

## How Does the Kyl Amendment to the VAWA Reauthorization Bill Affect Immigrants?

### AMENDMENT WOULD AUTHORIZE COLLECTION OF DNA

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#### ■ What does the Kyl amendment to the Violence Against Women Act (VAWA) reauthorization bill really do?

- On Oct. 4, 2005, the United States Senate approved a bill reauthorizing the Violence Against Women Act (S. 1197). The bill includes an amendment offered by Sen. Jon Kyl (R-AZ) that would for the first time allow the federal government to collect the DNA of anyone who is arrested, even if the person is never charged or convicted, or of any “non–United States person” who is even briefly detained. The House VAWA reauthorization bill (HR 3402) does not contain a comparable provision.
- The DNA provision has no connection to protecting women from domestic violence and in fact may doubly victimize them if they are arrested, or even detained for questioning, based on false accusations from abusers. It raises constitutional and privacy concerns for citizens and immigrants alike whose genetic information would be put in a criminal database.\* It will also exacerbate the huge current backlog in analysis and processing of DNA samples from persons convicted of felonies, sexual assaults and other serious crimes, and as a result will undermine public safety.
- For immigrants, the provision is stunningly egregious and overreaching. It would cast immigrants — both documented and undocumented — as criminals, requiring them to submit to seizure of their DNA for entry into a criminal database even in the absence of an arrest, and even when there is no hint of a criminal violation or charge of a civil immigration violation. Moreover, the provision contains no mechanism for immigrants to have their DNA sample removed from the criminal database, even when they were wrongly detained, have legal status, or even have become U.S. citizens.
- Allowing DNA collection from “non–United States persons who are detained” would cover an exceedingly broad variety of situations, including those in which no criminal or immigration proceedings are ever initiated or where no illegal activity is even suspected. As a result, the provision would essentially authorize the seizure of DNA from a wide range of immigrants and permit the entry of the DNA into the criminal database solely on the whim of federal authorities.
- The vastly increased authorization to collect DNA would be subject to abuses such as “DNA dragnets,” in which innocent people in a geographic area could be asked to provide samples, sometimes based on racial profiling.

\* See ACLU Letter to the Senate Judiciary Committee Regarding the Violence Against Women Act of 2005, Sept. 29, 2005, [www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=19185&c=15](http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=19185&c=15).



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### ■ How does the Kyl amendment change current law for collecting DNA and putting DNA-related information into a database?

- Currently, the federal government is authorized to collect DNA samples only from persons convicted of felonies, violent crimes, aggravated sexual abuse, or serious military offenses. 42 USC 14135a. Analysis of the samples is stored in a federal database called CODIS.
- The Kyl DNA amendment would allow DNA collection from anyone who is arrested for any reason, regardless of whether the person is convicted of a crime or even whether a charge is filed against the person or reasonable suspicion exists to justify the arrest. It would also expand DNA collection to the civil immigration context.

### ■ How does the Kyl amendment apply to immigrants?

- The Kyl amendment provides that “the Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non–United States persons who are detained under authority of the United States. The Attorney General may delegate this function within the Department of Justice, as provided in section 510 of title 28, United States Code, and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section” (emphasis added).
- Under this provision, the attorney general could authorize the Dept. of Homeland Security and its immigration agencies to collect DNA samples from immigrants who are arrested and “non–United States persons” who are detained under authority of the United States. In fact, there is reason to believe this is one of the main intended purposes of the amendment.

### ■ Who is a “non–United States person”?

- A “non–United States person” is someone who is not a citizen or a lawful permanent resident of the United States. Under the Foreign Intelligence Surveillance Act, “United States person” means a citizen of the United States, an alien lawfully admitted for permanent residence, and certain unincorporated associations and corporations. 50 USC sec. 1801(i).

### ■ Doesn’t “non–United States person” just mean people who are undocumented?

- No, among immigrants only lawful permanent residents are excluded from the category of non–U.S. person. All other lawfully present non–U.S. citizens are non–U.S. persons, including those who are:
  - Applicants for lawful permanent residence status
  - Tourists
  - Business visitors
  - Investors
  - Diplomats
  - Journalists
  - Scientists, artists, educators, businesspeople or athletes of extraordinary ability
  - Entertainers and models
  - Cultural exchange participants
  - Managers
  - Students

- Employees of international organizations
- Highly skilled workers
- Seasonal workers
- Teachers, researchers or doctors in U.S. Information Agency–designated programs
- Fiancé(e)s of U.S. citizens
- Nurses
- Religious workers
- Asylees
- Refugees
- Torture victims
- Parolees
- People granted temporary protected status
- People cooperating in criminal prosecutions
- Victims of trafficking
- Crewmen
- Victims of substantial physical or mental abuse
- Spouse and children of people in above categories
- Holders of border crossing identification cards

■ **Doesn't “detained” only mean having been taken into custody by immigration authorities and charged with an immigration offense?**

- No. “Detained” does not have a statutory definition. In the immigration context, “detained” covers a wide spectrum of circumstances.
- The dictionary definition of “detained” is to keep from proceeding or to keep in custody or temporary confinement. Noncitizens could be considered detained when they are:
  - Sent to secondary inspection in an airport for interrogation or verification of documents;
  - Required by immigration agents to prove their immigration status in a worksite immigration raid or on the street;
  - Subjected to examination upon arrival in the U.S.;
  - Detained while awaiting consideration of applications for asylum or other benefits;
  - Held as material witnesses;
  - Questioned because they witnessed or were victims of a crime; or
  - Stopped at an immigration checkpoint away from the border.
- Being a person in custody who has been charged with civil immigration offenses is only one of the many ways in which a noncitizen may be detained.
- Federal authorities would be able to require non–U.S. persons to provide their DNA for inclusion in the CODIS database if they are detained for any reason, even briefly and innocently, and regardless of whether the detention has any relation to illegal activity.

■ **Would non–U.S. persons be eligible to have their DNA expunged from the DNA database?**

- No. The DNA provision provides for expungement of the DNA from the database only when a conviction has been overturned, or, in the case of an arrest, when the charge has been dismissed, has resulted in an acquittal, or if no charge was filed within the applicable time period.

- The provision does not authorize the expungement of the DNA of non–United States persons who are detained.
- That DNA would remain part of a criminal database, and immigrants would not be able to have their DNA expunged even if they were wrongly detained or had legal immigration status or became citizens.
- Expungement is not automatic even for those people eligible for it and happens only upon filing of a certified copy of a final court order establishing that a conviction has been overturned, or that a charge has been dismissed or has resulted in an acquittal, or that no charge was filed within the applicable time period. Even this provision is problematic for people never charged who would not be able to present a certified copy of a court order establishing that they were never charged.

■ **Could DNA be collected from lawful permanent residents who are arrested for civil immigration violations, and can the DNA be kept in the criminal database?**

- Yes. Immigration officers may arrest any noncitizen whom they believe is in violation of any law regarding the admission, exclusion, expulsion or removal of aliens. The DNA could be collected under the section of the Kyl amendment authorizing the collection of DNA from individuals who are arrested, even though it was not an arrest for a criminal violation.
- Lawful permanent residents would not, however, be eligible to have their DNA expunged in the same way as other individuals whose DNA was taken when they were arrested. The expungement provisions apply only when convictions are overturned, or when charges are dismissed or acquittals occur, or when no charges are filed in the applicable time period. Only the term “charges” has possible application in the civil immigration context.

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