



U.S. Commission on Civil Rights

U.S. Commission on Civil Rights

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

May 17, 2002

Proceedings

CHAIRPERSON BERRY: Okay. Thank you all for joining us this morning. Today, in this briefing, we will be examining the issue of racial data collection and its relevancy to civil rights enforcement. Though the issue has only recently begun to appear on the horizon, there's nevertheless a real and growing national debate over the necessity and desirability of collecting public racial and ethnic information by government entities.

Many important civil rights issues are raised by this subject. What is the relevancy of racial data collection for enforcement? How will the demand affect the ability of the judicial system to ensure that the nation's civil rights laws are being enforced? And how will the lack of racial data affect the modicum of civil rights enforcement, as well as the efficacy of research that is done by scholars and public policy people on these questions?

This is as a rising profile of this issue reflected in part by the initiative campaign underway in the state of California to ban state entities from collecting racial and ethnographic data. And this has spurred us to request the staff—the staff has prepared this briefing for us today on the impact racial data collection bans may have on civil rights enforcement. We're only concerned about the impact on civil rights enforcement and civil rights. The commissioners were sent notifications several weeks ago and then a briefing book last week which contained a background paper, panelist bios, and supplemental reading materials on the topic to be discussed.

We have a knowledgeable panel of experts to help us in our discussions today who have been very patient with us, and their bios are in the material previously provided to you. And we will hear from each of them, and when they have finished, then we will have

questions. First we will hear from Dr. Peter Skerry, a professor of government at Clairmont McKenna College in California and a senior fellow of government studies at the Brookings Institution. He will provide us with an overview of the impact of racial data collection bans from the perspective of an academic and political science researcher. Please, Dr. Skerry?

Peter Skerry, Professor of Government, Clairmont McKenna College; Senior Fellow of Government Studies, Brookings Institution

MR. SKERRY: Thank you, Madam Chairperson, and thank you, commissioners. I, first of all, have to apologize for not having submitted to you a written version of my remarks this morning. Due to travel from Europe and so forth—

CHAIRPERSON BERRY: We're just glad you're here.

MR. SKERRY: Okay. Well, I'm here, and I'm glad you're here.

COMMISSIONER THERNSTROM: And you can submit them subsequently.

MR. SKERRY: Yes, yes, yes. And I will do so.

CHAIRPERSON BERRY: Without objection.

MR. SKERRY: Okay. I am speaking here this morning, first, as a social scientist who is a consumer and user, I dare say an avid user and consumer, of racial and ethnic data and statistics. And I suppose that what follows from that is a certain professional self-interest, which I would put forward without shame and will come back to that point subsequently.

But I also speak as a public policy analyst and as a citizen who, along with my role as a social scientist, believe that eliminating or banning the collection of racial and ethnic data would be bad public policy. Now, I say this as someone in both of my roles as a social scientist and as a public policy analyst who has been critical of many of the uses in policies and programs to which—that make use of these racial and ethnic data.

But I'm of the opinion that these data are more important than the uses to which they're put, if you will, and argue with and have argued with opponents of various policies, race-conscious policies, that if they are opposed to such policies then they should use the data gathered, for example, by the Census Bureau, racial and ethnic data, to evaluate those policies. And that whether the data are used by themselves or their opponents, the data are fundamentally important for the conduct of public policy.

And that, alternatively, 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. And that, I suppose, by way of preface, a preface to a short set of remarks, is my basic position. I want to elaborate a few points that follow from that.

CHAIRPERSON BERRY: Okay.

MR. SKERRY: First, I want to address some misconceptions about how these data get compiled. I think these misconceptions have already begun to emerge in the incipient debate in California and across the nation. Then I want to address a couple of points about the incentives that are presumed to exist in the very collection of these data, incentives to individuals to identify racially and ethnically. And then I want to make a point about what I call the need for realism about the nature of these data and their admitted and acknowledged, I believe, flaws. They're not perfect, but, again, that will lead me to a quick look at the alternatives and what would be a much worse situation.

Okay. With regard to the misconceptions about how these data get compiled, there's a lot of rhetoric, there has been a lot of rhetoric in and around since the 2000 census, in particular, about how the collection of such data put people in boxes, the notion that somehow Americans are getting crammed into artificially constructed categories.

Well, what needs to be pointed out, it seems to me, is the obvious fact that we don't classify people in any obvious sense of the term by the collection of these data. I think we don't classify people in any common sense notion of the term. The linchpin, certainly, of the U.S. Census, which is a primary vehicle for this kind of collection process, is self-identification. By and large, individual Americans put themselves in various categories. Again, this is not inviolate, there's a lot of—there is some manipulation of these data.

People don't always put themselves in existing categories or categories that make sense. So there is some sort of allocation that goes on. But, by and large, people put themselves in these categories. So much so in fact that I'm not quite sure what the notion of racial privacy means. The initiative that's being proposed by Ward Connelly in California is billed a Racial Privacy Initiative.

I'm just not clear on what that is supposed to mean. These data are, it seems to me, collected in the spirit and in the fact and practice of racial privacy. They're not divulged at the individual level, and they determine the classification by individuals in the privacy of their own domicile, presumably, or wherever the forms are filled out.

My second related point here has to do with the categories that are presumed to operate through the collection of racial and ethnic data. I would point out that no individual has ever benefited, at least in modern times, at least in the 20th century, from identifying himself or herself, for example, as an African American or as an Hispanic on a census form or, I might add, on many other kinds of collection vehicles that would ask for racial or ethnic identification.

Now, I would contrast this with the identification—an individual identifying him or herself as a racial minority, for example, on a college application where, I think pretty clearly, that has some impact on the decision by an institution to admit an individual or not. But that's not the situation with the census, which, again, is a kind of classic vehicle for this kind of racial and ethnic data collection.

Just think back a couple of years ago, if you will, to the debate we were having over the undercount of the census, that it was undeniably undercounting racial and ethnic minorities, a clear public policy problem whose solution was the subject of considerable disagreement. But what that was also telling us, I think, not very frequently noted, was that clearly large numbers of minority individuals did not see it in their interest to fill out census forms. There were also some questions about whether the Census Bureau was seeking them out adequately. But there's a lot of evidence that individual members of racial minority groups did not see it as sufficiently in their interest to identify themselves on the forms and fill out the forms.

My point being that there is a disconnect, if you will, between filling out the form and identifying yourself and any concrete benefit. If there were such a concrete benefit, as many opponents of the collection of these data seem to think, then you wouldn't have had that undercount problem, because people would have filled out the forms because they would have gotten something for it. Not the only motive for acting, but clearly an important one.

Okay. I come to my point about the need for realism about the nature of racial and ethnic statistics. In a book I published from the Brookings Institution in the year 2000 about the politics of the census, I explored and acknowledged the lack of what statisticians call "construct validity" in the collection of racial and ethnic statistics. It's clear that the categories that are used do not consistently apprehend and measure the racial and ethnic identity that we're trying to measure. It's a problem, undeniably.

It's also clear that these data typically lack statistical reliability: if you ask the same question of the same people at different points in time, you'll get different measures of who consider themselves African American or Hispanic. It's different for different groups, but it's clearly not as reliable as we would like. But, again, that's a fact, that's a reality of the contextual nature, among other things, of racial and ethnic identity in American society, and I think it's important to acknowledge that.

It's also important to emphasize that these categories themselves, of race and ethnicity—African American, Hispanic, and so forth—are very clearly political constructions. They are the outcome of a political process. That leads some people to reject the whole enterprise as somehow a function of artificial constructions that are just not worth our engaging in or using. This reminds me of the arguments people get into—to perhaps get myself into a different set of problems about arguments about our borders as a nation, that about whether our borders between Mexico and the United States or the U.S. and Canada are artificial. Well, in some sense they are artificial; in some sense, these racial and ethnic categories are artificial. But I think a better word might be that they are the result of a political process and that we have some agreement on where to draw these lines even though it's not always hard and fast.

CHAIRPERSON BERRY: Now you have to sum up, Mr. Skerry.

MR. SKERRY: Okay. Then my summing up is simply calling for realism in the use of these data. They are flawed, they are not perfect, but we risk moving into a terrain of obscurantism and dissension of even worse sorts, I fear, if we don't continue to collect such data. An example, quickly, from the fall comes to mind. There were disputes after September 11, you may recall, over how many Muslims we have in the United States. We don't have good data on that for good reasons: the Census doesn't collect data by religion. I'm not advocating that it should, but the kind of back and forth, the kind of dissension you saw there over some very basic informational questions I think is just the tip of the iceberg that we would see a whole lot more of if in fact we cease to collect racial and ethnic data.

CHAIRPERSON BERRY: Thank you very much. And there will be questions. Mr. Roger Clegg has been here before us on many occasions. Now he's vice president and general counsel with the Center for Equal Opportunity. He was a deputy assistant attorney general in both the President Reagan and Bush, the first administration. He will provide an analysis of the meeting, the desirability of racial data collection bans as they pertain to civil rights enforcement, equal opportunity, and social research. Mr. Clegg?

Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity

MR. CLEGG: Thank you very much. I am delighted to be here. I appreciate the invitation.

Let me say at the outset that my testimony is not going to categorically support or condemn the collection of racial and ethnic data. I think that there are pros and cons, and I think that whether the pros outweigh the cons depend on the context in which the data collection takes place. I note that most of what Professor Skerry was talking about was collection by the U.S. Census. And I would say that that presents one set of issues.

The issues might be different if the data were being collected by a different entity. I think there are different questions raised in whether the collection is being collected by the Census versus a state college or a local police force. You have to look at the context. And I know that from the Chairman's remarks that some of the Commission's interest was piqued by the Racial Privacy Initiative, which has really put this on people's radar screen. And so a lot of my remarks will be aimed at that.

The Racial Privacy Initiative, of course, would not have any effect on whether the Census could collect this information. It goes only to the collection at the state level and by state entities. And even here, there are a lot of exceptions within the Racial Privacy Initiative. For instance, there are exceptions for collection of data in the context of medical research, which I know is an area with a lot of interest to folks.

So, anyway, I would say that sometimes the data can be put to good use, sometimes it can be abused, and some methods of data collection are more problematic than others. And specifically in the context of civil rights enforcement, sometimes the data can help civil rights enforcement, but sometimes I think its collection actually hurts civil rights

enforcement, because it facilitates racial and ethnic discrimination. And so we have to look at the specific context, and balance costs and benefits.

As I say in my written statement, I think that the Racial Privacy Initiative is a good idea. I think it certainly deserves a try. California is the logical place to try it, since it's our most populous and diverse state. There are procedures within the Racial Privacy Initiative for its amendment. And I think that the potential benefits outweigh the potential dangers in the Racial Privacy Initiative.

