



U.S. Commission on Civil Rights

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**Briefing on the Consequences of Government Race Data Collection Bans
on Civil Rights**

May 17, 2002

Executive Summary

As part of its continuing efforts to inform itself of emerging civil rights issues, the U.S. Commission on Civil Rights periodically holds briefings in conjunction with its monthly scheduled meetings. On May 17, 2002, the Commission held a briefing on “The Consequences of Government Race Data Collection Bans on Civil Rights.” The briefing was held to discuss the relevancy of race and ethnographic data collection to the development of civil rights, and the effects that proposed bans on the collection of such data would have on the enforcement and assessment of the nation’s civil rights laws. Spurred in part by the ballot initiative in California seeking to approve a state constitutional amendment banning the collection of race data by government and public entities, the Commission was concerned, according to Chairperson Mary Frances Berry, with the practical research, enforcement, and policymaking consequences of such bans.

The Commission invited five panel members who had recognized expertise or experience in various aspects of the uses of race and ethnographic data in the civil rights enforcement and policymaking context. The Commission carefully selected the panelists to ensure that it was informed about the effects of racial data bans over a broad range of disciplines and services, as well as to ensure that it was exposed to a broad spectrum of views on the issue. The panel members testified generally on the impact that racial data bans would have on research and policymaking, such as in the areas of education and health care; civil rights law enforcement; and individual privacy and government coercion concerns.

After carefully considering the testimony of the panelists and examining proffered evidence, the Commission determined that bans prohibiting government or public entities from collecting racial data would be ill-advised. Though coming from different

perspectives, all the Commissioners agreed that a ban on the collection of racial data would be detrimental to the study and safeguarding of civil rights.

RESEARCH AND POLICYMAKING

Several panelists stated that a ban on racial and ethnic data collection would significantly impede the ability of researchers and advocates to identify, study, and monitor progress, as well as areas of needed improvement, in the development of civil rights in this country. The testimony supported the notion that implementation of racial data bans would undercut effective civil rights policymaking and enforcement. In particular, two of the panelists with expertise in education and health care issues highlighted the problems that would occur in those areas in light of a ban on racial data collection.

Dr. Peter Skerry, a professor of government at Claremont McKenna College and a government studies senior fellow at the Brookings Institution, testified that in his capacity as a social scientist and public policy analyst, he believed that “eliminating or banning the collection of racial and ethnic data would be bad public policy.” Though he had been opposed in the past to certain race-conscious policies, he believed that banning data collection itself was not an appropriate response. Rather, data is fundamentally important to the formation of public policy, regardless of the political or ideological outlook of those using the data. Otherwise, according to Dr. Skerry, “if we do not collect these data, I am fearful of what the alternatives would be—reliance on folk wisdom, anecdote stories, prejudice, and indeed racism.”

According to Dr. Skerry, it is also important to recognize that racial and ethnic categories are clearly political constructions. Though such an acknowledgment leads some people to reject the whole enterprise as an artificial construction not worth engaging or considering, Dr. Skerry argued that in reality such categories are like the political borders between countries. Although a political border or category may not necessarily reflect absolute reality about the nature of a population in question, borders and categories are nevertheless useful since they result from political processes that determine agreement on certain minimum baselines for an orderly understanding of the world. Dr. Skerry noted that “realism” requires an acknowledgment of flaws or imperfections that may exist in some data. Despite such errors, however, he stated that “we risk moving into a terrain of obscurantism and dissention of even worse sorts, I fear, if we don’t continue to collect such data.”

Other panelists, such as Marisa Demeo, the Washington, D.C., regional counsel of the Mexican-American Legal Defense and Educational Fund (MALDEF), voiced similar concerns. According to Ms. Demeo, government needs to be able to collect racial data to develop effective government policies and programs.

