

TESTIMONY OF
ROGER CLEGG,
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AT AN
OVERSIGHT HEARING ON
THE LEGACY OF THE TRANS-ATLANTIC SLAVE TRADE
BEFORE THE
HOUSE JUDICIARY COMMITTEE, SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

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Rayburn House Office Building, Room 2141

Thank you very much, Mr. Chairman, for the opportunity to testify today. My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

Overview

The discussion today of the legacy of the trans-Atlantic slave trade is intended, I presume, to help lay the groundwork for favorable consideration of H.R. 40, the "Commission to Study Reparation Proposals for African-Americans Act." And the enterprise that H.R. 40 would have us embark on, in turn, is as follows: First, a commission would determine what effects slavery and post-slavery discrimination had on African Americans and what "lingering negative effects" it continues to have on them; and then, second, it would suggest possible remedies for those effects. The two remedies that are explicitly mentioned are an apology and some form of compensation.

There are any number of problems with this enterprise, and I would like briefly to discuss some of them in my testimony today. (Some of the points I will make are also expressed, often in more detail, in a dialogue I have written on this topic, a version of which was published in *Engage* magazine, and which I have included as an appendix to my testimony; I've also included an op-ed I wrote on a recent Chicago ordinance requiring city contractors to document any slavery-related business in the antebellum era.)

This Is an Unnecessary and Hopeless Task for Such a Government Commission

First, this research project is ill-suited for a government commission. H.R. 40 says that “sufficient inquiry has not been made into the effects of the institution of slavery on living African-Americans and society in the United States.” I am not sure what that statement is based on, and I am not a professional historian. But as a lay reader and a civil rights lawyer, it seems to me that there is no shortage of books and articles about slavery, and discrimination, and the problems facing the African American community today, and the way all these intersect. I am not declaring that there has been “sufficient inquiry”; just that there has been a great deal and that it continues--and that, given the intrinsic interest of these topics, especially among those in the academy, it will likely continue for the foreseeable future.

What I would declare, moreover, is that this inquiry will never end, and it will be a long time before anyone would presume to call the inquiry “sufficient.” Few historical inquiries ever are: There is always some new angle to explore. Further, the conclusions that historians will draw will always be incomplete, imperfect, and challenged by contemporary and future historians. That is the nature of historical scholarship, especially for issues as complex as this one.

H.R. 40 suggests, on the other hand, that something like a definitive answer will be possible if the government takes \$8 million, hires seven “especially qualified” people, and gives them a year to figure it all out. This is, of course, absurd.

No one will dispute that slavery and Jim Crow were horrible and inhumane; no one will dispute that discrimination still exists, though only a delusional person would deny that America has made radical, dramatic, inspiring progress in the last 40 years—

that its society has truly been transformed in an astonishingly short period of time. But it is impossible to say how much of the present is the result of one particular kind of event in the past. Only someone very arrogant or very foolish would make such a pronouncement.

Let me give just one example. The principal hurdle facing the African American community today is the fact that 7 out of 10 African Americans are born out of wedlock. Just about any social problem you can name—crime, drugs, dropping out of school, doing poorly in school, and so forth—has a strong correlation with growing up in a home without a father. And it is very hard to argue that this problem is traceable to slavery or Jim Crow, since illegitimacy rates started to skyrocket in the African American community just at the time that Jim Crow was starting to crumble.

Given that, how can anyone say with any confidence that such-and-such amount of such-and-such a social problem facing African Americans must be due to slavery? It cannot be done.

Race-Based Compensation Would Be Both Illogical and Unconstitutional

But let's suppose that, nonetheless, the commission decides that it can be done. Let's suppose that this commission says, "Forty-six percent of the poverty in the African American community today can be traced to slavery and discrimination, forty-five percent is caused by illegitimacy, and the remaining nine percent is just bad luck," or some such silly thing. Or let's suppose that it says something less silly, but so obvious that it does not take a government commission to figure it out--something like, "To some significant extent, the disproportionate amount of poverty facing the African American community today can be traced to slavery and the discrimination its members faced."

Would it follow that some sort of “compensation”—one of the two remedies H.R. 40 explicitly asks the commission to consider—ought to be paid to African Americans? No. It certainly wouldn’t make sense to pay compensation to African Americans who are not living in poverty. It wouldn’t make sense to pay compensation to African Americans who are living in poverty if that poverty was not caused by slavery and Jim Crow—to give an obvious example, to African Americans who just immigrated here. Yet requiring a particular person to prove his slave ancestry leads to many problems (as discussed in Appendix A); presuming slave ancestry because of a person’s appearance raises many problems, too; and there are problems with simply taking people at their word as well.