There are basically two kinds of problems that result from the collection of racial and ethnic data for law enforcement and also more broadly. There are problems that arise from the actual process of collecting the data, and then there are problems that arise with the use to which the data are put after they've been collected. With respect to the process of collecting the data, that, in turn, also gives rise I think to two subproblems. One of them Professor Skerry has already alluded to. I think that it's very troublesome when we encourage people to adopt a particular racial identity, to embrace a particular racial identity. And it's also problematic for the government to encourage people or to require them to have such an identity.

And I'm not sure that you can solve these problems. If the government is doing the classifying rather than the individual, this is more coercive in some ways, and it also is likely to lead to errors. And we certainly don't want to train government officials in how to identify people by race and ethnicity—you know, give them a checklist of physical characteristics to look for, or anything like that. I think everybody would agree that that's very offensive. On the other hand, if you ask the people to identify themselves, no matter how voluntary you make it, when it's the government asking you for the information, there is some pressure being brought to bear.

Now, it's true that if we lived in a world in which everybody had to be either completely white or completely black, then you might say that the government's requirement that people check a box is really not forcing an identity on them that they don't already have. But that's not the America in which we live now. We are racially and ethnically very diverse. There's a lot of categories besides white and black, and there are also a lot of categories within white and black as well.

In California, for instance, the third largest category of births now, behind white and Latino, is interracial. And I think it's offensive for the government to ask these people about their racial and ethnic background and to demand that they choose a particular identification.

I think that this has ramifications for civil rights enforcement because discrimination is more likely to occur in a society in which people have strong racial identities and an us/them mentality. The other problem that arises from the very process of data collection is that the government may be encouraged to engage in racial discrimination if it wants a particular set of racial results.

For instance, in racial profiling—which the Racial Privacy Initiative, by the way, would ban, as I understand it—it’s often said that, in order to make sure that that profiling stops, we ought to require police officers to keep track of how many blacks they stop versus whites versus others. The trouble with that is that the police are going to know that they may get into trouble if they stop “too many” of one group versus another group. So, for instance, on a particular evening if a policeman knows that he’s already stopped several black individuals, he may feel that, “Well, I can’t stop any more,” even if there is a black individual that he thinks really should be stopped. And, conversely, he may feel under pressure to stop an Asian individual or an Hispanic individual.

Another example is if you have a state agency that’s told to keep track of race and ethnicity in order to ensure that there’s no discrimination in the agency. Again, if a manager has hired several Latinos, she might feel, “Well, whatever I do the next person I hire can’t be Latino, because I’m going to open myself up to a claim that I’m discriminating.” And of course this problem is compounded if there are already pressures being brought to bear that she achieve a certain level of “diversity.”

Finally, there’s the problem that arises when the government may actually use the data that it collects in order to discriminate. That’s what the Center for Equal Opportunity is seeing frequently in the context of college admissions. There really is no legitimate reason for a state college to be asking people what their race and ethnicity is. Clearly, they’re going to be using that data to discriminate.

Now, on the other hand, there are clearly uses of racial and ethnic data that are legitimate. There’s the use by social scientists and historians, there’s medical uses that I’ve talked about in my statement, and there’s law enforcement. An example of the latter that I give in my statement is a prison keeping track of the race and ethnicity of its prisoners, because if somebody escapes, they want to be able to tell the police who to be on the lookout for and include in the identification of the individual his or her race. So there are situations where the government having racial and ethnic data makes sense.

Another place where it makes sense is in determining whether racial and ethnic discrimination has occurred. Again, my organization, the Center for Equal Opportunity, over the past several years, has used freedom of information laws to get racial and ethnic data from college admissions offices. We do a regression analysis in order to determine whether the college or university is engaged in racial and ethnic discrimination.

I was astonished and appalled that Commissioner Edley, a couple of minutes ago, called into question the reliability of the Center for Equal Opportunity’s studies. I’d be interested in maybe talking about that a little bit. I don’t think there’s any question but that the data we collect is accurate. It’s supplied by the colleges themselves.

I have conflicting feelings about making that data collection impossible. On the one hand, I think it will lead to less discrimination at colleges and universities. On the other hand, it will make it harder to find it if it is occurring. On balance, even though in this particular

area it will make my job harder, the amount of discrimination that will result will decrease if the colleges are banned from collecting these data in the first place.

CHAIRPERSON BERRY: Could you sum up, please, Mr. Clegg?

MR. CLEGG: Yes. Let me just say, finally, that racial and ethnic data can be used in the course of a lawsuit but that there are some caveats here, too. First, a lot of civil rights lawsuits don't rely on the use of racial and ethnic data at all—for instance, harassment lawsuits and a lot of disparate treatment lawsuits. Second, it's possible to collect information after a lawsuit has been filed, through the discovery process. And, third, you have to weigh the problems that can result from not having the data with the abuse of the data in civil rights lawsuits. I'm afraid that, in many instances, lawsuits based on statistical imbalances have driven employers to adopt quotas—that is, to engage in racial and ethnic discrimination.

So, on balance, the harms in racial and ethnic data collection outweigh the benefits, and I think that the Racial Privacy Initiative deserves to be tried.

CHAIRPERSON BERRY: Okay. Thank you very much. Next is Ms. Marisa Demeo who has been here before too, and we appreciate your coming today. The Washington, D.C., regional counsel of the Mexican-American Legal Defense and Education Fund, known as MALDEF. She currently develops policy positions for MALDEF and legislative advocacy on the national level for Latino civil rights. She will give a civil rights litigator's perspective to the issue at hand.

Marisa Demeo, Regional Counsel, Mexican-American Legal Defense and Education Fund

MS. DEMEO: Good morning, and on behalf of MALDEF, I thank you for the opportunity to appear before the Commission. For those of you who aren't familiar with MALDEF, we're a civil rights organization dedicated to improving the situation of the 35 million Latinos who live in the United States. We're headquartered in Los Angeles. We have offices in San Antonio, Houston, Sacramento, Phoenix, Albuquerque, Chicago, Atlanta, and Washington, D.C.

We accomplish our work through a number of ways. We do it through community education programs, through advocacy, through providing scholarships to students, and also through litigation. I did want to also mention that MALDEF is involved in reviewing and working to oppose the Racial Privacy Initiative, the proposed initiative in California that if passed, would ban state and local governments from classifying individuals by race, ethnicity, color, or national origin, and I bring the experience that MALDEF has in reviewing this initiative today.

Today, I plan to cover several topics. What do racial and ethnic data tell us? Why do governments need to collect racial and ethnic data? Does the government violate an individual's privacy rights when it collects such data? And why does the Latino

community need the government to collect and provide access to the racial and ethnic data it collects?

First, with regard to what does this data generally tell us, it tells us who we are as a nation and who we are at the state and local level. It provides a window into how the Latino community, from our perspective, is faring on a wide array of socioeconomic factors. Just as an example, we have in the Latino community a very high rate of participation in the labor force—69 percent labor participation rate. This compares to a 67 percent white labor participation rate and a 66 percent black participation rate. That data, broken down by race and ethnicity, also tells us that despite these high levels of labor participation, blacks and Latinos make less than whites and have higher poverty rates.

These types of data cannot only tell us whether there's a difference between different subpopulations but also whether there is progress within different groups and the speed of the progress. For example, in 1970, 32 percent of Latinos who were 25 and older had graduated from high school. This compares to 57 percent in 2000. This is a measure of significant progress. We would not know this if we didn't collect the data based on race and ethnicity. It also shows whether there's a disparity between the Latino and white community. As it turns out, when you look at the data, the gap is widening despite the progress of the Latino community in terms of increasing high school graduation. The difference between the white graduation rates and Latino graduation rates is widening.

Data broken down by race do not explain the cause for the differences between various racial and ethnic groups. The data do not suggest whether the very fact that there is a difference between different racial and ethnic groups should be judged as a negative, as a positive, or neither. The data disaggregated by race and ethnicities do not in any way even suggest methods for reducing the racial disparities that do exist.

There are individuals who are critical of the causes that people attribute to racial disparities. There are also individuals who are critical of the solutions that people want to reduce the disparities. These individuals can challenge the interpretation of the data as well as the solutions proposed to address them without actually eliminating the collection of the data, which is needed both to enforce civil rights laws as well as create effective government policies and programs.

Why do governments need to collect such data? The two primary purposes for government collection of racial and ethnic data are, first, to implement various federal and state laws, and, second, in order to develop effective government policies and programs. I'll only cover the first purpose at this time.

First, federal and state governments collect racial and ethnic data to ensure compliance with a wide variety of government programs and laws. I'm going to focus specifically on civil rights laws during this briefing. In the written papers that I submitted to the Commission, I review a number of federal civil rights laws, such as the Equal Employment Opportunity Act, the Fair Housing Act, the Equal Credit Opportunity Act, and Title VI. In each of these cases, there is a prohibition against discrimination based on

race and national origin. Most states also have similar state laws which also prohibit discrimination on the basis of race, color, and national origin. And the state legislatures have granted enforcement authority to implement the state antidiscrimination laws to state agencies, similar to the federal-level agencies.

Federal and state civil rights laws, such as the ones that I list in the briefing paper, would be difficult, if not impossible, to enforce without the collection of racial and ethnic data. In the briefing paper, I review a number of examples in the areas of employment, in the areas of education and housing, as to why the collection of racial and ethnic data is essential to address racial discrimination.

In addition, I wanted to address the issue of whether the government violates an individual's privacy rights when it collects the racial and ethnic data, an issue that's been addressed by the two previous speakers. It is our understanding that when government agencies provide forms to individuals to fill out that include the collection of racial and ethnic data, the individual's provision of the data is voluntary.

Not only can a person choose not to check off a race, they can voluntarily check off any box that they want, either because that is how they identify themselves or simply because they feel like doing it that way.

My second point is that unlike the disclosure of some forms of data, such as the disclosure of a medical condition, such as diabetes that cannot be seen or heard, most people cannot hide their racial or ethnic identity. An employer or landlord or a lender will see an applicant or hear an applicant, even if the data of the applicant's race and ethnicity is not collected. An employer, landlord, or lender may make a decision based on race that he sees or the ethnicity that he hears through an accent. In order for a prosecuting agency or a court to determine if race or ethnicity could have been a factor in the decision, such data must be collected. Why does Mr. Clegg's example of allowing use of race in prisons and in apprehension of suspected criminals work? It works because people look at people and they see a race and they see an ethnicity in that context and that's why it happens in the civil rights context.

Why does the Latino community need the government to collect and provide access to the racial and ethnic data it collects? Really primarily for two reasons: one, so that we can hold institutions accountable if they are not meeting our needs and/or violating the law, and, two, so that we can educate ourselves to improve our own lives. MALDEF has community education programs, and it's the data broken down by race and ethnicity that allows us to tailor the messages and the programs that would work for our community.

