

U.S. COMMISSION ON CIVIL RIGHTS

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BUSINESS MEETING AND BRIEFING

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UNEDITED

FRIDAY, DECEMBER 16, 2005

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The Commission convened at 9:00 a.m in the Rayburn House Office Building, Room 2226, Washington, D.C., GERALD A. REYNOLDS, Chairperson, presiding.

PRESENT:

- GERALD A. REYNOLDS, Chairperson
- ABIGAIL THERNSTROM, Vice Chairperson
- JENNIFER C. BRACERAS, Commissioner (via telephone)
- PETER N. KIRSANOW, Commissioner (via telephone)
- ARLAN D. MELENDEZ, Commissioner (via telephone)
- MICHAEL YAKI, Commissioner
- KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

- RACHELLE BRACEY
- TERESA BROOKS
- CHRISTOPHER BYRNES
- DEBRA CARR, Esq., Associate Deputy Staff Director
- TERRI DICKERSON, Assistant Staff Director
- PAMELA A. DUNSTON, Chief, Administrative Services and Clearinghouse Division
- SETH JAFFE
- SOCK FOON MacDOUGALL
- EMMA MONROIG, Solicitor/Parliamentarian
- BERNARD QUARTERMAN
- EILEEN RUDERT
- AUDREY WRIGHT
- MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

- CHRISTOPHER JENNINGS
- LISA NEUDER
- KIMBERLY SCHULD

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AGENDA ITEM	PAGE
I. Approval of Agenda	4
II. Approval of Minutes of November 18, 2005 Meeting	5
III. Announcements	5
VIII. Commission Briefing: Disparity Studies	21
- Introductory Remarks by Chairman	21
- Speakers' Presentations	26
- Questions by Commissioners and Staff Director	59

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P-R-O-C-E-E-D-I-N-G-S

(9:24 a.m.)

CHAIRPERSON REYNOLDS: This meeting will come to order. This is a meeting with most of the commissioners participating by being present at the Rayburn House Office Building, room 2226, in Washington, D.C. Commissioners Braceras, Kirsanow, and Melendez will participate via telephone.

This meeting will continue until 10:00 a.m., when there will be a scheduled briefing on disparity studies as evidence of discrimination in federal contracting. If the business meeting has not concluded by the time the briefing is scheduled to start, then there will be a recess of the business meeting. And the same will be resumed after the briefing is concluded.

VICE CHAIRPERSON THERNSTROM: Mr. Chairman, you forgot to mention that Commissioner Taylor is also absent.

CHAIRPERSON REYNOLDS: Thank you, Abbie. That's correct.

Commissioner Taylor is absent. He is where he is supposed to be. His wife is expecting. The delivery is -- actually, he's probably a father once over as of now.

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I. Approval of Agenda

1
2 CHAIRPERSON REYNOLDS: In any event, we
3 have lost some time due to technical difficulties. So
4 I would like to move that we strip some items off of
5 the agenda so that we don't bleed into the briefing.
6 I would like to table discussion on the Arizona SAC
7 report, the working group on SAC reform, the section
8 on campus anti-semitism.

9 COMMISSIONER YAKI: Both items V and VI?

10 CHAIRPERSON REYNOLDS: Yes. Okay.

11 VICE CHAIRPERSON THERNSTROM: The Voting
12 Act's briefing report? We're going to discuss that?

13 CHAIRPERSON REYNOLDS: I'm sorry.

14 VICE CHAIRPERSON THERNSTROM: The Voting
15 Act's briefing report, are we going to discuss that?

16 CHAIRPERSON REYNOLDS: Yes, yes.

17 COMMISSIONER YAKI: I'll move the
18 amendment of the agenda.

19 CHAIRPERSON REYNOLDS: Second?

20 COMMISSIONER MARCUS: Second.

21 CHAIRPERSON REYNOLDS: Okay. Discussion?

22 (No response.)

23 CHAIRPERSON REYNOLDS: All in favor say
24 "Aye."

25 (Whereupon, there was a chorus of "Ayes.")

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1 CHAIRPERSON REYNOLDS: All in opposition?
2 (No response.)

3 CHAIRPERSON REYNOLDS: The motion passes
4 unanimously. There will be a number of pregnant
5 pauses while I get myself together.

6 **II. Approval of Minutes of**
7 **November 18, 2005 Meeting**

8 CHAIRPERSON REYNOLDS: Next up, may I have
9 a motion to approve the minutes of the November 18th,
10 2005 meeting.

11 VICE CHAIRPERSON THERNSTROM: So moved.

12 CHAIRPERSON REYNOLDS: Is there a second?

13 COMMISSIONER YAKI: Second.

14 CHAIRPERSON REYNOLDS: Discussion?

15 (No response.)

16 CHAIRPERSON REYNOLDS: All in favor say
17 "Aye."

18 (Whereupon, there was a chorus of "Ayes.")

19 CHAIRPERSON REYNOLDS: All in opposition?

20 (No response.)

21 CHAIRPERSON REYNOLDS: The motion passes
22 unanimously.

23 **III. Announcements**

24 CHAIRPERSON REYNOLDS: Okay. Next up we
25 have one announcement, and it regards the passing of

1 LeGree Daniels. I'm saddened to announce the passing
2 on November 19th of LeGree Daniels, a federal civil
3 rights official in the Reagan, Bush, and Clinton
4 administrations.

5 President Ronald Reagan appointed her
6 Assistant Secretary of Civil Rights at the Department
7 of Education in 1987, a position which she held for 2
8 years.

9 In 1999, President George H. W. Bush
10 appointed Ms. Daniels to the Postal Service Board of
11 Governors. President Bill Clinton reappointed her to
12 the board in 1999. And she remained a member until
13 her death.

14 Ms. Daniels' long record of service to
15 this country, her important work in the area of civil
16 rights, and the admirable manner in the way in which
17 she carried out her duties should be an example for
18 future generations.

19 Would any of the commissioners want to
20 make a comment on her passing?

21 (No response.)

22 CHAIRPERSON REYNOLDS: Okay. Let's see.
23 There's a motion to delay for one month the
24 implementation of GAO recommendations. And what I
25 will do, I will read the motion into the record.

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1 "I move that the Commission extend by one
2 month to mid February 2006 the implementation of the
3 GAO and OPM recommendations contained in the reports
4 issued from 1997" -- I'm sorry?

