database may add to the number of crimes solved through its use, it would also add to the costs of maintaining the system and to the backlog

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[24] With respect to the crime victims' rights portion of the bill, the Senate passed a similar bill (S. 2329) on April 22, 2004.

[25] See Department of Defense Directive 5154.24, *Armed Forces Institute of Pathology (AFIP)*, at [http://www.dtic.mil/whs/directives/corres/pdf/d515424_100301/d515424p.pdf], visited Dec. 23, 2004.

[26] Ibid., at §5.1.4.

[27] See 10 U.S.C. 1565a.

of samples that would need to be processed, complicating further backlog reduction efforts.

Identification of Relatives

By utilizing 13 markers, it is quite likely that a search of a database might identify a person who was a relative of the person whose DNA sample was being matched. Assuming a crime scene profile indicated a partial match with someone in the database, the question then arises whether law enforcement personnel should be entitled to investigate the relatives of the person, such as a sibling, based solely on the partial match. Presently, laws are different in each state in this regard.[28]

Saving DNA Samples

Presently, there is no clear federal policy regarding what happens to the DNA sample after profiles are added to the national database. The majority of states have some form of storage policies for DNA samples to be kept for a specified time period. However, some opponents fearful of invasion of privacy are concerned that the DNA that is not destroyed may become available to unauthorized parties or otherwise be used in ways that would disclose information that ought to remain confidential. While most states have restrictions on the commercial exploitation or non law enforcement use of DNA samples, there have been instances where persons whose sample had been taken sued to have their sample returned to them, as opposed to being destroyed, to ensure that there was no inappropriate use.

Use of National Database for Research

As the national database enlarges and if it is broadened to include persons convicted of a larger variety of crimes, it might be possible that statistical studies of the databases could reveal useful information. The question arises whether researchers should be allowed access to CODIS or the national database in order to further their fields even though they would not be using it in a law enforcement capacity.

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[28] Half of an individual's DNA comes from the individual's father and half from the individual's mother. There is a far greater probability that a suspect's 13 DNA markers would match or partially match those of the suspect's siblings, half-siblings, parents, or children of the suspect since they have a common source (i.e., a crime scene sample that points to a suspect is more likely to also point to his or her relatives than to the population at large). The difficulty is that authorities may lack the probable cause to require relatives to submit DNA samples in order to perform the more extensive analysis necessary to determine that their DNA does not match that of the crime scene sample, Lempert, "Some Caveats Concerning DNA as Criminal Identification Evidence: With Thanks to the Reverend Bayes," *Cardozo Law Review*, vol. 13, issue 303 (1991).

Current Legislative Issues for Congress

Taking into consideration the Administration's DNA initiative, the 108th Congress may ultimately consider some of the following issues affecting the operation of DNA identification systems and the use of DNA evidence.

All-Felons Sample Collection

While all states collect samples from some categories of convicted offenders, they vary in the types of crimes for which they collect DNA samples — with the trend toward broader sample collection. A number of states collect samples from juveniles adjudged delinquent on the basis of various crimes. A few collect samples from anyone arrested (not just convicted offenders). A substantial number of states have enacted legislation authorizing the collection of DNA samples from all offenders convicted of a felony after the legislation is enacted. The Administration's DNA initiative proposes to expand the categories of convicted federal offenders from whom the collection of DNA samples is authorized[29] so that it includes all convicted felons, regardless of whether the felony conviction was for a violent or nonviolent crime.

Many state cases have been solved as a result of DNA collected pursuant to the perpetrator's prior conviction for a nonviolent crime in states for which DNA is collected following conviction for such offenses (such as a theft, or drug offense). Broadening qualifying offenses for sample collection to include all felonies is based on the premise that the majority of serious offenders also commit lesser crimes.[30] In addition, international comparisons may become increasingly feasible, since eight of the 10 markers in the British offender database are included in the 13 core markers which the FBI uses.