Also, why should an African American who could trace his poverty to slavery be entitled to compensation over, say, a poor American Indian who could not but could trace it to some other historical wrong (in this case, say, a broken treaty)? Or a poor Latino or a poor Asian or even a poor white? Any of them might be able to trace his poverty to *some* historical wrong.

But most fundamentally, why does it matter whether the poverty is traceable to a historical wrong? Suppose you have two children. One could show somehow that the reason he was poor was because of the discrimination his family suffered. The other child is poor for no reason except his mother and father just immigrated to this country from a poverty-stricken homeland. Is the government supposed to say, “We view the first child’s poverty as a problem of federal concern, but not the second child’s”?

Of course not. There is no reason why eligibility for a social program ought to hinge on whether a citizen can trace his need for the program to this or that historical cause.

If we design social programs to help disadvantaged people, and if disadvantaged people are disproportionately African American because of the discrimination that they have disproportionately suffered, then African Americans disproportionately will be eligible for those programs. And, indeed, that is the case today. More than that makes no sense. And if the commission simply recommends more social programs that are not race-based, then it is even harder to see why its historical focus should be on one particular subset of one particular racial group.

If, finally, we were to make a social program available to those of one race and not to others, there would be serious constitutional problems. Presumably the justification for the program would be remedial, but the Supreme Court has--quite rightly--rejected general claims of societal discrimination as not sufficiently compelling to justify racial classifications.

An Apology Would Make No Sense Either

As for an apology, the second possible remedy listed by H.R. 40: The bill asks “Whether the Government of the United States should offer a formal apology on behalf of the people of the United States for the perpetuation of gross human rights violations on African slaves and their descendants.”

This is, at best, an odd apology. What would really be appropriate, of course, is for the slave-traders and the slave-masters to apologize to the slaves—but all these folks have long since passed on to their just rewards.

So instead we have the U.S. government (which actually ended slavery, at the cost of much blood and treasure) apologizing on behalf of today’s American people (none of whom ever owned slaves, and most of whom never had ancestors who did, either) to ...

whom? The bill does not say. Maybe the idea is just to apologize to ourselves, but that seems rather strange. Presumably the idea is to apologize to living African Americans. But these African Americans are not slaves; many are descended from slaves, but many are not; many of the former—maybe most now—are descended from both slaves and slave-owners.

Mr. Chairman, I cannot resist pointing out that, if there is anyone in the United States today from whom an apology for slavery and Jim Crow would be appropriate, it would be, not the U.S. government, and certainly not the American people—but the Democratic Party. It, after all, was historically the party of slavery, secession, and segregation.

But let's be honest: Inevitably, such apologies are intended and interpreted as whites apologizing to blacks for slavery. (I wonder what Asians and Latinos, as well as American Indians, think of this theater?) But no white today is or ever was a slaveholder; no black today is or ever was a slave. What's the point of one apologizing to the other?

Everyone has an ancestor who was wronged by someone else's ancestor; there is no point in trying to find a thread for each present-day misfortune in an individual's life that can be followed back through the decades to a particular misdeed; and anyone's poverty today likely has many causes—some old, some recent, some other people's fault, some one's own. Nobody nowadays thinks slavery was anything but an abomination; nobody learns anything from this charade.

We are told that these apologies will help to bring closure, help enable us to move on. Nonsense—and that is not their intent, at least for many people. The idea is to reopen wounds, to keep grievance alive, to keep white people on the hook. An obsession

with past wrongs, to the extent that present opportunity and future promise are ignored or slighted, is a bad thing.

A great strength of Americans is that we are forward looking. The trouble with slavery apologies is that they are designed to make whites feel guilty and to urge blacks to think of themselves as victims. Neither emotion is valid in these closing days of the year 2007; both are bad for race relations. In particular, the last thing an African American needs in 2007 is an excuse to fail. As individual white people will go about their business--and Latinos and Asians and Arab Americans and American Indians-- individual black people will be left with the same choice they've had for years: embrace self-reliance and responsibility, or fail and blame it on others.

Conclusion

All of this is true not just for the apology issue but also for the entire enterprise that H.R. 40 would embark on: That is, it would accomplish nothing and would cost much. And I don't mean monetary costs, but social costs: Specifically, the poisonous effect it would have a racial relations, and the pernicious message it would send, in particular, to those in the African American community, that their focus should be on what was done to them in the past, rather than the opportunities they have now.