5 COMMISSIONER YAKI: Was that in our
6 package?

7 CHAIRPERSON REYNOLDS: Okay. I'll start
8 from the top. "I move that the Commission extend by
9 one month to mid February 2006 the implementation of
10 the GAO and OPM recommendations contained in the
11 reports issued from 1997 through April 6 of 2005. I
12 so move to accommodate the House Judiciary Committee's
13 request that the Commission submit a revised draft
14 strategic plan to the Judiciary Committee staff on
15 December 12th." I assume that that has already
16 occurred.

17 "The Commission is currently awaiting
18 comments from the Committee. And in order to give
19 appropriate time for congressional comment, the
20 Commission will not be able to vote on a new strategic
21 plan until the January 20th Commission meeting at the
22 earliest.

23 "After implementation of the new strategic
24 plan, it will take at least one month to implement the
25 GAO and OPM recommendations. In the event that

1 cooperation with Congress should require any further
2 extensions, we ask that the staff director keep us
3 apprised."

4 Is there a second?

5 COMMISSIONER BRACERAS: Second.

6 CHAIRPERSON REYNOLDS: Thank you.

7 Discussion?

8 (No response.)

9 CHAIRPERSON REYNOLDS: All in favor please
10 say "Aye."

11 (Whereupon, there was a chorus of "Ayes.")

12 CHAIRPERSON REYNOLDS: Any in opposition?

13 (No response.)

14 CHAIRPERSON REYNOLDS: The motion passes
15 unanimously.

16 Okay. Although the temporary provisions
17 of the Voting Rights Act are set to expire in August
18 of 2007, the leadership in the House of
19 Representatives --

20 COMMISSIONER BRACERAS: I'm sorry. Excuse
21 me. This is Braceras. You're bleeping in and out.

22 CHAIRPERSON REYNOLDS: Okay. Can you hear
23 me now?

24 COMMISSIONER BRACERAS: Much better.

25 CHAIRPERSON REYNOLDS: Okay. Sounds like

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1 a commercial.

2 Although the temporary provisions of the
3 Voting Rights Act are set to expire in August of 2007,
4 the leadership in the House of Representatives is now
5 pushing to reauthorize the entire act this year.

6 The House has already held several
7 oversight hearings on various provisions of the act
8 during the Summer and Fall of 2005. In order to
9 fulfill our statutory responsibility, we must issue
10 findings and recommendations to Congress in a timely
11 manner so that members of Congress may act on them.

12 I'll read the motion into the record, "I
13 move to amend the scope of the work to be performed
14 for the Commission's previously approved for year 2006
15 national report on reauthorization of the temporary
16 provisions of the Voting Rights Act.

17 "specifically, I move to eliminate the
18 work formerly assigned to the Office of Civil Rights
19 Evaluation under the previously approved scope of this
20 project. This limitation is necessary to ensure that
21 the Commission can submit timely findings and
22 recommendations to Congress since Congress has
23 expedited the reauthorization of the Voting Rights
24 Act.

25 "The motion will not affect the work that

1 has been completed by the Office of General Counsel
2 for the report, namely a study of the Department of
3 Justice's enforcement of the act's section 5
4 pre-clearance requirement and the language of the
5 provisions of section 203 and section 204."

6 Is there a second?

7 VICE CHAIRPERSON THERNSTROM: Second.

8 CHAIRPERSON REYNOLDS: Discussion?

9 COMMISSIONER YAKI: I have discussion, Mr.
10 Chair. Could we get someone from OCRE or staff to
11 explain what we would be omitting in this revised
12 scope of report?

13 CHAIRPERSON REYNOLDS: Sure. Ms.
14 Dickerson, would you care to address this issue?

15 COMMISSIONER MARCUS: Let me begin as Ms.
16 Dickerson is coming here. By way of general
17 background, the previously approved scope of the
18 statutory report would have included both a legal
19 portion provided by the Office of General Counsel
20 through a contractor, which was a report worked on
21 during the last fiscal year together with additional
22 analysis by the Office of Civil Rights Evaluation on
23 LEP and disability issues to be done during this
24 fiscal year.

25 Ms. Dickerson, did you want to elaborate

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1 on the work within the scope on LEP or disability at
2 all?

3 CHAIRPERSON REYNOLDS: Okay. Well, I have
4 a question for you. Is it possible to include the
5 work on LEP and disabilities issues within that time
6 frame?

7 MS. DICKERSON: No, not the revised time
8 frame that I'm understanding you to say.

9 CHAIRPERSON REYNOLDS: Okay. Commissioner
10 Yaki, did you have some specific questions?

11 COMMISSIONER YAKI: My question is
12 directed at the director of OCRE. What kind of data
13 or findings will we not be privy to by nature of the
14 revised scope in terms of the LEP given that that goes
15 through a major section of the VRE, the section 204
16 extension? In other words, what kind of work were you
17 working on and now you will not be working on?

18 MS. DICKERSON: Oh, okay. I don't believe
19 we would be able to include anything having to do with
20 LEP or the disability issues at all. The whole
21 framework and scope would only be limited to -- I
22 guess it was referenced in a more minor way in the
23 report that the contractor did. And the focus was
24 really on section 5 for that report.

25 COMMISSIONER YAKI: Well, what I am

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1 asking, though, is what was it that you were going to
2 be looking at in terms of LEP and disability in terms
3 of the section 204 analysis? What kind of data was
4 being gathered? What kind of research were you going
5 to be looking at?

6 MS. DICKERSON: We were going to prepare
7 interrogatories and request data on complaints, the
8 nature of the complaints, you know, how they had been
9 handled, how many had been resolved, whether they were
10 pending, and to look at those, the complaints over
11 time, for example, We were also going to update some
12 of the -- the contractor's report I think went up to
13 the year 2004. So we would have asked them for the
14 more recent data as well to bring it up to current.

15 COMMISSIONER YAKI: Was there any section
16 5 part of the OCRE -- was there any jurisdiction over
17 section 5 of the report that your office had or was it
18 only on 204?

19 MS. DICKERSON: In the original concept,
20 we were going to use the contractor's work for the
21 section 5 analysis. We might have just asked for the
22 data that was indicated between 2004 to date.

23 But no. Our focus was on the other parts.

24 COMMISSIONER YAKI: Will the contractor's
25 data on section 5 be able to be included in the

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1 revised schedule?

2 COMMISSIONER MARCUS: Yes. All of the
3 contractor's work could be included under this
4 proposal. Let me also say about clarification that
5 the contractor's work wasn't limited to section 5 and
6 also did include some work on LEP issues in other
7 sections as well.

