

INVITED TESTIMONY OF
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before the
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
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Madam Chairman and members of the committee:

My name is Jane Robbins, and I'm with the American Principles Project Foundation, which works to restore our nation's founding principles. I appreciate the opportunity to speak to you today about protecting citizens' privacy when evaluating government programs, especially in the area of education.

The Commission on Evidence-Based Policymaking was created to pursue a laudable goal: To improve analysis of the effectiveness of federal programs.¹ We all certainly agree that public policy should be based on evidence, on facts, not on opinion or dogma. So unbiased scientific research, for example, is vital for policymaking.

But the problem arises when the subjects of the research and analysis are human beings. Each American citizen is endowed with personal dignity and autonomy and therefore is entitled to respect and deference when it comes to his or her own personal data. The idea that the government should be able to vacuum up mountains of personal data and employ it for whatever purposes it deems useful - without the citizen's consent, or in many cases even his knowledge - conflicts deeply with this truth about the dignity of persons.

Bear in mind that the analyses contemplated by the Commission go even further than merely sharing discrete data points among agencies. They involve creating new information about individuals, via matching data, drawing conclusions, and making predictions about those individuals. So in essence the government would have information about a citizen that even he or she doesn't have.

Our founding principles, which enshrine the consent of the governed, dictate that a citizen's data belongs to him, not to the government. If the government or its allied researchers want to use it for purposes other than those for which it was submitted,

¹ David B. Muhlhausen, "A Commission for Evidence-Based Policymaking: A Step in the Right Direction," Heritage.org (March 9, 2015), available at <http://www.heritage.org/research/reports/2015/03/a-commission-on-evidence-based-policymaking-a-step-in-the-right-direction>.

they should get the owner's consent (in the case of pre-K-12 students, parental consent). That's how things should work in a free society.

But according to well-funded organizations² with a vested interest in accessing citizen data for their own purposes, it's simply too limiting to have to get consent to use that data. Especially in the area of education data, they argue, important things could be done if the government were allowed to combine various repositories of data to track student outcomes. This consolidation of data need not be in one physical location - allowing or requiring agencies to link to each other's data will have the same effect.

In its wisdom, Congress has repeatedly prohibited the establishment of national education databases or other systems that would endanger student privacy. For example, section 9531 of the Elementary and Secondary Education Act (the No Child Left Behind iteration) prohibits "the development of a nationwide database of personally identifiable information" on students.³ Section 182 of the Education Sciences Reform Act similarly prohibits "the establishment of a nationwide database of individually identifiable information on individuals involved in studies or other collections of data under this title."⁴ And Section 134 of the Higher Education Act prohibits development, implementation, or maintenance of a federal student unit-record system (one that would allow the government to collect personally identifiable information (PII) on individual higher-education students and link education data to workforce data).⁵

This last prohibition is the focus of much of the current debate on use of education records. What's wrong with a unit-record system? For one thing, it's based on a faulty premise - that the "success" of a student's education is measured solely in terms of earning capacity. While a good education may increase earning power, that isn't and shouldn't be the sole or even the major point. Without exploring the question of the value of a liberal-arts education rather than simply workforce training, it's very dangerous to make policy on the assumption that a student who chooses to be a teacher or a minister or some other modestly compensated profession is less successful than one who makes more money.

The danger here is that government will look at this skewed data and conclude that students should be "nudged" in one direction or another regardless of their interests or indeed the unintended consequences for society. In fact, this social engineering is

² Kelly Field, "Rescind Ban on Federal Unit-Record System to Track Students, Report Says," The Chronicle of Higher Education (March 11, 2014), available at <http://www.chronicle.com/article/Rescind-Ban-on-Federal/145279/>.

³ 20 U.S.C. § 7911.

⁴ 20 U.S.C. § 9572.

⁵ 20 U.S.C. §§ 1001 *et seq.*, available at http://naicu.edu/docLib/20081030_HEA101-studentunit.pdf.

already happening in my state of Georgia, where last year the legislature changed the policy of subsidizing AP exam fees for low-income students.⁶ Now, the subsidy will be limited to AP exams in STEM subjects. Low-income students interested in English or history or languages are out of luck. One legislator was quoted as saying, “The truth is that for employable skills . . . they need to be taking AP STEM courses in high school.” So now the state government is decreeing what kinds of employment Georgia students should aspire to and what they should study to get there.