On the whole, we are opposed to initiatives that would ban the collection of race and ethnic data because of the effect that it would have on civil rights enforcement. Thank you very much.

CHAIRPERSON BERRY: All right. Now, we'll hear from Dr. Jorge Chapa, who is professor and director of Latino studies at Indiana University as well as adjunct professor

of sociology in the School of Public and Environmental Affairs. His research has focused on alternatives to increasing the successful participation of Latinos in higher education.

Jorge Chapa, Professor and Director of Latino Studies, Indiana University

MR. CHAPA: Thank you very much. Race is a major feature in American social life and the central feature of our educational system. 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. One of the compelling justifications for collecting data on race is many African Americans and Latinos were historically relegated to separate, unequal, and inferior public education facilities, and in parts of the country these schools are becoming resegregated without these students ever attaining equality.

In my written comments, I outline some of the research I've done in Texas before I moved to Indiana. I was a professor at the LBJ School of Public Affairs and also associate dean of the graduate school at UT. And I ran the Graduate Opportunity Program at the time the *Hopwood* decision became law in Texas. I wanted to say a little bit about that experience. I know that you'll refer to my written comments.

Cheryl Hopwood and her co-plaintiffs filed their suit before Texas had even equalized the expenditures in its public institutions. Again, I outline that in my paper and my forthcoming book. There are tremendous disparities and public school education. This has been the subject of decades of litigation. I think these inequities completely justify affirmative action in access to public education. There was and is disparate access to public educational resources.

But after *Hopwood*, my observation is that the University of Texas administration has been scrupulous in not using race to consider the decisions of any applicant—or the admission decision regarding any application or financial aid. Once again, the appellate court made that the law of the state. But there is a legitimate purpose for collecting racial data, even when it's not part of the decision, and that is as a state institution, I think the University of Texas and other state and public institutions can be asked how well they serve the population of their state or their service area. And, again, it's a very valid concern for any public institutions. That's a legitimate use of race, and, again, at the University of Texas, race data has no role in the decision for admission or financial aid.

Also, I've served for the last 10 years as a member of the Census Bureau's Racial and Ethnic Advisory Committee, and through that position had the opportunity to see how the entire U.S. statistical system is being revised and has revised itself to account for the people in the United States who claim a multiracial identity. In the 2000 census, 2.4 percent of the U.S. population claimed a multiracial identity, yet the entire U.S. statistical system from Census Bureau, labor statistics, and now every school in the country will adopt this "one or more race" format basically in response to the concerns, the complaints, the legitimate complaints of a small part of the population who said that they did not fit in any one box. And, basically, the answer is, okay, check off more than one or

check all that apply. So the racial collection system has been responsive to their commands.

Many school districts collect data that reflect their local population. The general policy would be if there's more than 1 percent of a population in any school district, they will collect data on that special population but in terms that that population identifies itself. So it is a responsive system, responsive to a very small part of the population.

In my paper, I outline there's still tremendous disparities in educational opportunity and much worse for racial and ethnic minorities, and it's part of the everyday school system. I cite a paper in my comments where the education anthropologist taught in the California school and she recorded thousands of what she called "race comments" where everybody talked about race.

I'm currently working as an evaluator for an educational project in Chicago—the ENLACE project in Chicago public schools and community colleges, and my experiences were that race is the reality that shapes education, and it's not the collection of those statistics. In fact, I think the collection of those data is trivial. Often, 55 percent of the school districts collected the data once—this is public schools. When a student initially enrolls, they'll collect the data and that's it. Seventy-seven percent of the time the data is provided by the parents, so it would not directly affect the students in public schools at all.

I think as Ms. Demeo said, in higher education it's voluntary. A growing number of applicants and enrollees in higher education do not record a race. In fact there's no validity check to see if how they identify themselves actually corresponds to any reality other than what they would themselves see. So it's voluntary and I think nonintrusive. 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, for example, again, this possible negative effect of collecting racial data.

I have in an appendix in my report, about 200 tables available from the National Center for Educational Statistics, that show racial differences in education at all levels. I have not examined all 200 tables, but I think almost all of them will show the educational attainment of minorities would be less than the white majority; in fact, probably all of them.

And the collection of racial statistics does not force the educational system to equalize the outcomes. We don't see that at all; in fact, I think race is the factor that shapes those opportunities in every way, and, again, I just outlined those in my paper. But without recording that we would not be able to see how different the educational systems are treating their students along these really important lines.

Well, I'll just end my comments there.

CHAIRPERSON BERRY: All right. There will be some questions. Last presenter is Mr. Jan Liu, who is a policy analyst from the Asian and Pacific Islander American Health Forum. In his current position, he is responsible for conducting analyses and advocacy on California and national health policy issues affecting Asian Americans and Pacific Islanders. Please proceed.

Jan Liu, Policy Analyst, Asian and Pacific Islander American Health Forum

MR. LIU: Thank you. Good morning, Madam Chairwoman Berry and distinguished members of the Commission. Thank you very much for this opportunity to be here. It's an honor for me.

My name is Jan Liu. I am with the Asian and Pacific Islander American Health Forum. We are a national nonprofit advocacy organization dedicated to promoting policy, program, and research efforts to improve the health of Asian Americans and Pacific Islanders. The Health Forum has been following this ballot initiative in California very closely, and we are extremely concerned about its impact on health and on the enforcement of civil rights. We believe the attempt to limit the amount of information that is collected on race, ethnicity, and national origin will have a negative impact on communities of color and on the public's health.

The collection of data on race and ethnicity is essential for creating sound public policies, ensuring the most efficient use of resources, and addressing the needs of diverse communities. State and local public health departments have a legitimate interest and responsibility in protecting and promoting the health of all people.

Racial and ethnic data that is collected by public entities with regards to health is particularly important to understand and address the disparities that exist in almost every measure of 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.

Furthermore, data has been identified as one of the top priorities for Asian American and Pacific Islander communities. In testimony after testimony presented before the President's Advisory Commission on Asian Americans and Pacific Islanders, communities have asked for better data collection and dissemination to meet the needs of this very diverse and heterogeneous population. Failure to collect this data has resulted in exclusion from full participation in federal programs.

Now, I'd like to start by talking a little bit about the effects of a ban on racial data in terms of health, because I think most people here are not familiar with all the details of health—on its impact on health and because I think it's—

CHAIRPERSON BERRY: Except our own health.

MR. LIU: Except your own health, perhaps.

CHAIRPERSON BERRY: Or the lack thereof anyway.

MR. LIU: And I think because it's relevant to the discussion of civil rights, which I'll go into a little further down the line.

Probably nowhere are racial and ethnic disparities better documented and more disturbing than in the field of health. These disparities exist for all racial and ethnic groups and in almost all areas in health and health care. Stark disparities exist in access to health care and health insurance with Latinos and Korean Americans having the highest uninsurance rates in the country, many times higher than the general population.

Disparities also exist in medical treatment and procedures. The nonpartisan Institute of Medicine recently reported that racial and ethnic minorities receive lower quality of care regardless of insurance and regardless of income. Minorities were found to be less likely to be given appropriate cardiac medications, less likely to undergo bypass surgery, less likely to have kidney dialysis or transplants, and the list goes on and on.

Finally, and most importantly, we know that disparities exist in actual health outcomes. There are entire volumes written about this published by the Surgeon General's Office, published by the Department of Health and Human Services, published by numerous, numerous studies: infant mortality, tuberculosis, diabetes, HIV/AIDS, smoking, lung cancer. All of these health outcomes are different by race and ethnicity.

So the question is not whether there are disparities in health by race and ethnicity, because the evidence is there, the evidence is overwhelming and it's undeniable, but rather how can we work towards reducing and eliminating? 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.

Now, in terms of the enforcement of civil rights in the health care context, the ban on racial and ethnic data would likely have similar consequences in the health and human services context as it would in other areas, such as education, housing, and employment. All recipients of federal funding are required to comply with Title VI of the Civil Rights Act and verification of compliance is dependent upon data, and Title VI provides the legal foundation for the collection and reporting of racial and ethnic data by federal recipients. Yet the Department of Health and Human Services has few requirements or guidelines in place at this time. Any bans on the collection of data would negatively impact civil rights enforcement in programs where there is no clear mandate to collect this race data.

Now, the National Health Law Program and the Summit Health Institute for Research and Education recently published a report in October on this very issue. Their examination of statutes that apply to HHS funding recipients found only two that explicitly require the collection of racial and ethnic data in health care services and, two,

in the surveillance of diseases. These statutes apply to the Maternal Child Health Services block grant, a SAMHSA program for children of substance abusers, a couple of CDC data collection efforts. In addition to these statutes, there are a small number of agency regulations that require the collection of data on race and ethnicity with regards to the Medicaid program, only in the managed care portion, I believe, the State Children's Health Insurance Program, and the End State Renal Disease Program.

While these regulations and statutes provide some protection against the ban on racial and ethnic data collection, it does not represent the vast majority of programs funded by the Department of Health and Human Services. In fact, according to the Catalog of Federal Domestic Assistance, the Department of Health and Human Services administers and funds over 300 programs. Therefore, aside from the few exceptions that I mentioned, a ban on data collection would affect the majority of programs under HHS.

HHS currently has the authority to require the collection of data on race and ethnicity to ensure the compliance of Title VI. I won't read to you the Code of Federal Regulations, but it's there.

CHAIRPERSON BERRY: You need to sum up, though, Mr. Liu.

MR. LIU: Okay. I will certainly do that. So in conclusion, let me state just three things. First, that bans on collection and use of data on race, ethnicity, and national origin, including the proposed initiative in California, would severely hurt public health efforts and civil rights enforcement in the health context. Secondly, a clear mandate by the Department of Health and Human Services for the collection of such data could mitigate the impact of such bans. And, thirdly, the Department of Health and Human Services already clearly has legal authority to issue policy guidance requiring collection and reporting of data on race and ethnicity by recipients of federal funding.

Therefore, in the interest of reducing racial and ethnic health disparities and improving compliance with existing civil rights laws, we recommend that the Department of Health and Human Services immediately begin the process of creating policy guidance to require the collection of data necessary for civil rights enforcement. And when I wrote this, I realized that rarely do we see the word "immediately" with a large agency like the Department of Health and Human Services, but I am an optimist.

Efforts such as the initiative in California to limit the amount of information available for understanding health, education, employment, and housing only serve to inhibit our progress towards reaching our full potential. The issues of race, racism, and discrimination in America are no doubt extremely complex, and our understanding of them and our ability to work towards equality will not be accomplished by ignoring our problems. I want to thank you for the opportunity to be here and for this testimony.