Ms. Demeo further asserted that the reason the Latino community needs the government to collect and provide access to the racial and ethnic data is twofold: first, to hold institutions accountable if they are not meeting the needs of the Latino community and/or violating the law, and, second, so that the Latino community can educate itself and

improve the lives of its members. Data broken down by race and ethnicity allows organizations to tailor their messages and provide programs that work for their communities.

She testified that collection of racial data allows us to see who we are as a nation and to compare and measure the progress of ethnic groups with respect to a wide variety of socioeconomic factors. Although data can reveal differences between different groups, it does not necessarily reveal the causes of such differences or whether such differences are positive or negative. Neither does data by itself suggest what are the proper policies for addressing such differences. Ms. Demeo suggested that individuals who are critical of the interpretations of such data or who are opposed to policies based on those interpretations could challenge the interpretations and proposed solutions without actually eliminating the collection of the data itself.

The importance of data collecting to policymaking was also reiterated by Jan Liu, policy analyst with the Asian and Pacific Islander American Health Forum. He stated that collection of racial data is essential for creating sound public policy, ensuring efficient uses of resources, and understanding and addressing disparities in health and well-being. “Data on race and ethnicity are often used to target health interventions, design more effective outreach programs, develop culturally appropriate health interventions, and measure success in the elimination of health disparities,” according to Mr. Liu. He testified that data collection has been one of the top priorities of the diverse and heterogeneous Asian American and Pacific Islander communities, as past failures to collect data had resulted in exclusion from federal programs.

Likewise, Dr. Jorge Chapa, professor and founding director of Latino studies at Indiana University and adjunct professor of sociology in the School of Public and Environmental Affairs, referred to tables available from the National Center for Educational Statistics showing racial differences in education at all levels. Collection of racial data, he said, does not necessarily force the equalization of outcomes, but without data one is unable to see how differently education systems are treating populations based on important race and ethnic variables.

A more qualified view was presented by Roger Clegg, vice president and general counsel of the Center for Equal Opportunity, who stated that he believed the desirability and acceptability of racial data collection depended on the context of the collecting activity. He noted that Dr. Skerry’s discussion revolved mainly around the U.S. census. In other contexts, however, such as collection efforts by a state college or police force, the pros and cons of collecting racial data, according to him, may compel a different result.

Mr. Clegg opined that there were instances when racial data collection was warranted, such as recording the racial or ethnic appearance of prisoners, so that in the event of an escape, identification and capture would be made easier. And, he said, it would be legitimate to access a college admissions office’s data records on students’ ethnicity in order to determine whether discrimination had taken place.

He stated, however, that the very process of collecting racial data also encourages discrimination if the government wants a particular set of racial results. Mr. Clegg gave examples of police deterred from stopping a valid suspect for fear of being accused of racial profiling, or an agency manager under nondiscrimination directives afraid to hire a qualified Latina because of several previous Latina hires. Then there are situations, according to Mr. Clegg, where collection of data is clearly for the purpose of discrimination, such as collection of race data on college applications. In those instances, he stated, the collection of such data is not being done in furtherance of a legitimate use.

Though he stated he felt conflicted about the desirability of a ban on data collection, to him the drawbacks and downsides to collecting racial data outweigh its potential positive effects. Therefore, in his opinion, data bans, such as the California initiative, are worth a try.

Education

With respect to the specific significance of racial data collection to research and policymaking in the area education and equalization of educational opportunities, the testimony presented confirmed that racial data is an important and indispensable tool.

According to Dr. Chapa, “race plays a large role in determining which schools students attend, the quality of schools, and how they’re treated by their teachers and by other students.” Dr. Chapa continued that a compelling justification for collecting data on race is that many people of color were historically relegated to separate, unequal, and inferior public education facilities. In parts of the country, those schools are resegregating without disadvantaged students ever having attained equality. The tremendous disparities in public school educational opportunities justifies the collection of data and use of affirmative action as an equalizing tool.

He asserted that as an educator in Texas, he witnessed the dismantling of that state’s affirmative action program under the *Hopwood* court decision before the state had equalized its expenditures in public education. But even if race data could not be utilized to promote affirmative action goals, Dr. Chapa said collection of such information by state institutions is still important in order to determine how well they serve the populations of their states or respective service areas.