Our Founders would be surprised and, I think, alarmed, that government would be pushing students in *any* direction, much less away from the well-rounded liberal-arts education that enabled the Founders to create the most impressive political document ever written.

No government is equipped to make these kinds of decisions for individuals. No government can make better decisions than can the individual exercising his freedom. Human beings are not interchangeable. Our country has thrived for centuries without this kind of social engineering - by leaving these millions of small decisions to free citizens -- and it's deeply dangerous to change that now.

Beyond this philosophical problem, a unit-record system violates the Fair Information Practice Principles⁷ established in the Privacy Act of 1974,⁸ and also rules of ethical research, in numerous ways. The same is true of other schemes designed to increase access to education data to accomplish other goals.

First, these envisioned structures would use and disclose students' PII without their consent - or even their knowledge that this is happening. It's one thing to collect and use data from a student who voluntarily participates in a government program and understands that participation will expose some of his PII to program administrators; it's quite another to forcibly suck every individual into a data-collection system simply because he enrolled in an institution of higher education or even in a public school at any level. Telling that student he must relinquish control over his personal data to promote a greater good as defined by bureaucrats and lobbyists - or even worse, just dragooning him without telling him anything - not only violates Fair Information Principles but is simply un-American.

As stated by Mr. Frank Balz of the National Association of Independent Colleges and Universities, “the act of enrolling in college, even for a single course, should not

⁶ Ty Tagami, “Some Fear Change in AP Exam Subsidy Slights Low-Income Students,” ajc.com (Aug. 9, 2017), available at <http://www.myajc.com/news/local-education/some-fear-change-exam-subsidy-slights-low-income-students/jMvPp7FznJQvZw936Jv6oM/>.

⁷ See <https://www.cippguide.org/2010/01/18/fair-information-practices-principles/>.

⁸ 5 U.S.C. § 552a.

require permanent entry into a federal registry.” But that’s what all proposals for a unit-record system would require.

Mr. Balz also expressed concern about future expansion of such a system, which brings us to a second problem. Fair Information Principles also prohibit “repurposing” data for things not contemplated by the citizen owners when they turned it over. But the various program-evaluation schemes under consideration in Congress would do exactly that.

The problem is that literally everything can be linked to education. So why stop with employment data? Why not analyze the connection between one’s education and his health? Or his participation in the military? Or his housing choices? Or the number of children he has? Or his political activity? Or whether his suspension from school in 6th grade might indicate a future life of crime? As education-technology companies brag, predictive algorithms can be created, and their conclusions could allow government to push students down certain paths or close off others. And every question can be justified by citing “transparency,” “program effectiveness,” or “better consumer information.”

The chances of this data being “repurposed” - provided for one purpose but then used for something else entirely - are significant. Senator Warren very recently expressed concern about this issue in the context of whether the U.S. Department of Education is misusing federal earnings data to determine how much loan forgiveness should be allowed for defrauded students.⁹ Regardless of how you come down on this particular question, the point illustrates that the government has a natural tendency to use this convenient data for other purposes, despite the lack of consent from the citizen who provided it.

Proof that the Big Data community wants to repurpose data in a multitude of ways comes from one witness from Booz Allen Hamilton (former employer of Edward Snowden), who testified before the Commission about the “predictive intelligence” possibilities of mining and sifting federal databases. “For example,” he said, “eligibility and participation tracked by the Social Security Administration - when combined with taxpayer data and tax subsidies from the IRS, survey data from the U.S. Census Bureau, and data from other agencies, such as HHS and HUD - could exponentially . . . enhance our potential to draw insights that could not have been derived before.” This concept is simply chilling. This is what totalitarian countries like China do. It is not what free societies do.

Schemes that would connect all these distinct silos of data violate the Fair Information Principle requiring data minimization. Under this principle, the federal

⁹ “Warren Seeks Inquiry of Education Dept. Use of Earnings Data to Judge Student Fraud Claims,” politico.com (Jan. 3, 2018), available at <https://www.politico.com/newsletters/morning-education/2018/01/03/devos-consider-stricter-standard-for-student-fraud-claims-063595>.

government should maintain as little data - not as much data -- on each citizen as possible.