Question-and-Answer Session

CHAIRPERSON BERRY: I want to thank the panel, and I'm going to recognize the commissioners for questions, but since none of you mentioned it, because we didn't ask you explicitly, I want to say that the Indian health situation, according to all the statistics, is probably worse by many measures than most people, the other people of color that you talked about, and I just wanted to throw that in the mix. Commissioner Braceras?

COMMISSIONER BRACERAS: I have a question really for any of the panelists who care to answer. I think Mr. Clegg said, if not in his presentation I believe in his paper, that the Racial Privacy Initiative would certainly be worth a try, and in some respects there is one part of the country where something similar has been tried, and that's Puerto Rico, where my family originally comes from. Until the Clinton administration, for a large period of time, Puerto Rico was the only part of America that was not required to check race on the census. And that has since changed, and I believe, certainly correct me if I'm wrong, I believe that when that changed over 80 percent of Puerto Ricans identified themselves as white, which I find extremely interesting since if anybody has ever been to Puerto Rico, that doesn't mesh with my reality.

But I'm wondering whether anybody knows—I don't know whether the state government of Puerto Rico collected racial data outside the census, but I'm wondering if anybody knows whether the lack of that collection was detrimental in any way to research or social programs or social analysis?

And the second part of the question would be given what seems to me to be a somewhat inaccurate self-reporting in the new census, what we sort of make of—some of you sort of addressed it in your presentations, but how reliable and accurate do we think this self-reporting is?

CHAIRPERSON BERRY: Who wants to answer? You can and then all of you can. Anybody who wants to.

MR. CLEGG: Well, I agree with the concerns raised by Commissioner Braceras, and I think there are questions that Professor Skerry talked about to some extent on the reliability of self-identification. And if you're asking somebody besides the individual to guess at the race or ethnicity of someone, that creates not only reliability problems but, again, if you try to address the reliability problems, then you're giving them a checklist of physical characteristics to look at in order to determine if somebody is this or that race or ethnicity, and that's a problem, too.

You mentioned Puerto Rico. I wasn't familiar with that example, but it is true that we're not writing on a completely blank slate here. For instance, I was interested to learn that France does not collect racial and ethnic data. They have a sad history of the abuse of that data, particularly during World War II, and so they've decided they just won't collect it. And, of course, we don't collect that information—Professor Skerry mentioned this also—for—religion, and I'm not aware of any criticism that the civil rights laws prohibiting—religious discrimination are therefore ineffective.

And it's interesting that the Employment Non-Discrimination Act, which would make it illegal to discriminate on the basis of sexual orientation, as a matter of federal law also includes in it a provision that expressly prohibits the EEOC from asking individuals about their sexual orientation. Now, I actually oppose the Employment Non-Discrimination Act, but the point I'm making is that even the people who support it clearly think that you can have an effective civil rights law in that area without requiring the collection of data, and indeed they would prohibit the collection of that data.

CHAIRPERSON BERRY: Dr. Skerry, you wanted to say something?

MR. SKERRY: Well, yes. I have to confess I don't have much light to shed on your question. I think it's a fascinating one, and I'm likely to run home and look into it. One issue it raises for me, as you framed it, is that it emphasizes, number one, that these data are self-identified, and I wouldn't gainsay your surprise at the outcome. But it's a social—apparently a social outcome, a social fact that has to be somehow reckoned with, whatever it means.

But it also underlines that the census is self-identified, but civil rights enforcement data is typically not self-identified. I didn't underline that in my testimony, and that's a difference I think the Commission would want to scrutinize. Typically, the civil rights enforcers much prefer, for reasons I have to confess I've never fully understood, although I haven't pursued it as much as I would have liked, prefer that the data be by observers, not self-reported. But that's a major difference you might want to consider and explore. But for your Puerto Rico example, I'm afraid I have—

COMMISSIONER BRACERAS: I mean I'm interested because for many years, you know, the people of Puerto Rico, through their leaders, expressed a desire not to have to divide themselves along racial lines. And certainly Puerto Rico is not without racial problems and the problems—

COMMISSIONER EDLEY: How would you know?

COMMISSIONER BRACERAS: I'm sorry.

COMMISSIONER EDLEY: I'm sorry, go ahead.

COMMISSIONER BRACERAS: What did you say?

COMMISSIONER EDLEY: Well, how would one know—

COMMISSIONER BRACERAS: Well—

COMMISSIONER EDLEY:—if you can't count?

COMMISSIONER BRACERAS: I know from personal experience.

COMMISSIONER EDLEY: Anecdote, right?

COMMISSIONER BRACERAS: Right, no, exactly. Right. And I think anybody who's lived in Puerto Rico or spent time in Puerto Rico knows that there are still biases, stereotypes, issues based on color. Even if most people there all consider themselves to be Latino, there are differences among people and inequalities that exist. But it is interesting to me that the people did feel that their racial situation would be exacerbated by having to comply with American notions of race, and I'm wondering whether people have any thoughts on that.

CHAIRPERSON BERRY: Marisa, did you want to comment on that? I saw a couple of hands.

MS. DEMEO: Yes, if I could. I'm familiar with Puerto Rico to the extent that I, myself, am Puerto Rican, my mother's from Puerto Rico, and I've been to Puerto Rico many, many times, aside from having relatives and friends that live there. I've done a little bit of research. The federal laws still apply in Puerto Rico, so for example, Title VII—

COMMISSIONER BRACERAS: Of course.

MS. DEMEO:—cases can be brought, even on the basis of race, even though it may not be collected. I'm not sure to what extent it's collected by local jurisdictions. And I would say, just without having looked at the research but just based on my past work in enforcing Title VII of the Civil Rights Act, there is a problem in Puerto Rico with racial discrimination. Puerto Ricans like to say that we don't have a racial problem—

COMMISSIONER BRACERAS: Right.

MS. DEMEO:—because when you look at the census data, 98 percent of the people who live on the island are Puerto Rican. And so it's Puerto Rican first and everything else doesn't matter. But in fact it turns out that people who are darker skinned Puerto Ricans actually feel that they are not treated as well, and so there are cases in this area of like treatment in hotels and that sort of thing.

COMMISSIONER BRACERAS: Oh, right, but I'm wondering whether you think the lack of data collection sort of hindered or helped or had no effect on prosecution of those?

MS. DEMEO: Well, actually, I think it hindered. I think, ultimately, it hindered the ability to move forward and address some of the racial disparities that do exist. And, ultimately, if there really isn't racial discrimination, then it's the very data that could show that it doesn't exist, and I think it has hindered at least the federal government's work. I can't really speak to the state—

COMMISSIONER BRACERAS: Right.

MS. DEMEO:—the commonwealth of Puerto Rico and its work.

And as to the second question, you know, how accurate is self-reporting, I guess, ultimately, people can put down whatever they do want to, but regardless of what you check off, people still respond to you based on what they perceive and what they see. So even if 60, 70, 80 percent of Puerto Ricans said they were white, if they have darker skin when they walk into a place, say, in the U.S., outside of Puerto Rico, just because they identify as white doesn't mean that they will be perceived as white.

COMMISSIONER BRACERAS: Right.

MS. DEMEO: So, ultimately, with civil rights enforcement, I think you want to give people the ability to express themselves however they identify, but you also want to address disparate treatment because of how other people see them. And it could be that they're perceived as black or Latino even though they see themselves as white.

CHAIRPERSON BERRY: I'm going to recognize Dr. Chapa to comment, but I'm glad you said that, Ms. Demeo, because I was about to privilege personally the Puerto Rican experience and talk about my friend, Dr. Antonia Pantoja, who is the godmother of everything education in Puerto Rico and who founded Aspira, and with whom I have had numerous conversations about this subject, and I've been to Puerto Rico with her. And she said pretty much what somebody up there said, it's not what you count, it's what you see, as Toni says. But I'm glad you commented on it. It's a very interesting question. Dr. Chapa.

MR. CHAPA: Well, as I say, most of my points have already been addressed, so I'm happy to move on if that's okay with you.

CHAIRPERSON BERRY: Move on, okay. Which of you had your hand up first? Yes, Dr. Thernstrom.

COMMISSIONER THERNSTROM: Well, just a couple of things. I want to say, first, that I was the one who suggested that Roger Clegg come here, and I did it for a very specific reason: I believe in robust debate on civil rights issues, and I am personally opposed to the Racial Privacy Initiative, but I wanted the other side heard. I wanted the argument on the other side heard since I believe always in airing a diversity of views.

Two, the core of my view was really stated by Peter Skerry, and I think the alternative to the collection of data is rumor, it's funny numbers, policies built on inaccurate information, overheated rhetoric, and so forth. And I actually think that this Commission's experience of the whole question of spoiled ballots in Florida is a perfect example, because of course there is no racial identity on ballots and nobody says coming out in an exit poll, "I spoiled my ballot." And so there were a lot of, with fancy statistical methods that differed, a lot of guesses at exactly what the percentage of spoiled ballots were, and of course great differences of viewpoint. And at the end of the day we need

hard data in dealing with civil rights issues, and that was a perfect example of the pitfall of not having it.

Third, and this leads to my question, I'm bewildered by both the briefing, the Commission's briefing that we got and by some of the testimony by the statements that there will be a cost in terms of educational policy. No Child Left Behind, the recently passed revision of the Elementary and Secondary Education Act, does force the disaggregation of all testing data, and testing is mandatory, yearly testing of grades three through eight, by race and ethnicity. And it is also mandatory that states build public policies upon that racial and ethnic data in an effort to close the appalling racial and ethnic gap in academic achievement.

So that we have a federal law now that means there is no way for any initiative, such as the Racial Privacy Initiative, to refuse to collect educational data and in fact to build policies in response to that data. And there's something puzzling about statements that implied in general that RPI could override federal mandates. And I'm not sure why people talked about education at all when that issue is closed and why there was some implication that a state initiative can trump federal law.

CHAIRPERSON BERRY: Marisa?

MS. DEMEO: You're absolutely right that the No Child Left Behind Act does require disaggregation specifically with regard to test results. However, the reason why we raise education as an issue that could be affected by RPI is because there's a number of areas of data that the state of California currently collects that would not be required under federal laws. In the written testimony that I submitted, we talk about some of the different areas that the state Department of Education collects, such as scores on SAT, ACT, AP, Stanford 9 scores, API rankings and incentive awards, eligibility for underperforming school grants, enrollment, graduates, and dropouts, English language learners, staffing, projected teacher hires.

Also, the California Post-Secondary Education Commission, created in 1974, is charged with collecting data on education, including cross-referencing it with race and ethnic data. Included in the type that they collect, which we believe is not required under federal law are: California's high school graduates and first-time freshmen, college-going rates, disposition of applications for admission by first-time freshmen, community college transfers to the University of California and the California State University, enrollment in graduate programs, faculty composition, just to give one example of what these data show that we believe would not be evident if the RPI was put into effect.