8 COMMISSIONER YAKI: Well, I mean, thank
9 you. I just want to express my personal concern as a
10 commissioner from some ethnic background that where we
11 have 204 issues in California on language, whether
12 it's languages for folks from Asian backgrounds or
13 from Latino backgrounds, I think I would be very
14 disappointed if our report to the Congress was not
15 comprehensive on those issues.

16 I understand the time line that we are
17 under. I do not want, however, the Congress to think
18 that we are giving 204 and the underlying data in the
19 short trip in the analysis.

20 That is my concern about the revision, but
21 I understand the need to make it relevant in terms of
22 timeliness. I just don't know if I will be able to,
23 I will personally be able to, support it.

24 CHAIRPERSON REYNOLDS: Commissioner
25 Thernstrom?

1 VICE CHAIRPERSON THERNSTROM: Well, I very
2 much appreciate what Commissioner Yaki has said, but
3 the fact is that the issue that is really on the table
4 in congressional debate is the extension and
5 amendment, potential amendment, to section 5.

6 I do not believe at the end of the day
7 there will be any real debate on the language
8 assistance provisions. They will be extended.

9 MS. DICKERSON: Can I just correct
10 something I said?

11 CHAIRPERSON REYNOLDS: Oh, sure.

12 MS. DICKERSON: The disability section was
13 never within the scope of the project because those
14 provisions aren't expanded. So we were going to do
15 the section 203 analysis and also the section that
16 relates to election monitors.

17 VICE CHAIRPERSON THERNSTROM: And I don't
18 think either of them really is in danger of expiring.

19 COMMISSIONER BRACERAS: I'm sorry. I
20 can't hear the rest of you very well.

21 VICE CHAIRPERSON THERNSTROM: I was simply
22 saying that language provisions and the provision for
23 federal monitors, neither of them are in danger of
24 expiring. There may be one or two voices in the House
25 of Representatives who will raise questions about the

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1 necessity of reauthorizing those provisions. But
2 basically they are off the table. It is section 5 and
3 these potential amendments that are on the table.

4 And so those grounds I think confining
5 ourselves to section 5, to the real issues, makes
6 sense given the constraints that we're operating
7 under.

8 COMMISSIONER MARCUS: And I want to make
9 sure that it's clear that under the Chairman's motion,
10 we would not be stripping out all discussion of the
11 limited English proficiency issues. Rather, we would
12 be focusing on the analysis of LEP issues before the
13 Department of Justice, which was already prepared by
14 the contractor, and trying to provide that on an
15 expedited time frame so that it can be available to
16 Congress while Congress is still considering the
17 issue.

18 So there still will be information on that
19 area. It's true there will be less of it, but it's
20 hoped that it will be more timely and, therefore, more
21 useful.

22 COMMISSIONER YAKI: This is Commissioner
23 Yaki.

24 I understand what both the Vice Chair and
25 the Staff Director have said. I believe that this

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1 motion is going to pass. So I will be looking very
2 closely at our discussions on 203 and 204.

3 I just want to reiterate, however, that --
4 and the election-monitoring section as well. If I
5 could have a dollar for every time I thought there was
6 a surety about what Congress was going to do on a
7 particular item, I would not be worried about turning
8 in my time sheets for the Commission.

9 So, with that, why don't we just move to
10 a vote. I will probably abstain from this, but we
11 will look forward to working with the staff, the Staff
12 Director, and the fellow commissioners on the
13 production of the final report in a constructive and
14 positive manner.

15 CHAIRPERSON REYNOLDS: Is there a second?

16 VICE CHAIRPERSON THERNSTROM: Second.

17 COMMISSIONER MELENDEZ: Can I ask a
18 question?

19 CHAIRPERSON REYNOLDS: Yes, Commissioner
20 Melendez?

21 COMMISSIONER MELENDEZ: This is
22 Commissioner Melendez.

23 On the temporary provisions of the Voting
24 Rights Act, which I received a draft, at what point
25 does that become final? Because on page 53, it had

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1 something to do with a statement of the commissioners.
2 Is that something that a statement by any of the
3 commissioners can be added in to this exception or any
4 of those 203 --

5 COMMISSIONER MARCUS: Yes, Commissioner
6 Melendez. I believe that the document that you are
7 referring to is most likely a report prepared by the
8 contractor to the Commission, which was intended to
9 provide material which could be then used in our final
10 report.

11 COMMISSIONER BRACERAS: Wait a minute.
12 Sorry. This is Braceras.

13 I think Commissioner Melendez may be
14 getting confused with the briefing summary.

15 COMMISSIONER MELENDEZ: Yes.

16 COMMISSIONER MARCUS: Oh, that could be.

17 COMMISSIONER MELENDEZ: The briefing
18 summary that I received. I just wanted to make sure
19 that that wasn't a final document until --

20 COMMISSIONER MARCUS: Neither of those two
21 documents is considered a final document. In both
22 cases, we're going to recommend that the commissioners
23 be given until the end of the year to provide comments
24 on either of those two Voting Rights Act documents.

25 COMMISSIONER MELENDEZ: Okay. Thank you.

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1 That's all. I wanted clarification. Thank you.

2 CHAIRPERSON REYNOLDS: Okay. May I have
3 a second?

4 COMMISSIONER BRACERAS: Second.

5 CHAIRPERSON REYNOLDS: Okay. All in favor
6 please say "Aye."

7 (Whereupon, there was a chorus of "Ayes.")

8 CHAIRPERSON REYNOLDS: All in opposition?

9 (No response.)

10 CHAIRPERSON REYNOLDS: Any commissioners
11 abstain?

12 (Whereupon, there was a show of a hand.)

13 CHAIRPERSON REYNOLDS: Okay. Let the
14 record reflect that Commissioner Yaki abstains. The
15 remaining commissioners voted in favor of the motion.
16 The motion passes.

17 COMMISSIONER YAKI: Is that it?

18 CHAIRPERSON REYNOLDS: Yes. Well, for
19 that piece. Okay. I'm going to read the next motion
20 into the record. "I move that commissioners submit
21 comments, suggestions, and revisions on the work
22 already performed by the Office of General Counsel on
23 the previously approved 2006 national report on
24 reorganization of the temporary provisions of the
25 Voting Rights Act to the Office of Staff Director by

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1 close of business Friday, December 30th, 2005.

2 "I also move that the Office of Staff
3 Director prepare a revised report incorporating these
4 comments, suggestions, and revisions for submission to
5 commissioners on Monday, January 9th, 2006."