Thank you again, Mr. Chairman, for the opportunity to testify today. I would be happy to try to answer any questions the Subcommittee may have for me.

Appendix A:

A Dialogue on Reparations

by Roger Clegg (adapted from his Engage magazine article, May 2003)

A. Should African Americans be paid reparations for slavery?

B. The short answer is no, but first let's unpack that question. Do you mean only for slavery?--because most reparations advocates also think that reparations are appropriate for post-slavery discrimination.

A. Oh, yes. That should be included, too.

B. But in that case, why limit it to blacks? Other groups have been discriminated against as well.

A. But not as much, wouldn't you agree?

B. I suppose, although you could make a case that the treatment of American Indians has been pretty bad. And Japanese Americans were the only ones actually interned.

A. That's true; those are the two others that are especially bad. But the existence of treaties and reservations makes it possible to consider American Indians separately, and of course the Japanese Americans who were interned already have received reparations.

B. Fair enough. You would concede that other groups have been discriminated against, too, obviously, but your point is that they didn't suffer under an actual Jim Crow system?

A. Correct.

B. But Latino advocates would argue that there has been school and housing segregation, ethnic gerrymandering, and employment discrimination against them. So might Asian advocates. It is certainly defensible to draw a line between blacks and everyone else. But I want to make the point that if you open the door to reparations for blacks for non-slavery discrimination, then others will try to come through that door.

A. Well, what if we limit it to reparations just for slavery, then?

B. This will complicate matters considerably. For instance, it then becomes important that only those with slave ancestors be compensated. Blacks who immigrated after the 13th Amendment (December 6, 1865) cannot really claim to have been victims of slavery, nor can their descendants, nor can the descendants of black freemen.

A. But aren't the vast majority of African Americans descendants of slaves?

B. Good question. I don't know. You would agree that the higher the percentage who aren't, the more problematic reparations for all African Americans is, right?

A. Yes, but you would agree that if the percentage is high enough, the assumption that all blacks qualify is a reasonable one?

B. Reasonable, yes, although not so compelling and narrowly tailored—as the lawyers put it—to pass strict scrutiny. Let me also ask you this. How will we prove who is an African American? That is, if someone claims his or her share of reparations, how will you determine if they are in fact an African American.

A. Won't just looking at the person be good enough in most cases?

B. It depends on how honest you think people are. If you start handing out \$50,000 checks for anyone who claims to be an African American, and you take everyone at his word, I predict you will have some problems with false claims. To put it mildly.

A. Let's have a two-part test. If you can tell the person is black just by looking at them, that's good enough. If not, then the person has to provide some additional proof.

B. So let me get this straight. You'll have a line of people, and some government bureaucrat will size each one up. He'll judge how dark their skin is—maybe by holding up a paper grocery bag next to it—how kinky or nappy their hair is, the shape of their noses and lips, that sort of thing? And the ones that are judged to be black will get their check?

A. I guess that's about right.

B. Yuck. And the ones who aren't judged to be black, even though they assert they are, will then have to prove it in some way. DNA tests? Genealogical records? Sworn affidavits?

A. Something like that.

B. Yuck again. And, as I pointed out earlier, that will be more difficult if you have to show that you are a slave's descendant. Anyway, will the government be using a one-drop rule? That is, do you get your check even if you have only one African American ancestor, as opposed to being, say, at least half African American?

A. I don't see any alternative. And probably a person and his or her ancestors will have suffered a fair amount of discrimination under the one-drop rule.

B. All right. I agree that it would be an even bigger mess if you had to trace back not just to one ancestor but to several. By the way, how are you going to define African American?

A. Someone whose ancestors came from Africa.

B. But it can't be just anywhere in Africa, right? I mean, white South Africans won't do, nor would North African Arabs, right? Back to my line example, suppose one of the people standing in line admits that he doesn't "look black," but says that's just because his African ancestors were Afrikaner or Egyptian or Moroccan. And what if he can prove it?

A. Well, I can see that it would be a problem if we had to prove immigration from a specific country. Maybe the DNA people can help us out.

B. Maybe. But there's a certain irony here, since generally those supporting reparations also believe that race is a social construct without any true basis in biological science.

A. Look, I see your point, but many reparations advocates make clear that they aren't proposing that individual checks be cut. Instead, they want social programs put in place as the reparations. So you aren't going to have this problem of whites claiming to be blacks.

B. Granted, there will be less fraud if what you're offering is in a place in a special school or job training facility rather than a \$50,000 check.

