

# CRS Report for Congress

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## **DNA Testing for Law Enforcement: Legislative Issues for Congress**

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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. The Advancing Justice Through DNA Technology Act of 2003 (P.L. 108-405) addresses many of the proposals raised in the Administration's initiative, including authorizing funding to eliminate state and federal DNA backlogs and expanding a grant program to state and local governments to perform DNA analysis of samples collected from convicted individuals and violent crime scenes, among other things. The act also sets forth conditions under which federal prisoners could obtain post-conviction DNA testing and authorizes funding for representational support for both the prosecution and defense in capital cases.

The 109<sup>th</sup> Congress is considering legislation that would broaden the categories of individuals who would be subject to DNA testing, among other things. On September 14, 2004, the House passed the Children's Safety Act of 2005 (H.R. 3132). A similar bill, the Violence Against Women Act of 2005 (S. 1197) was favorably reported to the Senate on September 12, 2005. Both bills would authorize federal authorities to take DNA samples from larger categories of individuals, including those who are arrested and detained (H.R. 3132 also permits DNA samples from individuals convicted of a federal crime). Other legislation have been introduced but have not seen congressional action. Such legislation would require the DNA samples of sex offenders to be included in CODIS who are required to register (S. 1220); permit the Attorney General to make grants to train and employ additional prosecutors (S. 1727/H.R. 1602); require the Attorney General to establish and maintain a DNA database for sex offenders (H.R. 244 and H.R. 2423/S. 1086); authorize appropriations to eliminate the DNA backlog (H.R. 3404); and require DNA samples from federal inmates who are released on parole (H.R. 3072).

This report discusses DNA testing for law enforcement and identifies issues with such testing, such as broadening the database, post-conviction DNA testing, DNA standards in testing and saving DNA samples. This report will be updated as legislation warrant.

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# DNA Testing for Law Enforcement: Legislative Issues for Congress

## Current Legislative Developments

On September 14, 2004, the House passed the Children's Safety Act of 2005 (H.R. 3132). A similar bill, the Violence Against Women Act of 2005 (S. 1197), was reported favorably by the Senate Committee on the Judiciary on September 8, 2005. S. 1197 includes an amendment that was adopted by the Senate Judiciary Committee that is similar to the DNA provisions in the House passed bill. Among other things, Title II of H.R. 3132 and the Senate amendment to S. 1197 would, in essence, broaden the federal government's authority to collect DNA sample from individuals for inclusion in the FBI's Combined DNA Indexing System (CODIS).

## Introduction<sup>1</sup>

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.<sup>2</sup>

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,<sup>3</sup> District of Columbia offenders,<sup>4</sup> and military offenders.<sup>5</sup> Federal law also features a grant program under which DNA-identifying information collected by state law enforcement officials is fed into CODIS and available to law enforcement officials online.<sup>6</sup> 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

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<sup>1</sup> This report was previously written by CRS Analyst Cindy Hill.

<sup>2</sup> See CRS Report RL30717, *DNA Identification: Applications and Issues*, by Eric A. Fischer.

<sup>3</sup> 42 U.S.C. 14135a.

<sup>4</sup> 42 U.S.C. 14135b.

<sup>5</sup> 10 U.S.C. 1565.

<sup>6</sup> 42 U.S.C. 14131-14135.

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.<sup>7</sup> 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.<sup>8</sup>

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 forensic laboratories would be equipped to handle these 13 markers. Collectively, the 13 markers provide great discriminatory power. The chance that two unrelated

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<sup>7</sup> 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](http://www.ojp.usdoj.gov/nij/pdf/dna_studyreport_final.pdf)].

<sup>8</sup> Ibid.

people would have the same profile is judged to be extremely small — less than one in hundreds of trillions.<sup>9</sup>

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.<sup>10</sup>

## 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.<sup>11</sup> The criminal justice community began to utilize DNA analyses more often in criminal investigations and trials, and Congress enacted legislation to better define 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.

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<sup>9</sup> See NIJ, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group*, NCJ 183697, Nov. 2000.

<sup>10</sup> John Soloman, "AP: FBI's DNA Database Gets Heavy Use," *Associated Press Online*, Mar. 9, 2004.

<sup>11</sup> 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, 107<sup>th</sup> Cong., 1<sup>st</sup> sess., Mar. 29, 2004, pp. 53-54, at [<http://www.fbi.gov/congress/congress01/dwight061201.htm>].