With respect to the California initiative, Mr. Clegg stated that where federal law, such as the No Child Left Behind education initiative, requires collection of racial data, it trumps state bans. Ms. Demeo countered, however, that there are certain types of data that the state of California currently collects that it would not be required to collect under federal laws. These include race statistics such as scores on the SAT, ACT, and AP; Stanford 9 scores, API rankings, and incentive awards; eligibility for underperforming school grants; enrollment, graduates, and dropouts; English language learners; and staffing and projected teacher hires.

Ms. Demeo also stated that the California Post-Secondary Education Commission, created in 1974, is charged with not only collecting data on education, but also cross-referencing that data with race and ethnic data, which she believed is not required under federal law. As an example of the importance of statistics to education policy, she pointed out that only 2 percent of Latino high school students in California had taken courses making them eligible for in-state colleges. According to Ms. Demeo, this is the type of information that the Latino community needs in order to identify and address racial disparities in education (determine which courses are required for eligibility and encourage more Latino students to take them). Thus, any racial data ban would have a detrimental effect on ensuring equalized access to educational opportunities for all students.

Health care

Similarly, in the field of health care, the testimony demonstrated the acute need for accurate epidemiological and medical health data identifiable by race and ethnicity. Mr. Liu stated that nowhere were racial and ethnic disparities better documented than in the field of health care. He testified that Latinos and Koreans have the highest rates of underinsurance among the general population; that minorities receive lower quality medical care regardless of insurance or income; and that health outcomes from infant mortality, tuberculosis, diabetes, HIV/AIDS, smoking, and lung cancer all differ according to race and ethnicity. According to Mr. Liu, “the key to eliminating these inequities in health is having the information necessary to understand and to address them, and for this we’re dependent upon data.”

Mr. Liu stated that all recipients of federal health care funding are required to comply with Title VI of the Civil Rights Act, and that compliance is dependent upon data. According to Mr. Liu, however, the Department of Health and Human Services (HHS) has few regulations in place concerning such compliance. He stated that only two federal statutes dealing with HHS funding recipients clearly mandate the collection of racial data. In addition, there are just a small number of agency regulations that also mandate the collection of such data. Mr. Liu asserted, however, that the vast majority of federal health care programs are not protected by these statutes and regulations and would be vulnerable to any ban on racial data collection at the state level.

Mr. Liu stated that HHS has the authority to require collection of such data, and he recommended that HHS immediately begin the process of policy guidance to require collection of data necessary for civil rights enforcement.

In addressing the exemptions for medical research contained in the California initiative on banning racial data collection by public institutions, Mr. Liu noted that the exemption was ambiguous, as it could be read to apply only to clinical trials, which generally deal with small and negligible populations. Public health research, however, generally relies on population-level data, which includes data collected by health departments, by academic institutions, and by research institutions. Public health research does not

generally rely on data collected in hospitals or doctors' offices, the likely targets of the exemption.

CIVIL RIGHTS LAW ENFORCEMENT

On the issue of enforcement of civil rights, Ms. Demeo, as regional counsel of MALDEF, noted the importance of racial data collection to litigation and enforcement of civil rights. According to Ms. Demeo, government collection of racial data is a necessary component of implementing various federal and state civil rights laws. Ms. Demeo stated that “[f]ederal and state civil rights laws . . . would be difficult, if not impossible, to enforce without the collection of racial and ethnic data.” She referred to employment, education, and housing examples in her briefing paper to show why racial data is essential to addressing discrimination in those areas.

Ms. Demeo also testified in response to a question by the Commission, that in her opinion, the lack of race data collection in the commonwealth of Puerto Rico hinders both the federal government's work in prosecuting violations of Title VII of the Civil Rights Act of 1964, and the ability to address racial disparities and discrimination on the island.