6 Is there a second?

7 VICE CHAIRPERSON THERNSTROM: I second it.

8 COMMISSIONER BRACERAS: Second.

9 CHAIRPERSON REYNOLDS: Discussion?

10 (No response.)

11 CHAIRPERSON REYNOLDS: All in favor please
12 say "Aye."

13 (Whereupon, there was a chorus of "Ayes.")

14 CHAIRPERSON REYNOLDS: Any opposition?

15 (No response.)

16 CHAIRPERSON REYNOLDS: Any abstentions?

17 (No response.)

18 CHAIRPERSON REYNOLDS: The motion carries
19 unanimously.

20 (Pause.)

21 CHAIRPERSON REYNOLDS: This is that
22 pregnant pause that I referred to earlier.

23 Okay. I'm going to read the next motion
24 into the record. "I move that the staff conduct a
25 briefing on the use of racial categories in the 2010

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1 census on Friday, March 10, 2006. The briefing will
2 be based on the concept paper distributed on Friday,
3 December 9, 2005."

4 Is there a second?

5 VICE CHAIRPERSON THERNSTROM: I second it.

6 CHAIRPERSON REYNOLDS: Discussion?

7 (No response.)

8 CHAIRPERSON REYNOLDS: All in favor say
9 "Aye."

10 (Whereupon, there was a chorus of "Ayes.")

11 CHAIRPERSON REYNOLDS: All in opposition?

12 (No response.)

13 CHAIRPERSON REYNOLDS: Any abstentions?

14 (No response.)

15 CHAIRPERSON REYNOLDS: The motion passes
16 unanimously.

17 Okay. At this point I would like to
18 adjourn the meeting. We have 15 minutes. And then
19 we'll start the briefing.

20 VICE CHAIRPERSON THERNSTROM: And is there
21 possibility we will solve this technical problem
22 before the briefing?

23 CHAIRPERSON REYNOLDS: I have no idea. I
24 doubt it, though.

25 COMMISSIONER MARCUS: We'll certainly look

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1 into it during the recess.

2 COMMISSIONER YAKI: Good-bye.

3 (Whereupon, the foregoing matter went off
4 the record at 9:46 a.m. and went back on the record at
5 9:58 a.m.)

6 CHAIRPERSON REYNOLDS: We can get started
7 now.

8 **VIII. Commission Briefing: Disparity Studies**

9 **- Introductory Remarks by Chairman**

10 CHAIRPERSON REYNOLDS: On behalf of the
11 Commission on Civil Rights, I welcome everyone to this
12 briefing on disparity studies as evidence of
13 discrimination in federal contracting. The Commission
14 frequently arranges such public briefings with
15 presentations from experts outside the agency in order
16 to inform itself of the nation's civil rights
17 situations and issues.

18 In Adarand v. Pena, opinion of the Supreme
19 Court, quoting Richmond v. Croson, reaffirmed that
20 absent a searching judicial inquiry on the
21 justification for race-based measures, benign or
22 remedial classifications motivated by illegitimate
23 notions of racial inferiority or simple racial
24 politics. Well, you can't tell.

25 The court went on to hold that federal

1 programs that use racial classifications are subject
2 to strict scrutiny. Although the court has not
3 provided clear guidance on the contours of the strict
4 scrutiny standard, it is clear that federal agencies
5 that use racial classifications must demonstrate that
6 the classification is needed to remedy the effects of
7 discriminatory conduct.

8 In order to comply with this
9 constitutional requirement, federal and state agencies
10 and contractors have commissioned disparity studies to
11 demonstrate discrimination for a statistical analysis
12 that showed under-representation of minorities or
13 women among the federal contractors.

14 After Adarand, three efforts, a 1996
15 appendix to the Department of Justice guidance, a 1997
16 Urban Institute report, and 1998 and 1999 benchmark
17 studies from the Department of Commerce, were compiled
18 for evidence of discrimination in federal contracting
19 using disparity studies and other sources.

20 Yet, critics of the efforts point to stale
21 data, a lack of documentation of data sources, and
22 fluent analytical methods, a failure to develop
23 meaningful industry groupings for a study of federal
24 contracting, and a lack of a theory of discrimination.

25 Today the Commission is seeking

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1 information on the methodological and empirical
2 strength of these and other disparity studies
3 conducted since 1995.

4 We are pleased to welcome four experts to
5 comment on the quality of current disparity studies.
6 We have Dr. Ian Ayres of Yale Law School. Dr. Ayres
7 was one of the consultants who designed the Department
8 of Commerce's benchmark study.

9 An expert witness on many affirmative
10 action contracting cases, he has published widely on
11 racial discrimination and the need for affirmative
12 action. His most recent empirical study includes
13 forthcoming articles in the Yale Law Journal and
14 Stanford Law Review on racial disparities in taxicab
15 tipping and the effects of affirmative action on the
16 number of black lawyers. Professor Ayres has earned
17 a J.D. from Yale and a Ph.D. in economics from M.I.T.

18 Taught at the law schools of several major
19 universities, he served as a research fellow of the
20 American Bar Foundation and comments regularly on
21 Public Radio's "Marketplace" and in Forbes Magazine
22 and, finally, the New York Times.

23 We also have George LaNoue. Dr. LaNoue
24 analyzes minority business programs, consults with
25 state and local officials on disparity studies, and

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1 has written guide books on how to conduct such studies
2 and continues to serve as a trial expert on civil
3 rights cases in federal courts. He has published four
4 books and numerous articles, including five law review
5 articles on post-Croson law.

6 Dr. LaNoue is a professor of political
7 science at the University of Maryland at Baltimore,
8 where he directed the public policy graduate program
9 for 18 years.

10 In addition to teaching at several major
11 universities in the United States, Dr. LaNoue has had
12 the opportunity to conduct research and lecture in 15
13 countries.

14 Next up we'll have Dr. Constance Citro.
15 She has headed the Committee on National Statistics of
16 the National Academy of Sciences since May of 2004 and
17 served as study director for their newly released
18 "Evaluation of Disparities in Federal Contracting on
19 Women-Owned Businesses."

20 Formerly, Dr. Citro was the Vice President
21 and Deputy Director of Mathematica Policy Research,
22 Inc. She is a Fellow of the American Statistical
23 Association. Between 1984 and 2004, she directed
24 numerous projects reviewing the 2000 census, poverty
25 estimates, disentail census, and survey methodology,

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1 and social welfare program models.

2 Her research has focused on the quality
3 and accessibility of large, complex data sets and the
4 measurements of income and poverty. Her Ph.D. in
5 political science is from Yale University.