Right now, high school students that are eligible for California colleges number 2 percent of Latino students. This is because only 2 percent of Latino students have taken the types of courses that they would need in order to be eligible to attend college at the state schools. It's that type of data that we believe organizations like mine need in order to educate our community about what courses they need to take in order to be eligible and also, to the extent that there's a reason that is somehow a disparate access to resources at

the high school level, it would be something that we would need to address from a civil rights perspective.

COMMISSIONER THERNSTROM: Well, I think some of the things you have named, in fact, No Child Left Behind, will force the collection of, but let me just say, just as a flat statement, look, I'm a social scientist as Peter Skerry is. The last book I wrote had 70 tables in it based on racial methods data. I'm about to come out—well, I'm about to finish another one with a lot of data, and so I'm on board on collecting this data. But, anyway—

CHAIRPERSON BERRY: Mr. Clegg is next.

MR. CLEGG: Well, I just wanted to indicate that RPI itself has a provision in it—section (1)—that says that if there's federal law to the contrary or eligibility for federal programs at state, then RPI is not to the contrary. And, of course, even if it didn't, the Constitution makes clear that federal law trumps state law. I think that some of the things that—

CHAIRPERSON BERRY: Not always.

MR. CLEGG: Always.

CHAIRPERSON BERRY: Not always.

MR. CLEGG: I'm sorry?

CHAIRPERSON BERRY: Not always.

MR. CLEGG: Well, the—

CHAIRPERSON BERRY: Depends on what it is.

MR. CLEGG: No. If there is a federal law—

COMMISSIONER EDLEY: Then there's debate about whether it's explicit, whether it's implied, whether it's—

CHAIRPERSON BERRY: That's right, that's right. Well, let's not have a seminar. It's okay.

MR. CLEGG: Ms. Demeo mentioned a number of things that the No Child Left Behind law may not address, but some of them are addressed by other federal laws. For instance, she mentioned faculty composition. Well, that's going to be covered by the federal employment laws. I talked with somebody prior to this hearing at the EEOC, and they said that, yes, indeed the EEOC does require employers of a certain size, including state employers, to supply racial and ethnic data.

So, one question that's raised is that, all right, we have the federal government collecting all this: Does everybody else have to collect it also? And if there is no need—or if there's diminished need, at least—for asking these questions, to using these silly little boxes, then I think at some point if you're doing a cost-benefit analysis, you've got to say, no, the benefit that we're getting from having the 100th person ask this question is not outweighed by the cost.

CHAIRPERSON BERRY: Mr. Kirsanow?

COMMISSIONER KIRSANOW: To a large extent, my question was answered by both Ms. Demeo and to some extent Mr. Clegg. But I've got a general question and a specific one I'd like to direct to Mr. Liu. Originally, when I came to this, looking through the exemptions it appeared as if this RPI may be nothing more than something symbolic, because you could drive a truck through many of the exemptions. You've got the supremacy clause, for example, you've got the data that's to be collected by the Fair Employment Housing Department, which is extraordinarily broad in California, and at least seven other major exemptions, including a catch-all that deals with compelling governmental interests, query whether the state legislature and the government would agree upon what that is by a two-thirds vote.

But what does the panel think in terms of the ultimate impact on the collection of data, given all these exemptions? And, specifically, to Mr. Liu, with respect to medical data, you know there is an exemption with respect to medical research, and it seems to me that there may be other exemptions that may also incorporate some of that data. I don't know if the supremacy clause will incorporate federal programs, for example. I know that there are certain medical data that are collected pursuant to statute. What data would not be collected under RPI, if you know?

MR. LIU: I'm glad you asked that. I was waiting for someone to ask that, actually. That's a great question. In terms of health, there is an exemption for medical research subjects and patients. Now, based on our analysis, it really does depend on how you define those terms. We've done sort of a search of California statutes, looking for definitions of these terms. It's not clear what they mean. It could be very narrowly defined, it could be very broadly defined. Most people in health, when you say a medical research subject, people think of a clinical trial. And the number of people that are in clinical trials is so, so small that it's negligible, essentially.

Essentially, the majority of the data that's used for public health purposes is population-level data. It's data that's collected by health departments, it's data that's collected by academic institutions, it's data that's collected by research institutions, not data that's collected in hospitals or in doctors' offices, which is what I think the exemption would probably provide for.

So, in essence, in the realm of the data that's used in public health, only a small fraction of it comes from those sources. And the rest of that would be impacted by the initiative. Let me give you one example. There's a nationwide survey that's collected locally by

local school districts, called the Youth Risk Behavior Survey, the YRBS. It's coordinated through the CDC, the Centers for Disease Control, but it's actually collected and funded locally and by states.

In California, in San Diego, the study actually looks at issues of teen suicide, domestic violence, smoking rates, rates of risky sexual behavior. All of these things are included in the survey. And this kind of data would be lost and the ability to address those issues. In San Diego, we found that Filipino girls have the highest rate of suicidal thoughts of any group. And through this program there's a local community that's mobilized and addressed this issue by designing a program to effectively outreach to those girls.

COMMISSIONER KIRSANOW: Just a follow-up question: Has anyone given any thought to what extent the supremacy clause or any other provision, any other exemption federal provisions such as Executive Order 11246 and data collected by OFCCP would be involved in the exemption under RPI? Anybody?

MR. CLEGG: My understanding is that the supremacy clause says that the federal law is the law of the land, and executives order are and regulations and statutes and the federal Constitution are all federal laws. And so if you had one of those that required data collection, that would trump a state law to the contrary. Now, if you had a situation where it's possible to comply with both, then of course you have to comply with both. But if there's an inconsistency, then the federal law prevails.

COMMISSIONER EDLEY: Yes. I think we just have a disagreement over—I mean, obviously, it's the supremacy clause but in terms of—I mean I guess I would disagree with you on the executive order problem, which is an order to administrative agencies about who can or cannot get federal contracts, essentially. And at least my reading of it would be that firms in California that want to do business with the federal—that want to do business with the federal government—

[Vice Chair Reynoso presiding.]

VICE CHAIRPERSON REYNOSO: You're recorded twice.

COMMISSIONER EDLEY: Thank you—that want to do business with the federal government, I don't understand how they would go about doing it. In other words, there's no federal statute that requires, as a matter of law, that the Ajax Construction Company collect data on its—collect data if it wants to do—aside from what—to comply with 11246.

MR. CLEGG: Well, but you do have—

COMMISSIONER EDLEY: I mean there's the EEOC requirements.

MR. CLEGG: And you have federal statutes, including federal civil rights statutes, that give the Department of Labor and the EEOC authority to promulgate regulations, and those regulations—

COMMISSIONER EDLEY: That I agree with.

MR. CLEGG:—require data collection. And executive orders. Again, even if you didn't have these federal statutes and regulations, if you have an executive order, that's a federal law.

COMMISSIONER KIRSANOW: Just to—

VICE CHAIRPERSON REYNOSO: Further questions?

COMMISSIONER KIRSANOW: Sorry. Thank you. With the exemption, I tend to agree with your assessment that under 11246 that type of data wouldn't be collected except for there's another provision—I'm trying to find it—in the exemptions dealing with data necessary to comply with or to maintain eligibility under federal programs.

COMMISSIONER EDLEY: That's true, you're right.

COMMISSIONER KIRSANOW: And that might implicate that.

COMMISSIONER EDLEY: I agree with that.

COMMISSIONER KIRSANOW: But then that goes to my next question of the OFCCP data, which what they collect I'm not sure necessarily goes—well, I don't want to burden anybody with these technical requirements. I guess the general consensus among everyone is that the gathering is less important than the use to which that data are put.

MR. CLEGG: I actually don't agree with that. I think that they're both important. There are no benefits from gathering the data, that may be true. But I think that there are problems that arise from the very process of data collection, as well as problems with the data being misused. And the example that I gave is, for instance, that it may require the data collector to put his or her thumb on the scale, because they want to make sure that there's a particular outcome.

If a policeman, in the example I gave of racial profiling, is supposed to collect data on the people that he stops, and if he's already stopped several African Americans on a particular evening, then it may push him not to stop any more African Americans or to stop some non-African Americans whom otherwise he wouldn't have stopped. And it's interesting—I didn't hear this myself, but I understand—that the D.C. chief of police, who happens to be an African American, made that point and said that this is why he opposes a requirement that the police be required to keep track of the race or ethnicity of the people that they stop.

Same thing in the employment area. If a personnel manager knows that she's going to be graded on how well she "celebrates diversity," and she knows that she's already hired several Latina women, then for the next person that she's hires she's going to be a little reluctant to hire another Latina woman, because she knows that at some point she's going to be opening herself up to getting a bad evaluation because she is insufficiently "celebrating diversity."

VICE CHAIRPERSON REYNOSO: On this question still? Okay. A couple of comments, then we have a question over here. Let's see, I'll go from my right to your left.

MR. CHAPA: Yes. I think, real briefly, the main effect of the Racial Privacy Initiative would be just to encourage nonresponse when data are collected. At least in the public schools, I do think the collection of data is a trivial occasion. It happens once typically when a student enrolls. It would be interesting to study the 20 percent of the schools where the administrators or teachers do the identification. It would be interesting to look at those. But, still, generally, it's not a big deal. Like in California what the Racial Privacy Initiative will do is increase the nonresponse rate, particularly by whites, Anglos we call in Texas, and maybe Asians. But probably the minority response rate would stay generally.

VICE CHAIRPERSON REYNOSO: Mr. Skerry?

MR. SKERRY: Yes. My point would be, in essence, building on what Professor Chapa just said. I think Roger Clegg's analysis is an appropriate one in the sense that he's getting at this distinction between self-identification and observer identification. Unfortunately, that fine-grained analysis is not built into the Racial Privacy Initiative.

VICE CHAIRPERSON REYNOSO: Yes, Mr. Liu?

MR. LIU: I wanted to address the exemption that the commissioner raised. I'm not a lawyer, I have to confess, but in reading the exemption for federal funding, that if there's federal funding tied to it, then to say it's okay I think is a little bit beyond what the legislation would do. It would require that the data element of race actually be included, and if the data were not included, that that federal funding would be withdrawn, as I understand it. So if Ajax Construction or whatever organization, whatever federal recipient, were to provide all the information minus the race field, does that mean that they wouldn't get the federal funds? And I think that's a question that's up in the air.

VICE CHAIRPERSON REYNOSO: Ms. Demeo?

MS. DEMEO: Yes, just to address the gathering versus use question. I guess my general point was that I think there is a broad consensus about the importance of gathering. I think the debate has been most heated in the use of the data. So when you're talking about the RPI, it's really about the collection and classification which for a variety of reasons, I think, you'll find a large consensus as to why that's needed.