An opposite view was espoused by Mr. Clegg, however, who felt that racial data was not necessary in most racial discrimination lawsuits, and that in those instances where it might be relevant, the data could be obtained through routine discovery.

With respect to the issues raised by the California initiative, Ms. Demeo found it troubling that under one of the proposed provisions of that initiative, the California Department of Fair Employment and Housing would only be permitted to collect race data for an additional 10 years. Beyond that period of time, the department would be prohibited from further collecting any such data. According to Ms. Demeo, the lack of such information would effectively eliminate the efficacy of state antidiscrimination laws.

Moreover, according to many of the panelists, the effect of the initiative would be to discourage the collection of such data, even if such collection could not be legally prohibited. Ms. Demeo also stated that due to resource and budgetary constraints, the federal government often relies on the states to help implement and enforce federal nondiscrimination laws and policies. State-level bans discouraging race data collection and use of such data would, therefore, adversely affect enforcement activity.

PRIVACY AND GOVERNMENT COERCION

The panelists devoted a significant portion of their briefing discussion to the issue of privacy and coercion concerns engendered by government inquiry into racial and ethnic information regarding individuals.

Ms. Demeo asserted that government collection of racial data did not infringe upon the privacy rights of individuals, since provision of such information on government forms is voluntary. Furthermore, an individual can check off as many categories as he or she wishes and feels are self-applicable. Ms. Demeo also pointed out that unlike medical conditions, people cannot generally hide their race or ethnicity. A landlord or employer will, therefore, be able to perceive a person's race or ethnicity. Thus, she stated that "[i]n order for a prosecuting agency or a court to determine if race or ethnicity could have been a factor in [a hiring or renting] decision, such data must be collected."

As a member of the U.S. Census Bureau's Racial and Ethnic Advisory Committee, Dr. Chapa also witnessed the reform and revision of census forms to expand the number of racial and ethnic categories and permit the checking off of more than one category. He asserted that in higher education, disclosure of racial or ethnic information on forms is voluntary and that a growing number of people are refusing to check any category at all. The collection is, therefore, nonintrusive. He further opined that "it is not the collection of the data that shapes the reality but the reality that race is just a major dimension that shapes the distribution of educational resources."

Dr. Chapa also stated that the general policy of most school systems is to begin collecting information on any self-identified racial or ethnic group that compose more than 1 percent of the population. So the system of racial data collection has become responsive to the wishes and needs of the population.

In Mr. Clegg's opinion, however, there are problems with both the method by which racial data is collected and the manner in which it is applied. Mr. Clegg found it troublesome and problematic for the government to encourage or require the adoption of a racial identity. He stated that "no matter how voluntary you make it, when it's the government asking you for it, there is some pressure being brought to bear."

Furthermore, Mr. Clegg proffered that the U.S. population was not simply "black and white," and with the rise of interracial births, it was offensive to ask an individual to choose to identify with one or another racial category. This has ramifications for civil rights, according to Mr. Clegg, as discrimination is more likely if people have very strong racial identities and an "us/them" mentality.

Dr. Chapa noted, however, that in the last census, multiracial responses were permitted, although only 2.4 percent of respondents chose to self-identify in this manner.

Dr. Skerry testified as to what he considered common misconceptions about racial data collection. He stated that although there is much rhetoric about putting people "in boxes" and cramming them "into artificially constructed categories," in fact, the process of racial data collection is generally one of voluntary self-identification on government forms. Importantly, according to him, one does not derive any immediate, specific benefit from filling out racial or ethnic information on most of such forms, such as census inquiries. In such a context, there is no risk that the information is being used to benefit one group

over another. Indeed, if that were the case, one would not have expected the minority population undercount problem experienced during the last census.

CONCLUSION

At the conclusion of the briefing, the Commission considered the testimony and evidence proffered and reached a general consensus opposing bans on racial data collection. Although the Commissioners approached the analysis of racial data bans from different viewpoints and perspectives, all were concerned about the detrimental consequences of racial data bans and opposed the California initiative.