6 Finally, we have Roger Clegg. He's our
7 final speaker. He is Vice President and General
8 Counsel for the Center for Equal Opportunity, a
9 research and educational organization based in nearby
10 Virginia that specializes in civil rights,
11 immigration, and bilingual education issues.

12 Mr. Clegg writes, speaks, and conducts
13 research on legal issues arising from civil rights
14 laws. He is a contributing editor at National Review
15 Online and writes frequently for newspapers and law
16 journals.

17 Mr. Clegg has held several positions in
18 the U.S. Department of Justice from 1982 and 1993,
19 including Assistant to the Solicitor General, and also
20 the second highest ranking position in the Civil
21 Rights Division.

22 Later he served as the Vice President and
23 General Counsel for the National Legal Center for
24 Public Interest, which produces publications on legal
25 issues affecting businesses. He is a graduate of Rice

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1 University and Yale Law School.

2 Our panelists have wonderful credentials
3 and experience in this area. And we look forward to
4 a rich discussion on these topics. First up we have
5 Dr. Ayres.

6 - **Speakers' Presentations**

7 DR. AYRES: Good morning. I support the
8 requirement that race-conscious government programs be
9 strictly scrutinized. Courts should demand rigorous
10 and persuasive evidence and compelling governmental
11 interest and that race-conscious means be narrowly
12 tailored to further that compelling interest.

13 My central claim here today is that
14 quantitative methods exist and have already been used
15 to provide this kind of evidence. The Commerce
16 Department's disparity study is a case in point. The
17 results of this study created a red light/green light
18 system which turned off the use of bidding credits,
19 where there was not evidence of under-utilization of
20 minority contractors. But it's my opinion that the
21 evidence of discrimination in the green lighted
22 industries is both rigorous and sufficiently
23 persuasive to make out at least a prima facie case of
24 narrow tailoring.

25 We should guard against efforts to turn

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1 the narrow tailoring requirement into a burden that no
2 government defendant could ever meet to remedy
3 discrimination. Justice O'Connor was quite clear that
4 the requirement of strict scrutiny was not a
5 subterfuge to create a fatal, in fact, requirement.

6 Indeed, the Supreme Court's recent
7 willingness to accept the narrow tailoring evidence of
8 the University of Michigan Law School is strong
9 evidence that cutting-edge quantitative disparity
10 studies, such as the one produced by the Commerce
11 Department passed constitutional muster.

12 In the Michigan case, the Supreme Court
13 required almost no statistical evidence that the law
14 school used the minimum racial preference necessary to
15 achieve its compelling interest, but the Supreme
16 Court, nonetheless, was willing to sign off on the
17 constitutionality of that affirmative action program.
18 The best procurement disparity studies already provide
19 much more persuasive narrow tailoring evidence a
20 fortiori more clearly constitutional.

21 In the remainder of this statement, I will
22 analyze three things: number one, the evidence
23 supporting the government's compelling interest in
24 remedying discrimination; two, the most persuasive
25 methodologies for estimating disparity benchmarks;

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1 and, three, a comparison of the narrow tailoring
2 evidence and procurement in educational admissions.

3 Number one, there is credible evidence of
4 a compelling governmental interest. No one disputes
5 the fact that remedying discrimination is a compelling
6 governmental interest. And there is abundant
7 statistical evidence of that that discrimination is
8 not a thing of the past.

9 Many commentators have argued, however,
10 that government can only use race-conscious
11 affirmative action to remedy its own discrimination,
12 but this idea was flatly rejected by Justice O'Connor.

13 In Croson, Justice O'Connor in a plurality
14 opinion joined by Chief Justice Rehnquist and Justice
15 White concluded that the City of Richmond -- and here
16 I quote -- "can use its spending power to remedy
17 private discrimination if it identifies that
18 discrimination with the particularity required by the
19 Fourteenth Amendment."

20 While government discrimination against
21 minority contractors in procurement markets may be a
22 thing of the past, the same cannot be said of private
23 discrimination. Credible evidence of private
24 discrimination by both input suppliers to and
25 customers of minority contractors provides a

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1 persuasive basis for government to use its spending
2 powers to remedy private discrimination.

3 Discrimination is predominantly practiced
4 today in private markets. Government has a compelling
5 interest to try to remedy it. Narrow tailoring, of
6 course, requires the use of race-neutral methods, such
7 as simply prohibiting discrimination whenever
8 possible, but a great deal of private discrimination
9 will necessarily fall below the radar screen of the
10 law.

11 Discrimination that cannot be proven in
12 individual cases can often be identified in the
13 aggregate. We should guard against requiring
14 microeconomic tests of disparate treatment as evidence
15 for discrimination in a macroeconomic setting.

16 Point number two, there are persuasive
17 statistical methods for calculating disparity
18 benchmarks. The crucial and most disputed element of
19 any disparity study is calculating the benchmark.
20 This is sometimes referred to as the minority
21 availability percentage.

22 The benchmark attempts to measure the
23 market and share of percentage of business that
24 minority firms would receive in a world without
25 discrimination. The benchmark is crucial to

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1 establish: number one, whether minorities face
2 discrimination; and, number two, whether the proposed
3 racial preferences are sufficiently limited so as to
4 only remedy the discrimination, not to overshoot.

5 For example, in a particular market, if a
6 disparity study persuasively concludes that in the
7 absence of discrimination, minority contractors would
8 have received ten percent of the contracts but we
9 observed that minority firms are only receiving four
10 percent of the contracts, then the shortfall in
11 utilization is evidence of discrimination.

12 Under-utilization evidence of this kind
13 is, thus, probative of the compelling interest prong
14 of strict scrutiny, but the benchmark is also crucial
15 in testing whether an affirmative action program is
16 narrowly tailored.

17 So the crucial question in disparity
18 studies is to develop the credible methodology to
19 estimate this benchmark's share of contracts
20 minorities would receive in the absence of
21 discrimination.

22 The touchstone for measuring the benchmark
23 is to determine whether the firm is ready, willing,
24 and able to do business with the government. Early
25 disparity studies attempted to calculate benchmarks on

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1 a very crude head-counting methodology.

2 If minorities were X percent of the
3 general population, then under this theory, courts
4 would assume that, absent discrimination, they would
5 be awarded X percent of the procurement dollars.
6 Increasingly, however, courts rejected mere head
7 counting and moved toward a qualified-firm counting
8 approach.

9 The qualified-firm counting approach
10 requires courts to identify the pool of firms which
11 are qualified in the sense of being ready, willing,
12 and able to do business with the government.