While other crimes may be solved by expanding the categories of offenders included in DNA databases, at what point does the cost associated with the additional DNA samples to be analyzed outweigh the benefit? Some may argue that it is absurd to expand the collection of DNA samples to all convicted felons. Opponents of the measure may argue that while violent, habitual criminals may also commit nonviolent crimes, the majority of offenders committing nonviolent crimes are not committing violent offenses; therefore, resources are wasted. Moreover, expanding

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[29] Existing law permits collection from those convicted of a federal crime of violence, 42 U.S.C.14135a.

[30] The state of Virginia has often been cited as a leading model in DNA legislation. Virginia has been collecting DNA from all felons since 1990, taking DNA from everyone they arrest and destroying the samples from people who are not convicted. Virginia indicates that in 2003 they averaged 51 matches per month of DNA evidence to DNA profiles of convicted offenders. Since 1990, the state says that crimes solved in part due to DNA database matches included 223 homicides and 464 non-homicide sexual assaults. Of the 2,309-plus DNA matches Virginia has had to date, they report that 80% would have been missed if the DNA database were limited to only violent offenders. See VA Department of Criminal Justice Services' DNA Databank Statistics Web page, at [http://www.dcjs.virginia.gov/forensic/information/dna.cfm], visited Dec. 23, 2004.

the number of samples that need to be processed could add to the already taxed forensic science budgets of many states.

Comprehensiveness of the National DNA Index

Should all DNA profiles collected by states be added into the national database? The statute governing the national DNA index allows the inclusion of DNA profiles of "persons convicted of crimes"[31]; however it does not permit the inclusion of all DNA profiles from samples collected under applicable state authorities, such as those from adjudicated juveniles or individuals arrested but not convicted of crimes. Because what can be included in the national DNA database is narrower than the scope of DNA sample collection under some state statutes, it has been argued that the effectiveness of the national DNA index is hindered.

For example, most states collect DNA samples from some categories of adjudicated juvenile delinquents. Some states have authorized DNA sample collection from certain arrestees on a categorical basis. These states can collect these samples and include the resulting DNA profiles in their own DNA databases; however, they cannot submit this information to be entered into the national DNA index because of the wording of the federal database statute. The Administration's DNA initiative proposes to amend the statute to allow submitting jurisdictions to include any DNA profile from persons from whom they lawfully collected samples. Critics, however, have voiced strong concerns that such testing would violate constitutional rights to privacy and protections against illegal searches and seizures.

Statute of Limitations Changes

Often a statute of limitations balances the desire to prosecute serious crimes with concerns that a delayed prosecution may be unreliable given the passage of time, faded memories, and deteriorating evidence. It is possible that a person could be immune from eventual conviction if he or she was not indicted before the statute of limitations runs out, even if the DNA evidence might strongly implicate that person. Federal prosecutors can issue an indictment identifying an unknown defendant by a DNA profile for a sexual abuse offense (defined under chapter 109A, of Title 18 United States Code), for example, if they do so within five years of the crime, a later prosecution may be brought at any time.[32]

The Administration proposes that Congress should permit the statute of limitations to be waived where DNA evidence identifies the perpetrator in any federal offense, recommending that the statute of limitations (1) would not begin to run until the DNA identification occurs; and (2) would be made retroactively applicable to offenses committed before its enactment.

Opponents of this provision contend that this proposal creates an unfair advantage, where the rights of the victims are put ahead of the fair trial protections

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[31] 42 U.S.C. 14132(a)(1).

[32] 18 U.S.C. 3282.

for the accused. They claim DNA warrants are unfair to defendants because they circumvent the statute of limitations, which are there to protect people from being charged with actions that they cannot defend themselves against because they happened so long ago.

Post-Conviction DNA Testing

Most states have made provisions for post-conviction DNA testing. The Administration has proposed to establish post-conviction DNA testing standards and procedures for federal convicts who could not have obtained such forensic testing at the time of their trials. Under this proposal, procedures would be implemented in order to ensure that the use of DNA evidence could demonstrate innocence of the crime for which the person was convicted because he or she was mistakenly identified.

DNA Standards

Despite several cases where laboratories mishandled DNA evidence few states require accreditation to specified standards. The Administration's DNA initiative would require every lab to be accredited under a uniform system, with practices inspected and evaluated by independent inspectors.