In terms of the example that Mr. Clegg gives in the employment context, if someone is somehow feeling pressure to select against a Latino applicant simply because they have a significant number of Latinos on staff, and they do that in a racial or ethnic way as one of the motivating factors, then there are federal discrimination laws that in that specific example that the person, if they're a Latino, could file a case under the federal laws.

The one point that hasn't really been raised is the limited resources that the federal government actually has to enforce federal antidiscrimination laws. I worked in the Department of Justice in the Civil Rights Division in the employment area. We were charged with enforcing the Title VII provision against state and local employers throughout the country, and we had a staff of about 22 attorneys litigating. Even if you assigned each person to a state, we would not even have enough attorneys to cover all the states. And so one of the importances of state laws and state agencies is that they're able to address discrimination. It may be covered under the federal law, but they're able to use those resources at the state level to help end the discrimination that may be occurring.

And I think when you look at the provisions regarding the state agency in California, the DFEH, one of the troubling provisions for us is that after a decade they would no longer be able to classify or collect such data. Essentially, an individual would come, allege racial discrimination, and they would not be able to write down what that person's race is or investigate what the race is of anyone else who they would be compared to—so effectively eliminating the efficacy of the state antidiscrimination laws.

VICE CHAIRPERSON REYNOSO: Commissioner Edley I think had the next question, then Commissioner Thernstrom.

COMMISSIONER EDLEY: I have three, yes. I have three comments. The first is that I don't think that the supremacy clause issue is as simple as some of this discussion would suggest. In particular, at least my reading of recent Supreme Court jurisprudence, whether you look at commerce clause cases, whether you look at preemption cases, whether you look at 10th Amendment cases, whether you look at standing cases, I mean over and over again I think we see lots of suggestions of a growing reluctance to allow federal authority to shape the activities of state and local governments.

And it seems to me that even in supremacy clause jurisdiction the willingness of the courts to support an argument that a federal statute that is vague, a federal regulation that is not specifically required by a statute, an executive order and the like would be read to trump a state statute or state constitution. I just would not be optimistic over the long run about the effectiveness of preemption arguments in the supremacy clause arguments.

I think relatedly, it is not—I think to some extent we miss the important discussion here if we parse too closely the specifics of this initiative in California, because the broader question is, what's the trend? Only I think two weeks ago, word leaked out at the U.S. Department of Education about dismantling or at least substantially modifying what had been a biannual Office for Civil Rights survey of all school districts to eliminate the survey all together or to sharply curtail the number of data elements that are there.

Just yesterday, my wife was at a luncheon getting an award for something or other, and one of the speakers at the luncheon was the current head of the Minority Business Development Agency in the Commerce Department, who said, “We don’t talk anymore about the digital divide.” We talk about the need to get everybody in America plugged in, which is cute and it’s spin and it’s packaging, but I think there definitely is a general trend to try to stop talking about race and to try to stop talking about disparities.

And I think that the Racial Privacy Initiative has to be seen not just as a particular statute, proposed statute with a lot of particulars, but as part of a growing trend which is that the less we talk about it, the less we try to do to document the nature of the problems, the extent of the problems, then the less important issues of racial justice will be in the public agenda. And that, to this group of folks, is a good thing, let’s stop talking about it.

Second point I want to make is that I think that Mr. Clegg is certainly right that there are certainly circumstances in which when you request or require that somebody collect data about race, it’s going to make them more race conscious. Well, I think the problem is—and I agree also that that’s not costless, so I don’t reject out of hand his notion that there’s a cost-benefit framework that one could consider.

The problem is that in many circumstances, including, for example, allegations of racial profiling by law enforcement, the heart of the problem is that unconscious decisionmaking produces discrimination. And the only way to get away from unconscious actions that produce discrimination is to get people to be conscious about their behavior.

There is a therapeutic benefit, if you will, a treatment benefit to be had by asking people to be race conscious in circumstances and which are exactly our concern is that unconscious behavior is illegal or at least undesirable. So I’m willing to pay the cost in order to achieve the benefit in those circumstances, when we’ve got every reason to believe there’s a problem that has to be dealt with.

Now, you may disagree as to whether or not there’s a problem. Then fine, let’s say I don’t want to collect the data because I don’t want to find out if there’s a problem or because I don’t believe there’s a problem. That’s a different argument.

Third point, and then I’ll try to subside. I still remember quite clearly being struck by a trip to Brazil about two years ago as part of a Ford Foundation study on race relations—comparative race relations in the U.S., Brazil, and South Africa. And the stunning thing to me about Brazil was the testimony that we heard from people in Brazil about the ideology, the longstanding ideology since the 1880s in Brazil of denying the existence of salient racial categories. “There’s no such thing as being black or being white. We’re all Brazilians.” And this has been the reigning—this is the so-called myth of the nonracial democracy in Brazil.

And it just happens, curiously, that if you watch television, that all the people sitting around the pool are white—very fair skinned, excuse me. And all the people serving them

drinks have very dark skin. It just so happens that all the people living in the slum favellas surrounding Rio have very dark skin and the people living in the penthouses have very fair skin. But there's no racial issue in Brazil because, "We're all Brazilians."

It was the president of Brazil with a doctorate in sociology who said, "This is nonsense. We can't pretend that there's no racial problem by simply refusing to collect data, by refusing to say that these are the social realities." To those of us from the U.S., or to most of us from the U.S. and from South Africa looking at Brazil, the refusal to collect data was part of, if you will, a longstanding conspiracy to deny the reality of race in that society, to hide the truth as best they could.

And, frankly, it struck me as racist, the big lie, "Let's deny that the problem exists. That way we don't have to do anything about the problem." So since it's been about two hours, I think, since we've had any ad homonym attacks on anybody, I just want to say that there is a very serious suspicion in my mind that a substantial part of the movement, such as it is, to stop collecting data is a racistly motivated big lie. "Let's stop collecting data so that we don't have any effort to really understand the problems, and that way we won't have to deal with the problems."

It is part of an agenda, I think, as well, of trying to undermine civil rights enforcement by people who disagree with the current interpretation of the civil rights laws, who disagree that disparate impact doctrine is important, who disagree that there are problems of racial profiling by police enforcement. "Let's not collect the data so we can't try to do anything about the problems." And that to me, apart from the importance of supporting social science investigation, I think the ugly truth is that at least some of the motivation for this has a very unfortunate side to it.

MR. CLEGG: I have to say that that accusation is irresponsible and false.

VICE CHAIRPERSON REYNOSO: After that series of questions, I think that Commissioner Thernstrom was next, then the Chair.

CHAIRPERSON BERRY: I have questions.

COMMISSIONER EDLEY: I hope I'm wrong, but, you know.

COMMISSIONER THERNSTROM: Yes. I mean, Chris, I do think that was, talking about racist motivation, unfair, ugly. This is a very complicated and serious issue, and people of very good will on both sides are trying to explore it. And I don't know anybody who thinks that there's no problem of racism in America, no problem of racial inequality. I mean the argument is over whether you heighten race consciousness, perpetuate categories that have been inherited from 19th century social science, whether that harm—racist social science—outweighs the benefits, and I do think that there should be a lot of respect for both sides of this argument, even though I have come down on your side of the fence in this debate. I also think that Americans talk about race, we talk about it obsessively, and I don't see it dying out.

The issue about the supremacy clause is a serious one, because if Roger Clegg is right on it, then the Racial Privacy Initiative amounts, basically, to grandstanding. It's not going to have much of an impact or it's going to have marginal impact. I mean it is an extremely interesting question.

Finally, I would bet my house on the RPI not being on the ballot in November in 2002, so I think this is an interesting seminar, but the fact is I don't think we're about to have—

COMMISSIONER EDLEY: Can I just—just a brief comment. On your second point—

COMMISSIONER THERNSTROM: Yes.

COMMISSIONER EDLEY: I mean just to disagree on the first point as to how substantial this issue of subtle racism is and the motivations on either side, so we can just disagree on that. But on your second point, it is that—I guess I'm arguing that even if he's right about the supremacy clause, which I have some reservations about, to the extent that this movement picks up steam and there's an effort at the federal level as well to cut back on data collection, to modify, relax, repeal regulations that currently require data collection, then the supremacy clause wouldn't be available to trump initiatives like the RPI.

COMMISSIONER THERNSTROM: Well, let's cross that bridge when we get to it.

VICE CHAIRPERSON REYNOSO: I have three hands. I think you had the first one, then second, then third.

CHAIRPERSON BERRY: I have a question, but I have a brief comment beforehand, and that is that my experience in Brazil and all over Latin America is similar to yours. However, when people are asked, a lot of black people try to say they're white because they know being white is a good thing, and if they can get away with it—there was a big issue of *La Raca*, I guess that's how you pronounce it, the race magazine in Brazil, in which they were interviewing people who were talking about that. And there's this thing all over the Caribbean for a long time about how you whiten your skin if you can and whatever. And in every Mexican American family, some of the Puerto Rican families that I know about, the little brown ones are always identified that way. But, anyway, that was just a point I wanted to make.

The question I have to ask, Dr. Chapa mentioned, I think he said—oh, and I also want to reference Marisa's earlier intervention in which she explained what consequences the Racial Privacy Initiative would have for the collection of data in California. I don't want to repeat it, but I'm just saying that's in there. Dr. Chapa said something about 2.4 percent, if I got that right—

MR. CHAPA: Right.

CHAIRPERSON BERRY:—of people checked off multiraciality. Is that what you said?

MR. CHAPA: Two or more races in the 2000 census.

CHAIRPERSON BERRY: Two point four?

MR. CHAPA: Percent, yes.

CHAIRPERSON BERRY: Now, I would like to ask anyone there, do you have any idea why only 2.4 percent of the people checked that off? And why didn't, if there's this great trend toward everybody being multiracial—for example, in my own case, as in the case of many African Americans, I could have checked off Indian if I had wanted to, because I'm Caucasian, black, and Indian, to my knowledge, to my personal knowledge.

COMMISSIONER EDLEY: So am I.

CHAIRPERSON BERRY: And so are you. So we could have checked that if we wanted to. But I didn't, so why was it only 2.4 if anybody has a clue, if people are so puzzled about what race they are and does it make any difference and whatever?

MR. CHAPA: Well, I think, again, based on—I have the census right here. I'd be happy to forward it to you. In looking at it closely, as part of the Racial and Ethnic Advisory Committee, basically, the current categories work for most of the people. Like, for example, your own example, Madam Chairman, that, okay, you could identify, presumably—I mean you could have identified as anything, but you were happy with whatever choice you've made, and I think that's true—the whole multiracial experiment, the push for a multiracial category just didn't work.