13 While this qualified-firm counting
14 approach represented a substantial advance over the
15 cruder head-counting approach, it suffered from the
16 problem that qualified firms may have substantially
17 different capacities.

18 Firm A and B may both be qualified to do
19 some business with the government, but one firm may be
20 a multinational with many plants while the other firm
21 may be a sole proprietorship with only a single plant.

22 The qualified-firm counting approach
23 ignored differences in capacity and deemed
24 single-plant firms to be equally available to serve
25 the government as a multi-plant firm.

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1 The Commerce Department's approach for
2 estimating the minority benchmark was far more
3 sophisticated than either the head-counting or the
4 qualified-firm counting approaches.

5 This methodology, which I will refer to as
6 the capacity approach, calculated in dollar terms the
7 capacity of qualified firms to do business with the
8 government. This approach more reasonably assumes
9 that if SDBs control X percent of an industry's
10 capacity, then, absent discrimination, they would be
11 awarded X percent of the industry's procurement
12 dollars.

13 Unlike the qualified-firm counting
14 approach, the capacity approach would not find that
15 manufacturers in a small micro brewery brand and
16 Budweiser were equally available but, instead, would
17 likely find that Anheuser-Busch is more available in
18 the straightforward sense that it has a larger
19 capacity.

20 The Commerce Department's capacity
21 methodology is particularly conservative because it
22 did not attempt to calculate how much greater minority
23 capacity might have been but for discrimination. A
24 so-called "but for" adjustment would raise the
25 benchmark percentage by which utilization is judged.

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1 The methodology, instead, took minority
2 capacity as it found it. It, thus, made no attempt to
3 remedy historical discrimination or even present
4 discrimination by input suppliers and customers that,
5 predictably, would depress the capacity of minority
6 firms to supply government contracts.

7 Like Justice O'Connor, I strongly support
8 a requirement to government justifying race-conscious
9 policies by providing persuasive evidence that the
10 policies are narrowly tailored to promote a compelling
11 government interest.

12 The Commerce Department's disparity
13 studies are rigorous and provide credible prima facie
14 evidence of both discrimination and the potential for
15 narrowly tailored race-conscious remedies. As the
16 Chair began, critics have pointed to the staleness of
17 the data.

18 It's striking to me that the Commerce
19 Department has not seen fit to update its benchmark
20 analysis since 1999. I worry that the present
21 administration is trying to achieve a back-door
22 subsetting of remedial race-conscious programs by
23 fostering the increasing destitute of the necessary
24 narrow tailoring evidence. Regardless of how one
25 feels about affirmative action, we should mend and not

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1 end disparity studies.

2 Finally, the constitutionality of
3 race-conscious affirmative action in education
4 admission strengthens the differences that the
5 Commerce Department disparity study provide credible
6 evidence.

7 While the narrow tailoring requirement has
8 always had multiple dimensions, the central meaning
9 has been that government use only the minimum racial
10 preference necessary to achieve its compelling
11 interest. But the truth is that the Supreme Court's
12 Grutter decision required virtually no evidence that
13 the law school use the minimum preference necessary.

14 Now that the Supreme Court has signaled
15 its willingness to support more flexible modes of
16 proof in educational affirmative action, it would be
17 bizarre for it to strike down much more rigorous
18 narrow tailoring evidence and procurement.

19 In conclusion, it has been a great honor
20 to have the opportunity to speak to this Commission
21 that has played such a remarkable role in this
22 nation's struggle to secure quality for all its
23 citizens.

24 In reading the other panelists' prepared
25 statements, I do think there is some substantial

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1 agreement that we all support the requirement of
2 rigorous, robust, validated disparity studies. I also
3 support the comments that the disparity studies should
4 be as transparent as possible. We may disagree,
5 though, on whether they can and should be done.

6 Thank you for giving me this opportunity
7 to speak.

8 CHAIRPERSON REYNOLDS: Thank you,
9 Professor Ayres.

10 Dr. Citro?

11 DR. CITRO: Thank you.

12 I appreciate very much the opportunity to
13 appear at this briefing. As you noted, I have been
14 Director since May 2004 of the Committee on National
15 Statistics, which is a standing committee at the
16 National Academy of Sciences. And I have worked at
17 the committee for over 20 years, principally as a
18 senior study director.

19 My remarks are based largely on my
20 experience as study director for a Committee on
21 National Statistics project that looked at the
22 utilization of women-owned businesses in federal
23 contracting. The study was commissioned by the U.S.
24 Small Business Administration. We were asked to
25 review relevant data and methods.

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1 We published our report in March 2005. I
2 have provided copies to the members of the Commission,
3 and there are a few additional copies. It's also
4 available on the Web.

5 My remarks are also informed by my work
6 with a Committee on National Statistics panel on
7 methods and data for measuring racial discrimination.
8 It issued its report in February 2004. I only have
9 one copy here. It's quite a substantial document to
10 carry around.

11 My remarks are about data and methods. I
12 leave it to others to draw the conclusions about the
13 relevance to the legal situation. I briefly talk
14 about and expanded on in my written remarks
15 definitions, methodological issues for disparity
16 studies, the pros and cons of the specific studies
17 that our project looked at, which included the Urban
18 Institute meta analysis, the benchmark studies by the
19 Department of Commerce, and a preliminary SBA study
20 that was completed in 2002.

21 All right. One has to start with
22 definitions, which in this case the critical concepts
23 are disparity, which is simply a difference between
24 two groups on an outcome of interest, and
25 discrimination, for which there is a long history of

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1 the definition of both disparate treatment and
2 disparate effect discrimination.

3 Now, one would expect discrimination to
4 result in an observable disparity, but a particular
5 measured disparity does not necessarily imply
6 discrimination. It may be due to any number of
7 factors. But you have to start somewhere. And
8 obviously starting to determine if you have measurable
9 disparities seems the sensible obvious thing to do.

10 Our report reviews in detail various
11 measurement and methodological issues for disparity
12 studies. And I want to just comment on a few here.

13 The most common disparity measure that has
14 been used is something called a disparity ratio. It
15 has a numerator and a denominator. The numerator has
16 to do with utilization. You look, for instance, at
17 whether women or minority-owned businesses, the share
18 that they may have of contracts or contract dollars.

19 The denominator is the availability share,
20 which is some measure of what is the pool that is out
21 there that one could reasonably expect to be available
22 for contracting.