Other Proposed Legislation

In addition to P.L. 108-21, H.R. 3214/S. 1700, and H.R. 5107 discussed earlier, the following bills have been introduced in the 108th Congress regarding DNA for law enforcement purposes:

H.R. 3036 (Sensenbrenner). DNA Database Enhancement Act was added to the Department of Justice Appropriations Authorization Act, Fiscal Years 2004 through 2006, under an amendment offered by Representative Schiff during committee markup, H.Rept. 108-426 (2004). Amends the DNA Analysis Backlog Elimination Act of 2000 to require a backlog elimination grant application certification to (1) include each violent felony as a qualifying State offense; and (2) provide that a State does not prohibit or limit the comparison by a law enforcement officer of the results of a DNA analysis carried out on a lawfully obtained DNA sample with the information in the Combined DNA Index System. Authorizes appropriations for fiscal years after 2003 for DNA analyses of samples taken from individuals convicted of a qualifying State offense. Amends the Violent Crime Control and Law Enforcement Act of 1994 to authorize the DNA database to include (1) DNA identification records of persons arrested for crimes (currently, limited to those convicted of crimes); and (2) analyses of DNA samples from other persons as authorized under the laws of the jurisdiction in which the samples were collected. Neither the amendment nor any related provisions were included in the version of H.R. 3036, which passed under suspension of the rules, *Congressional Record*, daily edition, vol. 150 (March 30, 2004), pp. 16666-16683.

S. 1828 (Kyl). Advancing Justice Through DNA Technology Act of 2003. Among other purposes, this bill is designed to eliminate the backlog of DNA samples collected from crime scenes and convicted offenders; improve and expand the DNA testing capacity of federal, state, and local crime laboratories; increase research and development of new DNA testing technologies; and develop new training programs regarding the collection and use of DNA evidence. This bill is similar to Title I and II of S. 1700. It also provides for the creation of a new forensic backlog elimination grant program. This bill does not include post-conviction testing provisions. Introduced November 5, 2003; referred to the Judiciary Committee.

H.R. 2110 (Vitter). Emergency DNA Backlog Elimination and Self Defense from Serial Killers Act of 2003. Amends the DNA Analysis Backlog Elimination Act of 2000 to authorize appropriations and increase grant amounts for analysis and processing of DNA evidence kit backlogs and of DNA samples from convicted offenders and crime scenes. Gives priority funding for states and municipalities that are in the midst of combating apparent serial killers. Authorizes appropriations for FY2004 through FY2008 for grants to states that are documented by the FBI to possess a serial killer, to eliminate the backlog in carrying out DNA analyses of specified samples. Directs that grant applications include each offense under state law for which a sentence of death or imprisonment at hard labor may be imposed. Introduced May 14, 2003; referred to the Judiciary Committee. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security on June 25, 2003.

H.R. 1705 (Schiff). DNA Database Enhancement Act. Amends the DNA Analysis Backlog Elimination Act of 2000 to direct that the backlog elimination grant application include a certification that the state has determined those offenses under state law that shall be treated as qualifying state offenses, provided that each violent felony is treated as a qualifying state offense; and does not prohibit or limit the comparison by a law enforcement officer of the results of a DNA analysis carried out on a sample lawfully obtained with the information in CODIS. Authorizes appropriations for fiscal years after 2003 for DNA analyses of samples taken from individuals convicted of a qualifying state offense. Amends the Violent Crime Control and Law Enforcement Act of 1994 to authorize the Director of the FBI to establish an index of DNA records of persons arrested for crimes and analyses of DNA samples from other persons, as authorized under the laws of the jurisdiction in which the samples were collected. Introduced April 9, 2003; referred to the Judiciary Committee. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security on May 5, 2003.