In fact, one of the most outspoken proponents for a multiracial category in the census wanted a box that said people identify, "I'm multiracial," not the specific combination, but that was one of the many tests for the census. Basically, it was a flop; it just did not work for people identified as being multiracial. They would identify as a mixture of two or more races when they felt like it, basically.

CHAIRPERSON BERRY: But, Dr. Chapa, doesn't it—and this is just a brief follow-up—wouldn't it make sense then, or for anybody there, that we would stop collecting such data when the day comes that large numbers of people, huge numbers, checked off either multiracial or nothing? In other words, if people felt that there were no consequences and didn't feel themselves to be of any race and no results, wouldn't it make more sense to do it then than to try to do it—I don't know.

MR. CHAPA: I think so. I think that kind of in response to Mr. Clegg's comments or the written comment, when race doesn't matter we wouldn't collect it. It would kind of wither away by itself. I think in terms of why so many multiracial people now from all the anecdotes, ethnographic data, the people for whom it's a current issue are basically the children of multiracial parents. That is black/white typically—black/white or some other mixed-race parentage, their child they have a census form, and there's many cases where people say, "My child is—I don't want to say black, I don't want to say white,

she's both or, again, any other combination of races." And as the mixed-race parentage becomes a mixed-race ancestry, people feel the identity less strongly.

VICE CHAIRPERSON REYNOSO: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Thank you. Very quick question to Ms. Demeo again. You indicated earlier that the provision of the exemption with respect to DFEH expires after 10 years and there's a concern that certain data may not be collected by officers who were charged with, for example, taking affidavits of racial discrimination or sexual discrimination or any of the other protected classes. At first blush, when I look at Exemption G, pertaining to law enforcement officers, I think of policemen. Do you think the definition of law enforcement officers might incorporate those individuals who are, for example, stationed at the local or state civil rights enforcement commissions?

MS. DEMEO: Well, you know, I guess in terms of—I haven't seen how the drafters have interpreted law enforcement officers. I don't know—I don't think they actually define it within the context of the proposed initiative. But I will say just, you know, based on working on both criminal and civil laws and their enforcement, that generally it's sort of publicly recognized that when people say law enforcement officers they tend to mean criminal law enforcement officers. So I think just based on common usage, it would be, my guess is, unlikely that even though they are enforcing laws in the DFEH that it would be unlikely that that provision would ultimately be interpreted as somehow overriding the DFEH's requirement that they not collect the data after a decade.

VICE CHAIRPERSON REYNOSO: I'm sorry, could I add that in California who's designated as a law enforcement officer, a police officer, becomes very important for many other elements of the law, including retirement and all that sort of thing. So it's very specific who's actually a peace officer, a law enforcement officer. And the folk in this agency happen not to be within that designation.

COMMISSIONER EDLEY: Thank you, Judge.

[Laughter.]

VICE CHAIRPERSON REYNOSO: I'm sorry.

COMMISSIONER BRACERAS: I have some comments and a suggestion, actually, but I think in fairness to the witnesses that we should let them go, because my main comment is geared more towards where we go from here on this issue and—

VICE CHAIRPERSON REYNOSO: Oh, it doesn't relate to this. Well, let's see if there are any other questions for the panel, then we'll take up on your concern. Professor Skerry?

MR. SKERRY: Well, I don't know if it's appropriate but I was wondering if I might try to respond to Commissioner Edley's—

COMMISSIONER EDLEY: Tirade?

VICE CHAIRPERSON REYNOSO: By all means. By all means. To his three questions.

[Laughter.]

MR. SKERRY: As to the sources of this movement to do away with racial and ethnic data gathering, I think in all fairness it's important to point out that one reason why there's an element in American society today that wants to do this, to get rid of the messenger, as it were, is that there has been a decided tendency, it seems to me, among other segments of American society, to equate disparate outcomes or to explain disparate outcomes as straightforwardly the result of racial discrimination.

Ms. Demeo very carefully made that distinction in her remarks, that it doesn't necessarily imply causality or any such thing, but I noticed around the table this morning, there were several occasions when in fact that kind of logic was relied upon. It's just in the air. I mean it's in newspaper accounts. It's become one way of interpreting these. So to that extent, it's not surprising that you get this reaction, and I don't think that's necessarily racist, but it's an objection to that kind of logic.

And that's one reason why I argue for what I call realism in the use of these numbers. I think they get misused by lots of different folks and overinterpreted by lots of different folks. And I think they're important as guides to public policy, but I think we have to be mindful that they're flawed data, that there's lots of noise in the system, and we shouldn't overinterpret them in any direction.

VICE CHAIRPERSON REYNOSO: Mr. Clegg?

MR. CLEGG: I just want to second that and point out that, for instance, Professor Edley's colleague at Harvard, Orlando Patterson—who is a sociologist and so he probably likes to collect the data also—but is someone else who has written very eloquently about the poisonousness of looking at every disparity through a racial lens. Whenever we look at illegitimacy rates or academic performance rates or whatever, we immediately say, "Oh, well, let's see what this looks like in terms of race." This is very bad, this is a bad thing for race relations, and we've got to get beyond that.

And I think that Professor Skerry is right, that, on the one hand, you have a lot of individuals who think that racial and ethnic counting is a good thing and who think that preferences and proportional representation in all different fields is a good thing. They think that racial identification is a good thing and that the government ought to be actively involved in this and prosecuting private actors that don't want to play along. And if you're in favor of that, then of course you're also in favor of those agencies collecting lots and lots of racial and ethnic data. The agencies have to do that in order to do what these folks want them to do.

On the other hand, if you think that we ought to be getting beyond race in the United States, if you think that it's a mistake to try to analyze every social problem through the prism of race, then getting the government out of the business of asking people what their racial and ethnic background is and putting them in this little boxes starts to make a lot of sense.

VICE CHAIRPERSON REYNOSO: The Chair and then Commissioner Edley.

CHAIRPERSON BERRY: I think that the presumption or the criticism that people who point to disparities based on race and see them as signposts that something should be done or an analysis should take place, these sort of statements or impression that they somehow are being racist and are wanting to conclude that racism has caused the problem is so out of joint. We've heard it so many times on this Commission over the years, "You folks are for equal results and you look at the numbers and you think there are disparities," but given the history of this country, which I'm not sure how many people know based on the survey that came out about what school kids know, but given the history of this country, there's no way you cannot immediately, when you look at what has happened to some of the newer immigrant groups, Latinos, etc., Asian Americans, some Asian Americans, groups of them, and to look at African Americans, given our history and to say that when you see perpetuation of disparities on certain subject, like the amount of assets people own or whether they can get credit or whether this or that or the other thing, that you should not say that sort of presumes that I ought to look at this more carefully and see if race has anything to do with it. I mean it would be absolutely stupid if you didn't.

And then to reach from there when we say things like that, and that's what Commissioner Edley said, he didn't say that he concluded that there was somehow—that to look at race and to think until the disparities are gone that you always should check and that it may be a symptom, I think that that's absolutely fair, and I don't think it's racist at all.

MR. CLEGG: Well, I don't think anybody said that that was racist.

COMMISSIONER EDLEY: I certainly didn't.

MR. CLEGG: And I wouldn't say that. What I'm saying is that it's bad public policy. I'm saying that it's—

COMMISSIONER EDLEY: Counterproductive.

MR. CLEGG:—a bad instinct, and I'm also saying that it's counterproductive. But at some point immediately looking at the racial bottom line and focusing on it and obsessing with it starts to hinder improved race relations more than help them.

VICE CHAIRPERSON REYNOSO: Yes. I think the Chair wanted to comment. Then Professor Skerry.

CHAIRPERSON BERRY: Obsessing, obsessing, obsessing.

MR. CLEGG: Right, that's the word.

CHAIRPERSON BERRY: Do our good friends in the Jewish community obsess on the Holocaust?

MR. CLEGG: I don't think that—

CHAIRPERSON BERRY: Okay. Do we obsess on the savagery that has been perpetuated against American Indians?

MR. CLEGG: That is—

CHAIRPERSON BERRY: Do we obsess—

MR. CLEGG:—not—

CHAIRPERSON BERRY: When we—every time—

MR. CLEGG: That is not 2002 America.

CHAIRPERSON BERRY: When we mention the history of slavery and Jim Crow and racism in this country—

MR. CLEGG: That is not 2002 America.

CHAIRPERSON BERRY:—still continuing today, is that obsessing when we point out the fact that African Americans today have more difficulty getting loans—

COMMISSIONER BRACERAS: I have a point of order here.

CHAIRPERSON BERRY:—and getting mortgage loans, insurance? The data are all there.

COMMISSIONER BRACERAS: I have a point of order.

CHAIRPERSON BERRY: The disparities in health care—

VICE CHAIRPERSON REYNOSO: I will recognize you.

CHAIRPERSON BERRY: That we are obsessing about race?

MR. CLEGG: I think the mortgage and health care data are very controversial.

CHAIRPERSON BERRY: I'm finished.

COMMISSIONER BRACERAS: May I please make my point of order?

CHAIRPERSON BERRY: I'm finished, I'm finished.

COMMISSIONER BRACERAS: Okay?

VICE CHAIRPERSON REYNOSO: May I make the comment—

COMMISSIONER BRACERAS: No, please may I make my point of order, which I think takes precedence?

VICE CHAIRPERSON REYNOSO: I'm going to make a comment, whether you like it or not. My comment is that the point of order should be recognized when a sentence is finished. Since the sentence is now finished, I will now recognize you, and I wish that you would abide by that ruling of the Chair. What is your point of order?

COMMISSIONER BRACERAS: My point of order here is that it seems like we have a group of people where everyone wants to have the last word, and I think that the points have been made, the issue is one that impacts far-reaching areas of civil rights law beyond just the narrow question of racial privacy, and I'm sure we could all make—give tirades and statements and monologues about each of those areas. But I'd like to bring this hearing to a close, dismiss the witnesses and thank them for being here and make a proposal to this Commission about the specific issue at hand.

VICE CHAIRPERSON REYNOSO: Thank you for your point of order. I will recognize a response by Professor Skerry to a question raised earlier by the Chair, and I'll recognize a question—underlying question, thank you very much, Commissioner, by Commissioner Edley. Yes, sir?

MR. SKERRY: Yes. Thank you, Judge Reynoso. I want to agree and disagree with Chairperson Berry. Disagree in the sense that if you construed my observation or my remarks so as to argue that it is racist to regard disparate outcomes as the result simply of racial discrimination, I didn't use that language. I don't think it's necessarily racist. I think it's just unfortunate. It can be racist, but that's not my concern. I think it's just an unfortunate tendency, not simply in public policy but in public discourse today.