**The DNA Identification Act of 1994 (P.L. 103-322).** The DNA Identification Act of 1994 is a subtitle of the Violent Crime Control and Law Enforcement Act of 1994. 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. The act 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 (P.L. 104-132).** Section 811(b) of the Antiterrorism and Effective Death Penalty Act of 1996 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)<sup>12</sup> 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 (P.L. 105-251).** The Crime Laboratory Improvement Program (CLIP) was established under the Crime Identification Technology Act (CITA) of 1998. CITA 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.”

**The DNA Analysis Backlog Elimination Act of 2000 (P.L. 106-546).** The DNA Analysis Backlog Elimination Act of 2000 authorized the Attorney General to make grants available to states to carry out DNA analyses. 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

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<sup>12</sup> 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>].

in custody or under federal supervision, and established submission of a DNA sample as a condition of probation, supervised release, or parole.<sup>13</sup>

**The Paul Coverdell National Forensic Science Improvement Act of 2000 (P.L. 106-561).** The Paul Coverdell National Forensic Science Improvement Act of 2000 authorized funding to improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes through two sources: (1) Edward Byrne Memorial Formula grants,<sup>14</sup> and (2) the Paul Coverdell National Forensic Sciences Improvement Grants.

**The USA PATRIOT Act (P.L. 107-56).** Section 503 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 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.

**Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (P.L. 108-21).** Among other provisions, the PROTECT Act authorizes indictments identifying an unknown defendant by a DNA profile (“John Doe/DNA indictments”) in federal sex crimes. 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.

**Justice for All Act of 2004 (P.L. 108-405).**<sup>15</sup> The Justice for All Act reauthorizes an existing grant program that provides funding to states to assist with eliminating certain types of DNA backlogs. The act amends current law<sup>16</sup> by providing formula grants to state and local governments to perform DNA analysis of

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<sup>13</sup> 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.

<sup>14</sup> The Consolidated Appropriations Act, Fiscal Year 2005 (P.L. 108-447) consolidated the Edward Byrne Memorial Formula (Byrne Formula) grant and Local Law Enforcement Block grant programs into an Edward Byrne Memorial Justice Assistance Grant (JAG) program. 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.

<sup>15</sup> In Mar. 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. The Administration also supported expanding the collection of DNA to people who have been arrested but not convicted of a crime and adding them to CODIS. See the following links: Office of the President, *Advancing Justice Through DNA Technology*, Mar. 2003, available at [[http://www.usdoj.gov/ag/dnapolicy\\_book\\_cov.htm](http://www.usdoj.gov/ag/dnapolicy_book_cov.htm)]; 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, 108<sup>th</sup> Cong., 1<sup>st</sup> sess. (2003), available at [<http://judiciary.senate.gov/hearing.cfm?id=886>].

<sup>16</sup> See the DNA Analysis Backlog Elimination Act of 2000 (P.L. 106-546).

samples collected from convicted individuals and violent crime scenes, including sexual assaults. It also amends current law<sup>17</sup> by allowing states to include in the CODIS the DNA profiles of persons whose DNA samples have been collected under applicable legal authorities, including those authorized by state law as well as all felons convicted of federal crimes and qualifying military offenses. CODIS “keyboard searches” are also permitted by authorized state or federal users.<sup>18</sup> The act authorizes funding for the grant program of \$151 million for each year, FY2005-FY2009.

The act amends current law by delaying or suspending any otherwise applicable federal statute of limitations until after the completion of a DNA test which implicates an actual individual.<sup>19</sup> It also increases the penalties for misuse of DNA analysis;<sup>20</sup> and allows 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.<sup>21</sup>

Title III of the act authorizes funding of \$15 million for each year, FY2005-FY2009 for DNA research and development purposes. Title III also establishes the National Forensic Science Commission. The task of the commission is to develop recommendations for maximizing the use of current forensic technologies in solving crimes and protecting the public, and in identifying potential scientific advancements that may be used to further assist law enforcement personnel, among other things. It authorizes \$500,000 in appropriations for each FY2005-FY2009 to fund the commission. Title III also authorizes funding of \$12.5 million each year, FY2005-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 (FY2005- FY2009) for a grant program to provide forensic exams in sexual assault cases.

Among other things, Title III of the act requires professional accreditation of DNA processing laboratories within two years of passage of the act. It authorizes appropriations of \$42.1 million each year, FY2005 through FY2009 for FBI DNA programs and activities. It also authorizes \$2 million each year, FY2005 through FY2009 for grants that promote the use of forensic DNA technology to identify missing persons and unidentified human remains. Additionally, the act makes it a criminal penalty to disclose a DNA sample or its results to a person who is not authorized to receive it *or* for someone to obtain or use a DNA sample or result without such authority. The act also makes Paul Coverdell Forensic Science

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<sup>17</sup> See the DNA Identification Act of 1994 (42 U.S.C. 14132).