S. 152 (Biden)/H.R. 1046 (Green). S. 152 — DNA Sexual Assault Justice Act of 2003. H.R. 1046 — The Debbie Smith Act of 2003. Directs the Attorney General to (1) survey federal, state, local, and tribal law enforcement jurisdictions to assess the amount of DNA evidence from sexual assault crimes that has not been subjected to testing and analysis; (2) review national, state, local, and tribal government protocols on the collection and processing of DNA evidence at crime scenes; and (3) make grants for sexual assault examiner programs, examiner training and certification, acquisition or improvement of forensic equipment, and other training. This bill amends the DNA Analysis Backlog Elimination Act of 2000 to (1) ensure that DNA testing from rape kits and non-suspect cases are carried out in a timely manner; (2) reauthorize grants programs in the 2000 Act; (3) make local

governments eligible for grants; (4) direct the Attorney General to give priority to a state or local governmental unit that has a significant rape kit or non-suspect case backlog; and (5) expand the scope of DNA samples subject to privacy protections. This bill amends the Federal Criminal Code and the Federal Rules of Criminal Procedure to authorize "John Doe" DNA indictments for sexual abuse (this section was included in conference as Section 611 to S. 151, which became the PROTECT Act, P.L. 108-021) and amends the DNA Identification Act of 1994 to authorize appropriations to the FBI to carry out a redesign of CODIS. S. 152 introduced January 14, 2003, referred to the Judiciary Committee, January 14, 2003; H.R. 1046 introduced March 4, 2003; referred to the Judiciary Committee, May 5, 2003.

H.R. 889 (King). Convicted Child Sex Offender DNA Index System Support Act. Requires the Director of the FBI to develop a plan to assist states in performing DNA analyses of samples from convicted child sex offenders, with the objective of eliminating the backlog of samples awaiting analysis and providing for entry of those analyses into CODIS. Introduced February 25, 2003; referred to the Judiciary Committee. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security on March 6, 2003.

H.R. 537 (Andrews). DNA Database Completion Act of 2003. Amends the DNA Analysis Backlog Elimination Act of 2000 to authorize $100 million for each year, FY2003 through FY2007 for grants to eligible states for DNA analyses of samples taken from individuals convicted of a qualifying state offense, and of samples from crime scenes, for inclusion in CODIS. Introduced February 5, 2003; referred to the Judiciary Committee. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security on March 6, 2003.

H.R. 89 (Jackson-Lee). Save Our Children: Stop the Violent Predators Against Children DNA Act of 2003. Among other things, directs the Attorney General to establish and maintain a database solely for collecting DNA information with respect to violent predators against children. Introduced January 7, 2003; referred to the Judiciary Committee. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security on March 6, 2003.

S. 149 (DeWine). Rape Kits and DNA Evidence Backlog Elimination Act of 2003. Reauthorizes appropriations under the DNA Analysis Backlog Elimination Act of 2000 and makes local governments and Indian tribes eligible to apply for elimination grants; expands the scope of DNA samples to be included in CODIS; authorizes the Attorney General to award up to 15 grants to forensic laboratories to implement innovative plans for the submission of rape evidence kits and to award grants to train local prosecutors in the use of DNA evidence in a criminal investigation or trial; requires the Attorney General to establish a program to award and disburse annual grants to Sexual Assault Forensic Examination (SAFE) programs; eliminates the statute of limitations for child abduction and sex offenses; expresses that the Paul Coverdell National Forensic Science Improvement Act (P.L. 106-561) should be funded in order to improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes. Introduced January 13, 2003; referred to the Judiciary Committee.

S. 132 (Feingold). National Death Penalty Moratorium Act of 2003. Places a moratorium on executions by the federal government and urges the states to do the same, while a National Commission on the Death Penalty reviews the fairness of the death penalty. The commission is to study procedures to ensure that persons sentenced to death have access to forensic evidence and modern testing of forensic evidence, including DNA testing, when modern testing could result in new evidence of innocence. Introduced January 9, 2003; referred to the Judiciary Committee.

S. 22 (Daschle). Justice Enhancement and Domestic Security Act of 2003. Criminal justice bill that incorporates a provision entitled the DNA Sexual Assault Justice Act of 2003 (S. 152 in its entirety), which sets forth procedures governing DNA testing of a person convicted of a federal crime and provides grants for legal representation provided to indigent defendants in state capital cases. Introduced January 7, 2003; referred to the Judiciary Committee.

Related CRS Product

CRS Report RL30717, *DNA Identification: Application and Issues,* by Eric A. Fischer