A. A lot less. The payoff is less, and the whites who might otherwise be interested are going to be poor or working class, and they aren't going to want to label themselves black before the whole world. Their friends will see them going to the school or whatever, and will say, "Oh, I see you've got some plantation blood." They won't like that.

B. Maybe, although you're doing some stereotyping yourself here. Plus, it's a fair question why a poor or working class white—whose ancestors probably suffered some, too, one way or another—shouldn't be eligible for the programs anyhow. But that brings us to the basic question: Should society pay reparations to all blacks, and only to blacks?

A. The discrimination suffered by African Americans was especially cruel, and so special compensation is required.

B. Well, that doesn't make sense. The special cruelty isn't present now, and wasn't suffered by most blacks living now. The median age of African Americans is about 30, which means a birth-date after the end of the Jim Crow era. So it can't be the special cruelty. It must be that the economic impact was especially severe and long-lasting.

A. Whatever.

B. But if it's the economic impact that matters, why does it matter what its origins were? I mean, you have one child whose grandfather was lynched, and another child whose grandparents were drowned when their boat sank in the South China Sea. Both live in poverty. Why do we make some programs available to one but not to the other?

A. America didn't sink the boat. But it did the lynching. Remember it is *reparations* we are talking about. Reparations are paid by the wrongdoer to the victim. America is responsible for slavery and Jim Crow discrimination in a way it is not responsible for other calamities that some people have suffered. We *owe* something to blacks, in a way we don't to anyone else.

B. What do you mean "we"? The American people now—its taxpayers, voters, officials, and so forth—are in no way responsible for slavery or Jim Crow discrimination. Even if you say that it was the fault of American federal and state governments and corporations and other non-human entities that were around then and are around now, the reparations are going to have to come out of the pockets of those who *don't* owe African Americans for exploitation, because they weren't around when the exploitation happened.

A. But they still enjoy the profits from that exploitation.

B. Let's talk about that. If you mean that America as a whole was built on the backs of slave labor—an exaggeration, but I'll concede that certainly slave labor was one kind of labor that helped build America—it is true that we still enjoy the results of slave labor, but then that is no less true for blacks than for whites. That is, slaves may have cleared the farmland that now feeds us, but it feeds us black and white alike.

A. But whites profited more from it than blacks did.

B. Certainly slaveowners profited from it more than slaves did. But you're assuming that the class of 19th century slaveowners and slaves is the same as the class of 21st century whites (really, nonblacks) and blacks. The groups are completely different.

A. You haven't made the argument that slavery actually benefited blacks, because the 21st century descendants of slaves are better off than 21st century blacks still living in Africa.

B. I actually think that's a legitimate argument, if we start playing the game of what Thomas Sowell calls "cosmic justice." That's where the government tries to ascertain how much wealth a person would have if nothing unfair happened to any of one's ancestors. The problem with the game, of course, is that it is impossible to untangle the past. There's no doubt that slavery and discrimination have, in the aggregate, diminished the wealth of African Americans. But so have disproportionately high rates of illegitimacy, and substance abuse, and crime, and a failure to take advantage of the educational, employment, and business opportunities that were available. To be sure, these bad life-decisions were often a result of discrimination, but that only confirms how

impossible it is to say that group X has less wealth than group non-X, and that Y percent of this gap is because of bad things that group non-X did and 100 minus Y percent is due to bad things that X themselves did. It can't be done. But if you do decide to play this game then, yes, I think it is legitimate to point out that, but for slavery, group X would actually have much less wealth than they do now.

Let me also point out that most of the wealth that the nonblacks have was acquired after slavery. Lots of nonblacks—not just Asians and Latinos, but the Irish and Italians, for instance—didn't arrive here until after slavery. And lots of people who did have some wealth in the early 20th century saw it wiped out in the Great Depression. So telling the descendants of these people that they have to pay out a chunk of their wealth in reparations for slavery doesn't make a lot of sense.

Conversely, the blacks who are paid reparations will include many who actually have more money than the average nonblack, and many who are not descendants of slaves—whose ancestors actually immigrated to the United States quite recently—as well as many whose lack of wealth is more their own fault than that of some slaveowner in the distant past.

A. Enough! This is all logic chopping. The fact of the matter is that slavery and Jim Crow discrimination were uniquely grievous wrongs, that they did result in present blacks having less money than they would have if they had been treated decently, and that it is only fair that they be compensated for these wrongs.

B. I think the points I've raised are more fundamental and more valid than mere logic chopping. But even if you think that, after weighing my arguments against yours, there remain some potential benefits to reparations, you also have to weigh the costs.

