



## Can the U.S. government take DNA from immigrants without their consent?

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In a vast expansion of the technology used to enforce immigration policy, the Trump administration plans to collect DNA from hundreds of thousands of immigrants seeking asylum and being held in detention facilities, a move which experts say could violate the civil liberties not just of asylum seekers and immigrant detainees but also American citizens.

“DNA is intensely personal, private and sensitive information,” Esha Bhandari, staff attorney at the American Civil Liberties Union Speech, Privacy and Technology Project, told the Deseret News. “When you expand the databases of DNA profiles that the government has access to, it opens up the door in the future to population surveillance that could impact all of us.”

The plan, announced by Attorney General William Barr last week, is expected to result in federal authorities gathering information on about 748,000 immigrants each year, including asylum-seekers who present themselves at legal ports of entry, including children, NPR reported.

The DNA samples will be stored in an FBI database that will be used to help authorities fight crime, federal officials told [NPR](#).

DNA is a blueprint of personal and medical information that reveals information not just about that person but also their relatives, family members, even their unborn children. The proposal comes at a time when [Ancestry.com](#) and other private companies have made voluntary DNA testing popular and [controversial](#), raising questions about whether such companies truly safeguard such sensitive information.

But can the U.S. government, without a search warrant or probable cause, *compel* immigrants to hand over their DNA? And if so, what kind of precedent could such a policy set not just for immigrants but all Americans?

“This isn’t just a story about immigrants’ rights,” said Utah immigration attorney Aaron Tarin. “We have to remember that if we allow the federal government to overstep its bounds then it’s a very slippery slope that eventually could implicate everyone.”

**Is it legal? Is it constitutional?**

The legal foundation for the plan is based on the DNA Fingerprint Act of 2005, The New York Times reported. The act required authorities to collect DNA samples from anyone arrested or charged with a federal crime and included the authority to take samples from people in immigration detention.

Under the Obama administration, the part of the law that applied to immigrants wasn't enforced. But recently, officials from U.S. Customs and Border Protection came forward to say that by not collecting DNA from migrants, their agency was violating the 2005 act.

“The agency’s noncompliance with the law has allowed subjects subsequently accused of violent crimes including homicides and sexual assault, to elude detection even when detained multiple times by C.B.P and Immigration and Customs Enforcement,” said an August letter to the White House from Office of Special Counsel Henry J. Kerner. “This is an unacceptable dereliction of the agency’s law enforcement mandate.”

In addition to the 2005 act, a 2013 Supreme Court case could also provide a constitutional basis for the plan, according to Teneille Brown, a professor of constitutional law at the University of Utah. In that case, the court ruled that police officers can collect DNA samples as a routine part of arrest for violent crimes, without possessing a warrant.

Nevertheless, the plan is likely to face challenges in court on legal and constitutional grounds, said Erika George, also a professor of constitutional law at the University of Utah.

That’s because asylum seekers who would be subject to DNA collection are actually doing something *legal* under U.S. and international law: crossing the border into the United States to petition for asylum based on persecution they are experiencing in their home country.

“International law is a part of U.S. law,” she said. “We have signed the International Covenant on refugee rights, and it cannot be the case that we can compel people to disclose their genetic material as a condition for the right that we have granted through being a signatory to refugee rights protections globally.”

In addition, George says the plan could violate the constitution’s Fourth Amendment protections against unreasonable search and seizure.

“Generally, you need to have some kind of probable cause to seize or invade privacy, something criminal — which seeking asylum is not,” said George.

It is important to note that within 100 miles of the border, a more restrictive interpretation of the Fourth Amendment has been applied that allows for searches, even of American citizens, without suspicion.

But Alex Nowrasteh, director of immigration studies at the Cato Institute, a libertarian think tank, cited the Plenary Power Doctrine, the concept that immigration is a question of national sovereignty relating to a nation’s right to define its borders. Based on that doctrine, the U.S.