<sup>18</sup> 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).

<sup>19</sup> Amends Chapter 213 of Title 18 of the U.S.C.

<sup>20</sup> Amends 42 U.S.C. 14133(c)(2).

<sup>21</sup> Amends §2(d)(3) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(d)(3)).

Improvement grants (Coverdell grants)<sup>22</sup> 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. It authorizes appropriations of \$20 million for each year, FY2007-FY2009 for the grants.<sup>23</sup> With respect to the Coverdell grants, the act requires potential grant recipients certify they have developed a plan to conduct independent external investigations into allegations that may arise pertaining to employee misconduct or negligence. It also requires grant recipients to undergo external audits proving their compliance with the standards set forth by the Director of the FBI. The act also requires the Attorney General to report to Congress on implementation of the title within two years.

Title IV of the Justice for All Act, the Innocence Protection Act, amends current law by requiring the Attorney General to provide DNA testing of material evidence for federal prisoners who assert their innocence. Among other things, the act sets forth conditions under which federal prisoners could obtain post-conviction DNA testing and a requirement that the government preserve such biological evidence, unless otherwise specified under the act. In addition to federal post-conviction DNA testing, the act requires the Attorney General to establish a grant program for states to "... to help defray the costs of post-conviction DNA testing."<sup>24</sup> The act also establishes incentive grants to states to encourage DNA testing of offenders sentenced to death by an accredited laboratory. As a condition for receiving the grant, states must develop plans to ensure that there is prompt DNA testing of people who may have been wrongly convicted, while at the same time ensuring that procedures are in place to discourage frivolous testing. In addition to the grant program, the act establishes post-conviction DNA testing standards and procedures for federal offenders who could not have obtained such forensic testing at the time of their trials.

The act requires the Attorney General to submit DNA test results to the National DNA Index System under the following circumstances:

- if the current test results are inconclusive;
- if the results show that the offender was the source of the DNA evidence; or
- if the results show that the offender's DNA matches the DNA collected from another offense.

The act requires that if the results from the DNA sample of the offender do not match the DNA evidence sample or that of another offense, the DNA sample of the offender must be destroyed. The act also specifies who should incur the cost of the testing under which circumstances and establishes a threshold for granting a motion for a new trial.

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<sup>22</sup> 42 U.S. C. 3797m.

<sup>23</sup> 42 U.S.C. 3793(a)(24).

<sup>24</sup> P.L. 108-405, §412.

The Innocence Protection Act also authorizes grants to states for the following: (1) to improve the representation of indigent defendants by defense attorneys in capital cases; and (2) to improve the ability of prosecutors to represent the public in capital cases.

## Legislation in the 109<sup>th</sup> Congress

Several pieces of legislation have been introduced in the 109<sup>th</sup> Congress, however, only two bills have received congressional action, as discussed below. Other pieces of legislation that have been introduced in the current Congress are discussed later in the report.

### **Children's Safety Act of 2005 (H.R. 3132)/Violence Against Women Act of 2005 (S. 1197)**

S. 1197 includes an amendment that was approved by the Senate Judiciary Committee that is identical to the DNA Fingerprint Act of 2005 (S. 1606). Another bill, H.R. 2796, has similar provisions to H.R. 3132 and S. 1197 but has not received congressional action.<sup>25</sup> H.R. 3132 and S. 1197 would make changes to the current law governing the collection and submission of DNA samples for CODIS. Both bills would also change the law governing how DNA samples can be used in court.

Both bills would strike language in current law that prohibits DNA samples collected under applicable legal authority from persons that have not been charged in an indictment or information with a crime, or DNA samples that have been submitted voluntarily for elimination purposes, from being entered into CODIS.<sup>26</sup>

H.R. 3132 would strike language in current law directing the FBI Director to expunge from CODIS any DNA analysis from an individual that was included on the basis of a qualifying Federal or District of Columbia crime after the Director receives a certified copy of a final court order establishing that the conviction has been overturned.<sup>27</sup> H.R. 3132 would also strike language in current law requiring states, as a condition of access to CODIS, to expunge from CODIS analyses of people whose convictions were overturned or whose final conviction is for a lesser charge than that required for inclusion in CODIS.<sup>28</sup> S. 1197 would strike language in current law requiring states to expunge records from CODIS if all charges for which the analysis was included are dismissed or result in a dismissal and replace it with language allowing the expungement of DNA records if the state receives a certified copy of a final court order stating that all charges were dismissed or the individual

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<sup>25</sup> The House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security held a hearing on H.R. 2796 on June 9, 2005.

<sup>26</sup> 42 U.S.C. 14132 (a)(1).