23 If dividing the numerator by the
24 denominator you get a disparity ratio of one, then
25 that means there is no disparity. The share of

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1 contracts is commensurate with the share of the
2 available pool. If it's less than one, then you have
3 a measure that the share of contracts is not as great
4 as the available tool.

5 Now, in the contracting arena, you would
6 expect the availability share for a group such as
7 women-owned small businesses to vary across industries
8 and other characteristics of businesses. For this
9 reason, it is critical to use disparity ratios broken
10 down by meaningful categories and not just simple
11 counts or percentages of utilization.

12 For instance, if industry A has ten
13 percent women-owned small businesses and industry B
14 only two percent, you really need to look at those
15 separately, rather than just comparing the raw
16 percentages of contracts.

17 Now, there are a number of issues involved
18 in getting statistically defensible, valid, reliable
19 disparity measures. And we discussed them at length
20 in the report. I'll single out three.

21 One is that, for reasons that I have not
22 been able to determine, most of the work in disparity
23 measurement to date has compared apples and oranges in
24 the numerator and the denominator. Most commonly, the
25 numerator is a measure of contract dollars awarded to

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1 a target group, such as women-owned small businesses.

2 Most commonly, the availability measure is
3 some measure of numbers of businesses out in the
4 general population, but businesses are very skewed in
5 terms of their size distribution, in terms of revenues
6 or gross sales or whatever you wanted to use. And so
7 by comparing apples and oranges, one is distorting,
8 one way or another, the disability measure. One needs
9 to have a commensurate measure. One also needs to
10 actually look in our view at multiple measures.

11 The first speaker has emphasized that the
12 key element of the disparity ratio that is really
13 often in dispute is this availability measure. Who
14 are you going to put in the category of ready,
15 willing, and able? If you throw all businesses into
16 the availability pool, you undoubtedly have too broad
17 a pool as there are many businesses that don't care to
18 do contracting or are not able to do so. On the other
19 hand, if you have a very narrowly tailored
20 requirement, why, then you are probably excluding
21 firms that could be bidders.

22 Finally, the key issue -- and, again, many
23 disparity studies have not met this standard -- has to
24 do with validation, documentation, and transparency.

25 I will not go into the detailed evaluation

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1 that we did conduct of the Urban Institute and the
2 Department of Commerce and the SBA studies in my oral
3 remarks. I've summarized that in my written remarks.

4 Let me just make some concluding
5 observations. Again, disparity studies in my view are
6 a reasonable first step to identify situations in
7 which certain types of businesses could be
8 disadvantaged in government contracting due to current
9 or past discriminatory practices or behavior.

10 Observed disparities cannot establish by
11 themselves discrimination nor the locus of any
12 discrimination in time or space. For that, you have
13 really got to move back into the process to look at
14 various aspects of the contracting process or perhaps
15 to look even further back in the causal change by
16 which pools of ready, willing, and able bidders are
17 developed.

18 But you start with disparity studies. To
19 be relevant and convincing, they must meet high
20 standards for validity, reliability, and
21 reproducibility.

22 In general terms, all data, methods,
23 evaluations, and results must be thoroughly
24 documented. More specifically, in constructing a
25 disparity ratio, you need to use the same metric.

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1 That's dollars or numbers; that's the apples and
2 oranges problem.

3 You should use the same time period for
4 utilization and availability because there's a lot of
5 change going on in the composition of the business
6 community. And if you've got data that are quite old
7 for one aspect but not the other, you could be
8 distorting things.

9 In addition, we urge that more than one
10 type of disparity ratio should be calculated to
11 determine if the story is the same or different
12 depending on the measure used.

13 You should test the sensitivity of the
14 results, the variations in methods and data, and the
15 presence of outliers in the data. And you need
16 careful evaluation to determine the best groupings of
17 industries to use so that, for instance, you're not
18 mixing a limousine service with Greyhound bus in
19 determining your availability pool.

20 Finally, you really need explicit
21 rationales for the availability measure of why you're
22 going to define the pool of ready, willing, and able.
23 And, again, results that show significant disparities
24 for a target group, for a range of definitions of your
25 pool of availability will be more compelling than if

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1 you just pick out a single measure.

2 In terms of the specific studies, at this
3 point, I see little point in attempting to try to
4 replicate exactly the Department of Commerce benchmark
5 procedure. And the principal reason is at least we
6 were not able to find documentation of the methodology
7 and any sensitivity analysis of the particular
8 regression equations that were used to measure
9 capacity, although the notion the department had of
10 capability analysis, of trying to use some measures of
11 payroll and years of experience is certainly something
12 that is worth exploring.

13 The Urban Institute's meta analysis, the
14 specific studies used, are very out of date and apply
15 only to state and local government contracting in
16 specific jurisdictions. But this study really, while
17 not perfect, was a model of careful specification,
18 sensitivity analysis, and thorough documentation.

19 The Urban Institute report actually
20 provides the individual disparity studies. So one can
21 do some variations on their analysis, which we did in
22 our report.

23 We critiqued the SBA preliminary study and
24 said it needed to go back to the drawing board. And
25 my understanding is that that may be happening.

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1 Finally, a research program on the
2 contracting process in various industries and agencies
3 that draws on case studies, administrative records,
4 and statistical analysis could be very useful to
5 inform government agencies not only of the possible
6 role of discrimination but also of ways to improve the
7 process for all types of businesses.

8 I am not sure where funding for such a
9 program would come in this era, but I think that such
10 a program, which would use disparity studies but would
11 go much richer and deeper, could be very helpful in
12 this arena.

13 Thank you so much for the opportunity to
14 participate.

15 CHAIRPERSON REYNOLDS: Thank you.

16 Next up Mr. Clegg.

17 MR. CLEGG: Me or Dr. LaNoue?

18 CHAIRPERSON REYNOLDS: I'm just going to
19 go down the line.

20 MR. CLEGG: Okay. Fine. Thank you very
21 much, Mr. Chairman, for the opportunity to talk to the
22 Commission today.

23 I agree with Professor Ayres that there is
24 a lot of common ground among us on the issue of
25 disparity studies. One part of the common ground is

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1 I think everybody agrees that you have to be very
2 careful in looking at statistical disparities and
3 concluding that, therefore, there must be
4 discrimination.

5 Someone very wise once wrote "Somebody can
6 look at disparities and conclude that it is due to
7 discrimination, but before you can do that, you have
8 to perform an investigation because there are other
9 factors that could explain these disparities.
10 Disparities could be the result of discrimination or
11 could be the result of something else that has no
12 relation to discriminatory conduct." That, of course,
13 is what you said, Mr. Chairman.