A. Such as?

B. Reparations will be absolutely poisonous to race relations. They will increase white resentment, and they will increase blacks' victim mentality. Those are the last things we need. As discussed, there are also serious practical problems in deciding who is eligible for the program; other groups will soon demand reparations, too; and I will guarantee you that, once the program is begun, it will never end, and the demands for more and more reparations will only increase over time, and never diminish.

Appendix B:

The Bizarre Campaign To Eliminate “Profiteers of Slavery”:

Practical Questions about Chicago Ordinance Are Overwhelming

by Roger Clegg (from Human Events, January 12, 2003)

Last fall, according to its *Tribune*, Chicago "became the first major city in the nation" to pass a "groundbreaking ordinance requiring all businesses vying for city contracts to

search their records and disclose whether they profited from slavery." Cleveland and New York City are now considering similar laws.

To quote the ordinance itself, any such company "must complete an affidavit verifying that the contractor has searched any and all records of the company or any predecessor company regarding records of investments or profits from slavery or slaveholder insurance policies during the slavery era. The names of any slaves or slaveholders described in those records must be disclosed in the affidavit."

The last sentence is straightforward enough, and will be useful for plaintiffs' lawyers looking for clients. But beyond that, I have a few questions about the meaning of the phrase in the first sentence, "investments or profits from slavery or slaveholder insurance policies."

For starters, may we assume that it's not enough for a company just to look to see if there is a line in the annual report that says, "Profit from slavery: \$1,305.16"? That would be pretty unlikely. So are we to assume that the company is supposed to try to figure out now for itself what the profit was, or at least to collect the relevant records? But the calculations won't be easy, nor for that matter defining which records are relevant.

I think I know what "slaveholder insurance policies" are, but how do you calculate "profits" from them? You can't just add up the premiums. You also have to subtract out the payments, right? How about the company's overhead? Do you have to prorate that, since the policy also probably wrote non-slavery policies? Isn't that going to be awfully hard to do for 140-year-old transactions?

But the real problem is what is meant by "profits from slavery" or "investments" from slavery. Buying and selling slaves is understandable, but what if you bought cotton from a plantation? What if you bought cloth from an English company that bought cotton from a plantation? What if you bought shirts from a company that bought cloth from an English company that bought cotton from the plantation? Is the company supposed to collect all this information?

What if you sold a plow to a plantation? What if you sold a plow to a plantation but you didn't know then or don't know now if it had slaves on it? What if you manufactured plows and sold one to a retailer who sold one to a plantation? What if you don't know whether the retailer sold plows to plantations or not, or if there were slaves on them?

What if you sold a watch or a newspaper or a train ticket to a slaveowner? What if didn't keep track of the professions of those to whom you sold these items?

And how, once again, does one calculate the "profits" or "investments" from all this? You can't just add up the sales; you also have to subtract out the costs, right? How do you tell how much of the profit is from slavery and how much is from some other factor? If you

sold a really ingenious plow to a plantation, was the profit because of slavery or because of your ingenuity?

All right. Now suppose that we figure all this out and collect all the information. What precisely is the city going to do with it?

Either it will refuse to do business with companies that "profited" or "invested" in slavery, or not. If the latter, then this whole exercise is pointless, isn't it? If the former, then how much profit triggers the boycott? A penny? A million dollars? Somewhere in between?

And what, precisely, is the boycott supposed to accomplish? Is it supposed to punish the company? For what--for engaging in what were then perfectly legal activities? For decisions made by people long dead? For profits distributed to shareholders who spent them God knows where and are also long dead?

And, of course, the city will also be punished. After all, if the city refuses to do business with a company with whom it would otherwise have done so, then the city is going to lose money. The company made the city the best offer, but the city decides to pay more by contracting with someone else. So the city--and its taxpayers--will lose out, too. What is that supposed to accomplish?

Just asking. It was a 44-0 vote by the city council, so I'm sure someone has the answers. This couldn't have been political posturing by all 44, right? Or shouldn't I ask?

Appendix C:

Other Links of Interest

Peter H. Schuck, "Slavery Reparations: A Misguided Movement":

<http://jurist.law.pitt.edu/forum/forumnew78.php>

Walter E. Williams, "Proclamation of Amnesty and Pardon Granted to All Persons of European Descent":

<http://www.gmu.edu/departments/economics/wew/gift.html>

David Horowitz, "Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks--and Racist Too":

<http://www.frontpagemag.com/Articles/Read.aspx?GUID=%7B23D875B0-65A3-44A3-A27B-14831CCB4107%7D>