<sup>27</sup> 42 U.S.C. 14132 (d).

<sup>28</sup> 42 U.S.C. 14132 (d).

was acquitted of each charge that would allow a DNA sample to be included in CODIS.<sup>29</sup>

Both bills would strike language in current law requiring the Director to ensure any person accessing CODIS and entering DNA records or analyses in it can also carry out a “one-time keyboard search” on information obtained for a lawful purpose, except for DNA samples voluntarily submitted for elimination purposes.<sup>30</sup> Current law defines a “one-time keyboard search” as a search under which a DNA sample not included in the index is compared with information that is in the index.<sup>31</sup>

S. 1197 would amend current law<sup>32</sup> by striking language authorizing the Attorney General to make grants to states and units of local government for DNA analyses of samples taken from individuals convicted of a qualifying state offense and replace it with language authorizing the Attorney General to make grants to states and units of local government for DNA analyses of samples “collected under applicable legal authority.” H.R. 3132 does not have a similar provision.

H.R. 3132 would amend current law allowing the Attorney General to collect DNA samples from individuals arrested, detained, or convicted under the authority of the United States (under current law, only the Director of the Bureau of Prisons has this power).<sup>33</sup> The bill would also allow the Attorney General to delegate the responsibility within the DOJ and to any other federal agency that arrests, detains, or supervises individuals facing custody. S. 1197 has a similar provision, but it does not include individuals *convicted* from the power granted to the Attorney General and the Director of the Bureau of Prisons to collect DNA samples.

Both bills would amend current law by authorizing the Attorney General to (1) take DNA samples from inmates or supervised releasees; (2) use the means necessary to collect the samples from persons that refuse to cooperate with the collection; and (3) enter into agreements with state or local units of government or private entities to collect DNA samples from individuals in custody or on supervised release.<sup>34</sup>

Both bills would amend current law<sup>35</sup> by making the Attorney General one of the persons authorized to submit DNA samples collected under 42 U.S.C. 14132a (a) to the Director of the FBI.

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<sup>29</sup> Ibid.

<sup>30</sup> 42 U.S.C. 14132 (e).

<sup>31</sup> Ibid.

<sup>32</sup> 42 U.S.C. 14135 (a).

<sup>33</sup> 42 U.S.C. 14135a (a).

<sup>34</sup> Ibid.

<sup>35</sup> 42 U.S.C. 14135a (b).

Both bills would amend current law<sup>36</sup> by requiring individuals released by a judicial officer<sup>37</sup> be subject to the individual's cooperation with the collection of a DNA sample if such collection is authorized under 42 U.S.C. 14135(a). In addition, both bills would strike the exemption for felony sexual abuse<sup>38</sup> under 18 U.S.C. 3297. 18 U.S.C. 3297 allows for the extension the applicable statute of limitations on cases in which DNA testing identifies the individual. The statute does so by providing that, in a case in which DNA testing implicates a person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing that has elapsed that is equal to the otherwise applicable limitation period.

H.R. 3132 also directs the Attorney General to publish a model code identifying the procedures to be followed by law enforcement officers investigating missing persons or deaths within 60 days of the passage of the bill. The bill also requires the procedures to include instruction on the use of DNA analysis to identify human remains and to help locate missing persons. The bill would also state that it is the sense of Congress that each state should enact laws implementing the model code within one year of its publication by the Attorney General. Finally, the bill would require the Comptroller General, within two years of the code's publication, to submit a report to Congress on the extent to which the states have implemented the model code, including the reasons why a state has not. S. 1197 does not have a similar provision.

## Selective Legislative Issues for Congress

While there is opposition from some civil libertarians on the broad use of DNA, proponents contend that by 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. Nonetheless, there are a number of issues that arise when discussing broadening the DNA database. In addition to DNA database-related issues, other issues concerning the use of DNA for law enforcement purposes are also present, as discussed below.

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<sup>36</sup> 18 U.S.C. 3142 (b).

<sup>37</sup> 18 U.S.C. 3142 (b), which directs a judicial officer to order the pretrial release of an individual on their own recognizance, or on bond, subject to the condition that the individual does not commit a Federal, State or local crime during the period of release, unless the judicial officer determines that the individual may not appear when required or that the individual will endanger the safety of any other person or the community; and 18 U.S.C. 3142 (c)(1)(A), which states that if the judicial officer determines that the release of the individual described in 18 U.S.C. 3142 (b) will not reasonably assure that the person will appear as a required or will endanger other individuals or the community, the judicial officer is directed to release the individual under certain circumstances, including (A) "subject to the condition that the person not commit a Federal, State, or local crime during the period of release."