And will this dossier created on every citizen become permanent? Presumably so. If the goal of providing maximum consumer information is to be achieved, both historical and current data - constantly updated and expanded - must be compiled and preserved.

Perhaps this expansion won't happen. Perhaps the federal government, in stark contrast to its behavior over the last 100 years, will stay within its constitutional boundaries. But reality-based Americans know the government will push the envelope as far as it possibly can, as it always does. And they know that giving that government access to such a treasure trove of data is dangerous to privacy and to individual liberty.

A third concern is the inappropriateness of making this gold mine available for "research" without strict controls. Research is important and to be encouraged (at least when it's not of the biased type frequently funded by the federal government to produce evidence in support of a pre-ordained outcome¹⁰). But in a free society governed by consent, no identifiable citizen data held by the government should be made available to any researcher without the consent of the data owner - that is, the citizen from whom it was taken. Strict rules of ethics applicable to research require no less under the principle of "respect for persons."¹¹

When it comes to pre-K-12 education data, this principle is even more important because the research subjects are children who can't give informed consent. If children's education records are to be used in research other than in the very limited applicable exemptions, it is critical that the parents be informed and allowed to control their children's participation. All legitimate research organizations, including applicable agencies within the Department of Health and Human Services, recognize the special protection due children in research studies.¹²

When deciding how much access to allow to federal data repositories on children, it's critical to be aware of the enormously intrusive types of information that are being collected. The most sensitive is psychological data collected through the craze of so-called "social emotional learning," or SEL. With SEL, the government (through the

¹⁰See Emmett McGroarty, Jane Robbins, & Erin Tuttle, *Deconstructing the Administrative State: The Fight for Liberty*, Manchester, NH: Sophia Institute Press (2017), pp. 113-134. In addition, research that reaches conclusions contrary to what the government wants is frequently ignored (see the multiplicity of studies showing the futility and perhaps harm of the Head Start program, to which the government responds by annually increasing funding for Head Start). Allowing the personal lives of millions of Americans to be studied under a microscope to benefit a political agenda is unconscionable.

¹¹ See <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/faq/informed-consent/index.html>.

¹² See <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/faq/children-research/index.html>.

school) and corporate vendors can compile data about the most personal aspects of every child who is subjected to it, including (via sophisticated computer platforms) how his mind works and what attitudes, values, and dispositions he holds.¹³ In fact, the federal government is itself trying to “incentivize” this highly intrusive data collection through not only the Every Student Succeeds Act,¹⁴ but also through the Strengthening Education Through Research Act,¹⁵ or SETRA (which revises the Education Sciences Reform Act). Compiling this type of data is bad enough; allowing nonconsensual access to researchers and other agencies could create a nightmare for children and their families and should be unthinkable in a free society.

Fourth, the idea that this massive repository of sensitive PII (whether it exists physically or just through linkages of data systems) will be protected against unauthorized access and breaches is quite simply delusional. Merely two years ago, hearings of the House Committee on Government Oversight and Reform¹⁶ revealed the shocking lack of student-data security throughout the U.S. Department of Education. The last few years have seen serious data breaches at other agencies including NSA,¹⁷ DoD,¹⁸ OPM,¹⁹ and SEC.²⁰ The problems encompass both lax controls over the people allowed access to sensitive data, as well as outdated technology and inadequate security to prevent unauthorized access.

That the federal government should now consider ballooning the sensitive data contained in these insecure systems and opening it up to even more people is at best misguided and at worst, reckless. Given the difficulty or impossibility of truly securing

¹³ Karen Effrem & Jane Robbins, “Schools Ditch Academics for Emotional Manipulation,” thefederalist.com (Oct. 19, 2016), available at <http://thefederalist.com/2016/10/19/schools-ditch-academics-for-emotional-manipulation/>.

¹⁴ “Funding for Social-Emotional Learning in ESSA,” ASCD, available at http://www.ascd.org/ASCD/pdf/siteASCD/policy/ESSA-Resources_SEL-Funding.pdf.