And more specifically, I think the problem isn't here. I agree with you, I think. If that's the beginning of an analysis, then, yes, that's why I would argue that gathering such data is important. But too often in my experience it's not the beginning of the analysis, it's the end of the analysis. And here I speak especially in terms of the broader public discourse of how these things get thought about in the media and unfortunately sometimes in the academy, where it's a more difficult problem, because they are supposedly engaged in analysis. But to that extent, I agree with you. It should spark and initiate serious investigation.

COMMISSIONER THERNSTROM: Nobody disagrees with that.

VICE CHAIRPERSON REYNOSO: I'm sorry. Could you address the Chair, please? Are there further questions? Yes, ma'am? I'll recognize.

COMMISSIONER THERNSTROM: There's nobody who disagrees with that. You look at the numbers, you say—you know, you ask yourself is there something further to explore here? I mean the numbers are a trigger for the other questions. Everybody agrees on that.

VICE CHAIRPERSON REYNOSO: Good. If there are no further questions—

COMMISSIONER EDLEY: I'm sorry.

VICE CHAIRPERSON REYNOSO: Question?

COMMISSIONER EDLEY: Yes.

COMMISSIONER BRACERAS: More tirades?

VICE CHAIRPERSON REYNOSO: I was very specific that I would recognize a commissioner for a question. I hope that, Commissioner, you listened to me. Please proceed.

COMMISSIONER EDLEY: I think that it is—in virtually every—

VICE CHAIRPERSON REYNOSO: I'm sorry. I'll declare you out of order if you're not asking a question.

COMMISSIONER EDLEY: Would you agree that in almost every disparity that we recognize, I think there is—I can't think of any for which this is not true—there is probably a complex mixture, a mixture of discrimination and many other factors at stake? I mean if you take health disparities, for example, disparities in health outcomes, health status. Current, that is to say very recent, discrimination against individuals may account for a very small element of the disparities we observe. But on the other hand, it's also the case that a lot of the disparities we observe represent, in some sense, the legacy of color line, of a couple of hundred years in which various kinds of social and economic opportunities have been rationed, in part, based upon color.

And let me just say that I think from my point, the importance of all of this for civil rights enforcement is while there at the end of the day may not be as important as collecting the data just so that we understand what's going on in society so that you can then mobilize whatever private and public policies are appropriate to deal with it. Some of those things may have to do with combating discrimination, but a lot of them won't have to do with it.

The situation of the Filipino young women having suicidal ideation, maybe there's something having to do with discrimination that's at issue there, maybe there's discrimination in the allocation of community mental health resources or something, but

that aside, it seems to me it cries out for some kind of action that wouldn't be triggered unless the data were available.

So to the extent that you're right, Professor Skerry, about this getting confounded with issues of discrimination, I think that we do have a duty to try to untangle it, but I hope that the difficulty in untangling it would not be accepted by anybody as a rationale for refusing to develop and examine the data.

VICE CHAIRPERSON REYNOSO: Comment? Professor Skerry or anybody, any panelists? Yes.

MR. SKERRY: Yes. Well, I do agree with you that racial discrimination is a factor in many of these disparate outcomes and that it should be seriously pursued. I might make some distinctions with regard to an array of groups who have, I think, different histories, and maybe I'll leave it that for the sake of time and energy at this point, but, yes, I agree.

And I would also emphasize that racial group and ethnic group identity and consciousness has long been part of American history, for better and for worse, and it is today. It has positive aspects in terms of group sustenance and support, and clearly negative aspects in other ways.

And one of the things I find most troubling about the RPI initiative and some of the trends that you pointed to in your earlier remarks in terms of the desire to get rid of these data, is that they are ahistorical. Whether you are in favor of race-conscious policies or not, there is a history of racial and group consciousness in the United States that, to my mind, sits there in addition to our ideas about individual rights. Today we have a regime of individual rights that is also in some sense a regime of group benefits and rights.

And there is some middle ground there, that I suspect many at this table might not find much succor in, but there is something else there that's getting lost track of in many of these debates and that gets forgotten by many conservative critics of racial and ethnic data gathering. As I say, it is ahistorical and inaccurate to overlook the degree to which American society has been held together, and is held together today, by group and ethnic consciousness.

VICE CHAIRPERSON REYNOSO: Mr. Liu?

MR. LIU: Thank you. I just wanted to discuss a little bit the impact of the initiative in California and what the federal government can do to mitigate that impact. You know, Commissioner Thernstrom raised the issue of the supremacy clause, and regardless of how you interpret the supremacy clause, and I don't even claim to know what that is—

[Laughter.]

VICE CHAIRPERSON REYNOSO: The only lawyer who doesn't claim to know.

[Laughter.]

MR. LIU: I'm not a lawyer. I have made no claims about being a lawyer. But, regardless, I'm assuming that that is a federal law trumping state law, something to do with that. Regardless of that, there are—you know, Ms. Demeo mentioned all of these data collection efforts that are extremely helpful in education. I can give you a list of 114 data collection efforts in the Department of Health and Human Services in California. These are state collected data efforts that are extremely important to California.

And furthermore, there is national impact to this if this were to pass. There are 35 percent of the Asian American population that lives in California alone. Any collection of data that did not include California would have an enormous hole in that data, not to mention the Latino community, not to mention the African American community, and the Native American communities. So I think there is—I would contest the argument that there is no impact of this initiative on the country, even if it were—and, furthermore, this initiative is very dangerous in California. Polling shows that it is very popular at this point.

VICE CHAIRPERSON REYNOSO: Thank you very much. Well, I must say that as all of you panelists can see, I want to, one, thank you. As you can see, this is a timely and lively issue that we will be hearing a lot about. And the Commission tries to keep on top of these issues early on, and so we very much appreciate folk coming before us, traveling from California and elsewhere, to help educate us on the issues that will become very important for civil rights purposes in the future. So thank you very, very much.

COMMISSIONER BRACERAS: Thank you.

VICE CHAIRPERSON REYNOSO: Very much appreciate it. And I think we have—do we have a procedure where they check with the staff or something?

CHAIRPERSON BERRY: No, no, no.

VICE CHAIRPERSON REYNOSO: No? Okay. Okay.

CHAIRPERSON BERRY: Thank you very much.

VICE CHAIRPERSON REYNOSO: Thank you very much.

COMMISSIONER EDLEY: Jennifer had a—

VICE CHAIRPERSON REYNOSO: Yes. Well, no, no. Hers was aside from—

COMMISSIONER EDLEY: Right, right, right.

VICE CHAIRPERSON REYNOSO: Yes. Oh, no, I haven't forgotten. The panel can be dismissed. I think we have another issue to discuss. Again, thank you very, very much. I personally have found it really—

CHAIRPERSON BERRY: It was wonderful.

VICE CHAIRPERSON REYNOSO:—beneficial.

CHAIRPERSON BERRY: You were very good. Thank you. We appreciate your coming.

COMMISSIONER BRACERAS: Thank you.

VICE CHAIRPERSON REYNOSO: Yes. Yes, I'll recognize you for a different item.

COMMISSIONER BRACERAS: It's not unrelated to the topic, but what I wanted to say is I think this is probably one of the rare issues where every member of this Commission is in agreement, and I don't know that for sure, but I think. Maybe some for one reason, some for another. But I do think that we should capitalize on that and put out a statement or whatever that we can all agree on, because it is rare that this body is so united, and I'd like to see us do something constructive and unanimous.

VICE CHAIRPERSON REYNOSO: I think it's a very good suggestion. If there's no objection, could we ask the staff to do what they've done in the past, to summarize this forum, and then based on that—

COMMISSIONER BRACERAS: I mean I guess part—I'm sorry to interrupt, but I guess—no, no, no. And it was clear, for example, that Commissioner Edley and Commissioner Thernstrom come at this from a very different perspective—

COMMISSIONER EDLEY: Right.

COMMISSIONER BRACERAS:—but yet reached the same results.

COMMISSIONER EDLEY: So the shorter the better.

COMMISSIONER BRACERAS: And if we could put together a statement that says, "The United States Commission on Civil Rights unanimously," something very short, "unanimously, you know, opposes the prohibition of data collection on the basis of race and ethnicity, period," or, you know, something that we can all agree on without elaborating in a way that will divide us, I think that would be very constructive.

VICE CHAIRPERSON REYNOSO: Could we do the following then? I think that's a good suggestion. We have a lot of this material already. Could we have the staff prepare something of that sort, have it sent to us and then have a poll on it?

CHAIRPERSON BERRY: That's right. We just passed something about poll—

VICE CHAIRPERSON REYNOSO: Yes. And we can do it—

CHAIRPERSON BERRY:—poll votes.

VICE CHAIRPERSON REYNOSO:—in maybe a couple of weeks.

COMMISSIONER BRACERAS: I mean, you know, I'd like to do something—

VICE CHAIRPERSON REYNOSO: Yes.

COMMISSIONER BRACERAS:—when we can in a way that's—

VICE CHAIRPERSON REYNOSO: Yes. Could you put that in a formal motion so it's—

COMMISSIONER BRACERAS: Okay. I move that the staff put together a draft statement on the issue of racial privacy for a poll vote by the commissioners.

COMMISSIONER EDLEY: Second.

VICE CHAIRPERSON REYNOSO: But you also had earlier opposing the initiative.

COMMISSIONER BRACERAS: Yes, correct.

VICE CHAIRPERSON REYNOSO: Okay. Second to that motion?

COMMISSIONER EDLEY: Second.

COMMISSIONER BRACERAS: Or it can also be broader to say—I would be satisfied if it said, “Opposes all prohibitions on data collection.” As Commissioner Edley rightly pointed out, this is important, not just because of California but because it could be a trend, and so if we want to make a broader statement on that, I'm okay with that, and I believe other commissioners would be as well. I think where there might be disagreement would be as to the reasons why we oppose it. Some are opposed to it—well, we know the reasons that different people are opposed to it, so that's what I don't want to get into so that we can have the unanimity.

VICE CHAIRPERSON REYNOSO: Good. You've heard the motion and the explanation as background. Further discussion? All those in favor indicate by saying aye. All those opposed? And the motion passes unanimously.

[Motion Passed.]

STAFF DIRECTOR JIN: We will do that.

VICE CHAIRPERSON REYNOSO: Very good. Something further to come before us?

CHAIRPERSON BERRY: Are we finished—

VICE CHAIRPERSON REYNOSO: Adjournment?

CHAIRPERSON BERRY:—Mr. Chair?

COMMISSIONER EDLEY: I move adjournment.

VICE CHAIRPERSON REYNOSO: We have a motion to adjourn. Nondebatable.

CHAIRPERSON BERRY: Second.

VICE CHAIRPERSON REYNOSO: All those in favor indicate by saying aye. Opposed?
The ayes have it. Thank you very much.

[Whereupon, at 1:30 p.m., the Civil Rights Commission meeting was adjourned.]