

April 14, 2004

The Honorable Orrin Hatch  
United States Senate  
Washington, DC 20510

The Honorable Patrick Leahy  
United State Senate  
Washington, DC 20510

**Re: Proposed Expansion of the CODIS Database – S. 1700**

Dear Senators Hatch and Leahy:

I am writing to express the concerns of the National Association of Criminal Defense Lawyers (NACDL) regarding provisions contained in Title I of the Advancing Justice Through DNA Technology Act of 2003 (S. 1700 and H.R. 3214) that would expand the federal Combined DNA Index System (CODIS) database. NACDL strongly believes that the CODIS database should not contain DNA samples from arrestees and persons who have been charged but not yet convicted, juvenile offenders, and persons convicted of misdemeanors.

By allowing for the inclusion of DNA samples from those who have not been convicted of a crime, the legislation flouts the presumption of innocence, misallocates resources, and encourages racial profiling. While H.R. 3214 rightly prohibits inclusion of DNA samples in CODIS from persons who have been arrested but not indicted, S. 1700 does not include an exception for arrestees. The U.S. National Commission on the Future of DNA Evidence, in 2002, recommended against including samples from arrestees on the grounds that there were already hundreds of thousands of samples waiting to be analyzed, and state crime laboratories do not have the capacity to process more samples. Expanding DNA databases to include profiles from arrestees will produce an identification system that reflects and possibly exacerbates racially disparate arrest rates, in part because the inclusion of arrestees provides an incentive for pretext and race-based arrests for the purpose of DNA sampling.

The CODIS-related provisions grant tremendous discretion to the states in determining whose DNA to submit to the database. The states are only restricted by two exceptions: arrestees (in H.R. 3214, not S. 1700) and persons who voluntarily submit their DNA to be cleared of a crime cannot be included. These two exceptions do not sufficiently limit the states. In fact, states could choose to submit DNA samples from most any group of people, even those who are not suspected of any wrongdoing.

Of particular concern is the authority of states to submit DNA samples of juvenile offenders to CODIS. At least 33 states' databases include the DNA of certain juvenile offenders in their state DNA databases. With the passage of this legislation, the DNA data from juvenile offenders in at least those 33 states would be included in the federal CODIS database as well. Confidentiality and the practice of expunging records are essential to the juvenile justice system's principal goals

of treatment and rehabilitation. Policies that undermine the confidentiality of juvenile proceedings distort this rehabilitative model and threaten to stigmatize juvenile offenders.

Overall, NACDL is deeply concerned about the unnecessary expansion of the CODIS database. With the collection of an individual's DNA comes the potential for gross misuse of that data. DNA samples can reveal extremely sensitive, private information regarding physical and mental traits and the likelihood of the occurrence of genetic conditions and diseases. And as Justice Brennan wrote in his concurrence in *Whalen v. Roe*, "The central storage and easy accessibility of computerized data vastly increases the potential for abuse of that information." While we recognize that DNA evidence is unparalleled in its scientific ability to identify the guilty and protect the innocent, its treatment is subject to human error and thus must be thoughtfully and strictly regulated to prevent mishandling, contamination, and abuse.

Thank you for considering our concerns. Our hope is that the legislation will be amended so as to exclude from the CODIS database DNA samples from persons who are presumed innocent, juveniles, and misdemeanants. If you have any questions or would like further information regarding NACDL's position, please contact Legislative Director Kyle O'Dowd: (202) 872-8600 x226 or [kyle@nacdl.org](mailto:kyle@nacdl.org).

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Sincerely,

E.E. (Bo) Edwards  
President

cc: Members, Senate Judiciary Committee