¹⁵ See <https://edworkforce.house.gov/educationresearch/>.

¹⁶ U.S. Department of Education: Information Security Review” (Nov. 17, 2015), available at <https://oversight.house.gov/hearing/u-s-department-of-education-information-security-review/>.

¹⁷ Scott Shane, “New N.S.A. Breach Linked to Popular Russian Antivirus Software,” nytimes.com (Oct. 5, 2017), available at <https://www.nytimes.com/2017/10/05/us/politics/russia-nsa-hackers-kaspersky.html>.

¹⁸ Elinor Mills, “Bad Flash Drive Caused Worst U.S. Military Breach,” cnet.com (Aug. 25, 2010), available at <https://www.cnet.com/news/bad-flash-drive-caused-worst-u-s-military-breach/>.

¹⁹ See “Congressional Report Slams OPM on Data Breach,” krebsonsecurity.com (Sept. 16, 2016), available at <https://krebsongsecurity.com/2016/09/congressional-report-slams-opm-on-data-breach/>.

²⁰ Robert Hackett, “SEC Discloses Breach That May Have Enabled Insider Trading,” fortune.com (Sept. 21, 2017), available at <http://fortune.com/2017/09/20/sec-breach-insider-trading/>.

data, ignoring the Fair Information Principle of data minimization can result in serious harm to American citizens.

This illustrates the difference between two concepts that are too often conflated in the discussion, and in fact in the Commission's report. "Data security" means whether the government can keep data systems from being breached. "Data privacy" refers to whether the government has any right to collect and maintain such data in the first place. The Fair Information Principle of data minimization is designed to increase security by increasing privacy. A hacker can't steal what isn't there.

Even if the data systems were secure, the regulatory gutting of the Family Educational Rights and Privacy Act (FERPA) in 2012 means that government education officials (federal, state, and local) now have enormous leeway to disclose PII on individual students without their consent. Pursuant to the recent FERPA regulations, these officials may share private PII with other government agencies, nonprofit entities, corporations, researchers, and literally anyone on the planet as long as the disclosure can be characterized as an audit or evaluation of a (broadly defined) "education program."²¹ FERPA needs updating and strengthening, but that's a topic for another day.

Will the new conglomeration of student data be fair game for disclosure under these regulations? The danger is too real to dismiss.

As to the Commission's assurances that all this data would be disclosed only with "approval" to "authorized persons," we should ask: Approval of whom? Authorized by whom? There are myriad examples of government employees' violating statute or policy by misusing or wrongfully disclosing data. And even if bureaucrats have only good intentions, what they consider appropriate use or disclosure may conflict absolutely with what the affected citizen considers appropriate. Again, this illustrates the necessity for consent.

Two final points: Much of what the government wants to accomplish through various so-called transparency bills can be accomplished through the free market. For example, any legitimate institution of higher education will be happy to provide statistics on graduation rates, alumni employment, etc., to applicants who ask for it. If applicants aren't asking for it, that should tell us something about whether government should be mandating it. And the deeper problem here is that the government has taken over duties related to education and education financing that it manifestly has no constitutional right to be involved in. Having done so, it supposedly becomes necessary to add more layers of government control to ensure accountability for the results of this spending that never should have happened in the first place. I

²¹ Letter from American Association of Collegiate Registrars and Admissions Officers to Regina Miles of U.S. Dept. of Education (May 23, 2011), available at https://aacrao-web.s3.amazonaws.com/migrated/FERPA-AACRAO-Comments.sflb.ashx_520501ad842930.77008351.ashx.

understand that this unconstitutional system won't be dismantled any time soon, but I do think it's critical for Congress to recognize this underlying problem and begin to address it.

In conclusion, we certainly recognize the value of unbiased research in pursuit of optimal policymaking. But we ask that Congress continue its protective policies when the subjects of such research are human beings. The goal of benefitting others in society, in vague and theoretical ways, or of "helping" citizens lead their own lives and make their own decisions, does not justify the federal government's collection and dissemination of millions of data points on individuals - without their consent. This should not be happening in a free country. Some lines should not be crossed regardless of their supposed benefits. This is one of those lines.