<sup>38</sup> As identified under Chapter 109(A) (18 U.S.C. 2241-2248).

## Broadening the Database

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 adjudicated 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. P.L. 108-405 expands the categories of convicted federal offenders from whom the collection of DNA samples is authorized. Current legislative proposals, however, would further expand the categories of individuals who would be eligible to have their DNA collected to include arrestees.

Expanding the national database to include persons convicted of lesser crimes or possibly arrestees could 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. 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? Moreover, expanding 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;”<sup>39</sup> 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 DNA samples and include the resulting DNA profiles in their own databases; however, they cannot submit this information to be entered into the national DNA index because of the wording of the federal database statute. P.L. 108-405 allows for the 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.

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<sup>39</sup> 42 U.S.C. 14132(a)(1).

## Post-Conviction DNA Testing

Most states have made provisions for post-conviction DNA testing. In 2003, the Administration 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. Section 412 of P.L. 108-405 created the Kirk Bloodsworth Post-conviction DNA Testing Grant Program which awards grants to states to help defray the cost of post-conviction DNA testing. The act also authorizes \$5 million to be appropriated each FY2005-FY2009.

## 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. Section 302 of P.L. 108-405 permits only laboratories that (1) have been accredited by a nonprofit professional organization of persons actively involved in the forensic science field and (2) undergo external audits to prove that they are in compliance with the standards set forth by the Director of the FBI, to submit DNA samples for inclusion in CODIS. In its report, *Census of Publicly Funded Forensic Crime Laboratories, 2002*, the Bureau of Justice Statistics notes that 71% of publicly funded forensic crime laboratories in 2002 were accredited by some type of organization.<sup>40</sup> The report also notes that 61% of the labs were accredited by the American Society of Crime Laboratory Directors Lab Accreditation Board.<sup>41</sup>

## 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 there was no inappropriate use.

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<sup>40</sup> Bureau of Justice Statistics, *Census of Publicly Funded Forensic Crime Laboratories, 2002*, Feb. 2005, p. 10, found online at [<http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.pdf>].

<sup>41</sup> *Ibid*, p. 11.

## Other Proposed Legislation

In addition to H.R. 3212 and S. 1197 discussed earlier, additional bills have been introduced in the 109<sup>th</sup> Congress regarding DNA testing for law enforcement purposes, see discussion below.

**S. 1220 (Dodd).** The Prevention and Recovery of Missing Children Act of 2005 would revise the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act to require the responsible official to obtain fingerprints and a DNA sample from a sex offender who is required to register, unless such samples were collected within the three previous months. The bill was introduced on June 9, 2005, and referred to the Senate Committee on the Judiciary.

**S. 1727 (Vitter)/ H.R. 1602 (Gallegly).** The Grants for DNA Backlog Prosecution Act would amend current law by allowing the Attorney General to make grants to train and employ personnel to help prosecute cases cleared through use of funds provided for DNA backlog elimination.<sup>42</sup> S. 1727 was introduced on September 20, 2005 and referred to the Senate Committee on the Judiciary. H.R. 1602 was introduced on April 13, 2005, and referred to the relevant committees.

**H.R. 244 (Jackson-Lee).** The Save Our Children: Stop the Violent Predators Against Children DNA Act of 2005 directs the Attorney General to establish and maintain a database solely for collecting DNA information with respect to violent predators against children. The bill was introduced on January 6, 2005, and referred to the relevant committees. A hearing was were held on the bill on June 9, 2005.

**H.R. 3404 (Andrews).** The DNA Database Completion Act of 2005 would amend the DNA Analysis Backlog Elimination Act of 2000<sup>43</sup> by authorizing appropriations for grants to eligible states for DNA analysis. The bill was introduced on July 22, 2005, and referred to the House Committee on the Judiciary.

**H.R. 2423 (Foley)/ S. 1086 (Hatch).** The Jacob Wetterling, Megan Nicole Kanka, and Pay Lychner Sex Offender Registration and Notification Act would direct the Attorney General to establish and maintain a database to manage DNA information regarding individuals convicted of a listed offense against a minor. On June 3, 2005, H.R. 2423 was introduced and referred to the relevant committees and on June 9, 2005, subcommittee hearings were held. S. 1086 was introduced on May 19, 2005, and referred to the Senate Committee on the Judiciary.

**H.R. 3072 (Davis).** Section 4209 of H.R. 3072 would require the U.S. Parole Commission to impose as a condition of parole that the parolee cooperate in the collection of a DNA sample if the collection of such a sample is authorized under current law.

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<sup>42</sup> See §206 of P.L 108-405.

<sup>43</sup> PL 106-546.