Supreme Court has historically deferred to the other branches when it comes to immigration policy, he said.

“The program is almost undoubtedly constitutional because the courts gave Congress the power to make any immigration rules it wants,” said Nowrasteh. “And Congress gave that power mostly to the president, so he can probably do whatever he wants on this.”

### **‘Guilty until proven innocent atmosphere’**

Taking DNA from asylum seekers can be seen as a way of criminalizing an act that is, in fact, legal, said George.

“It’s a conflation of immigration status with criminal activity, which is contributing to a guilty until proven innocent atmosphere,” Henry Sias, a Philadelphia immigration lawyer, told NPR.

While the Trump administration told NPR that creating a massive database of biometric information on immigrants will help put criminals behind bars, Brown said it is unclear how DNA would help the government to do so.

“There is no rape, no murder — no unidentified assailant. The DNA does not serve to put a name to crime scene DNA. Because the crime is being present in the U.S. without a visa or legal status, it’s hard to see how DNA can help to solve it,” she said. “An individual either has the legal authorization to be in the USA or they don’t. Their DNA has almost zero probative value that is relevant to their legal status. So, then what’s it being used for?”

That’s different than the way that the government has justified collecting DNA from suspects in the past, she continued.

“In the previous cases to allow DNA samples to be taken from arrestees, the courts have focused on the seriousness of the offenses and the fact that the DNA samples will help prosecute violent crimes,” she said. “That’s not the case here.”

This may be part of a larger effort of the Trump administration to criminalize unauthorized border crossings as well as those who enter the country lawfully by seeking asylum, the Times reported, and efforts to link all immigrants to crime regardless of legal status.

“This will help law enforcement,” said Mike Howell, a former Department of Homeland Security Official under the Trump administration and current senior adviser for executive branch relations at The Heritage Foundation, a conservative public policy think tank. “We know illegal aliens commit a lot of crime, a lot of very violent crimes. And it’s a different crime set than the native (born) American population, it’s more heinous, barbaric ... machete killings, rapes, murders.”

A large body of research has shown that immigrants are less likely to commit crimes than U.S born citizens. A Cato Institute study focused specifically on the state of Texas showed that in

2015, undocumented immigrants had a criminal conviction rate 50% below that of native-born Americans, and the conviction rate of those here legally was 66% below.

“It’s completely unnecessary from a public safety perspective,” said Alex Nowrasteh, director of immigration studies at the Cato Institute, a libertarian think tank. “Illegal immigrants, asylum seekers, people coming across the border, are much less likely to commit crimes than native-born Americans. Gathering their DNA is just a waste of time, and if the main purpose of this is to reduce crime, this is probably one of the least effective ways to go about it.”

Implementing the policy is expected to cost about \$13 million for three years, NPR reported.

### **DNA collection ‘could implicate everyone’**

The rule could have implications not just for immigrants, but for U.S. citizens as well, said Bhandari with the American Civil Liberties Union. The DNA records will be entered into the FBI’s DNA database called the Combined DNA Index System, which already contains over 17 million people who were arrested, charged or convicted of a crime, according to NPR.

“When DNA is taken from one person, the information revealed is not just about that person but also their family members and relatives, including children who have not yet been born,” said Bhandari, adding that those relatives may be U.S. citizens or legal residents.

“When you expand the databases of DNA profiles the government has access to, it opens up the door in the future to abuse,” Bhandari continued.

Important questions remain unanswered, said Bhandari, including how long the DNA will be retained in the database, who will have access to the information, and how easy it could be for a foreign government to hack the database to access personal data — including medical data — for thousands of people.

“This is another example of using technology to restrict civil liberties and enable even greater government control and surveillance of the population, and goes to the heart of whether we have freedom and a measure of autonomy from the government accessing personal information,” said Bhandari.

Trump administration officials told The New York Times that a working group was meeting weekly to put the measure in place as quickly as possible, but officials have not stated a specific timeline for the plan’s implementation.