14 I think that the distinction between
15 disparities, on the one hand, and discrimination, on
16 the other, is a point that Dr. Citro makes in her
17 written statement.

18 I also think that we all agree that before
19 racial preferences can be used to remedy any
20 discrimination that is actually found, that there has
21 to be this finding of actual discrimination that needs
22 to be very carefully done to make sure that the
23 discrimination being required is closely related to
24 the discrimination that is supposed being corrected
25 and that, in addition, the use of preferences be

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1 narrowly tailored and that an element of narrow
2 tailoring is that there be no other way to correct the
3 discrimination.

4 The Justice Department told the Supreme
5 Court that a federal program may use race-conscious
6 remedies only as a last resort where the effects of
7 discrimination are stubborn, persistent, and incapable
8 of eradication through race-neutral measures.

9 Professor Ayres in his written testimony
10 said that if the government objectives, in this case
11 remedying discrimination, could be fulfilled without
12 the use of a racial preference, then no racial
13 preference could be allowed.

14 What I would like to focus on in the
15 remainder of my oral remarks is why it is that in the
16 year 2005, it is extremely unlikely that, even if you
17 were able to do a disparity study that made everybody
18 happy in terms of actually identifying discrimination,
19 as opposed to simply disparities, that it would not
20 follow that racial preferences should be used to
21 remedy the discrimination because of the fact that
22 there are I think always going to be better ways to
23 eliminate the discrimination than through more
24 discrimination.

25 At every step of the contracting process,

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1 it is clear that there are more narrowly tailored
2 remedies than using racial preferences; for instance,
3 if companies are being excluded from bidding because
4 of unrealistic or irrational bonding or bundling
5 requirements. And those requirements should be
6 changed, but they should be changed for all companies,
7 regardless of the skin color of the owner.

8 If the companies who could submit bids are
9 not doing so, then the publication and other
10 procedures used in soliciting bids should be opened
11 up. But in opening them up, they should be opened up
12 to all potential bidders, not just some.

13 And, finally, if it can be shown that the
14 government bids are being denied to the lowest bidder
15 because of the bidder's race, then there should be put
16 in place safeguards to detect discrimination and
17 sanctions to punish it. But, again, those safeguards
18 and sanctions should protect all companies from racial
19 discrimination, not just some.

20 One point of -- I'm not actually sure it's
21 a point of disagreement, but I think a point that
22 should be clarified is that not only does it not
23 follow that if there is a disparity, there must be
24 discrimination. It also doesn't follow that if there
25 isn't a disparity, then there can't be discrimination.

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1 For instance, Asians are over-represented
2 in terms of the general population in acceptance to
3 universities, but they are also discriminated against.
4 So the mere fact that they are over-represented in
5 universities doesn't prove that they haven't been
6 discriminated against.

7 So you have to be very careful in using
8 statistics either way. And if you're putting in place
9 measures to fight discrimination, they should be
10 protecting everyone from discrimination, even
11 individuals who belong to groups that happen to be
12 "over-represented."

13 Contracting is different I think than
14 hiring, promoting, and even university admissions
15 because in those instances, there's I think a larger
16 irreducible and significant amount of subjectivity in
17 the decision-making.

18 Contracting is an area -- I think
19 Professor Ayres alluded to this -- where the process
20 can be made very transparent and where this
21 transparency should make it relatively easy to detect
22 and correct discrimination.

23 Even if there could still be in theory a
24 few cases of discrimination that go unremedied, which
25 is always going to be the case -- there's always the

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1 possibility that you might not be able to get, you
2 know, the very last case of discrimination -- you have
3 to ask yourself whether putting in place a regime that
4 institutionalizes discrimination in the other
5 direction is the appropriate and narrowly tailored and
6 fair means to get rid of that last little bit of
7 discrimination.

8 I would say, Mr. Chairman, that the study
9 that the Commission recently published did a very good
10 job of collecting and discussing the various
11 race-neutral alternatives that are available to
12 entities that want to correct contracting
13 discrimination.

14 I want to say that my only criticism of
15 the report is that it did not make it clear that the
16 aim of the alternatives is to correct and end
17 discrimination, not to achieve a particular percentage
18 of contracting by this or that ethnic group because,
19 as I think we have all agreed, you can't really
20 conclude that there is a particular percentage that is
21 necessarily going to be appropriate. Some groups may
22 be over-represented and others under-represented for
23 all kinds of reasons that have nothing to do with
24 discrimination.

25 I should also say that these race-neutral

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1 alternatives have been used very successfully in a
2 variety of contexts, most recently in the State of New
3 Jersey, where I think, principally as a result of a
4 court order striking down that state's use of racial
5 preferences, a system of race-neutral alternatives was
6 put into place. And it's been quite successful.

7 And so, Mr. Chairman, I think that great
8 care must be taken in preparing a disparity study to
9 ensure that the evidence marshalled actually
10 demonstrates discrimination. And I think that you're
11 getting a lot of good advice today on how those
12 disparity studies need to be done very carefully.

13 The thought that I want to leave you all
14 with is that, even if a disparity study finally
15 marshals evidence that is persuasive in its
16 documentation of discrimination, it does not follow
17 that the use of racial and ethnic preferences to
18 correct that discrimination is justified, I think
19 that, again, in the year 2005, there are always going
20 to be better means to correct any discrimination than
21 piling more discrimination on top.

22 Thank you very much.

23 CHAIRPERSON REYNOLDS: Okay. Thank you,
24 Mr. Clegg.

25 Next up we'll have Dr. LaNoue.

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1 DR. LaNOUE: Thank you, Mr. Chairman. I
2 thank the Commission for holding this hearing. It's
3 an important subject. There's an enormous amount of
4 money at stake, a huge number of government programs;
5 and, equally important, a perception of race relations
6 that is involved in creating accurate disparity
7 studies.

8 I would add the only one thing to my
9 background in 1989 after Richmond versus Croson, I
10 created the project on civil rights and public
11 contracts at the University of Maryland to function as
12 a library and database, minority and women-owned
13 business enterprise programs. Today it contains about
14 20,000 pages of materials, including more than 160
15 disparity studies. It's the largest publicly
16 accessible collection anywhere. And that collection
17 is available to the Commission if it wants to examine
18 any documents or to do any research.

19 My written statement is 44 pages long, and
20 thank you for indulging me on that. I'll only repeat
21 some conclusions here, but I'll be happy to answer any
22 questions about the report.

23 Discrimination is a poison in the
24 bloodstream of American life. Understanding the role
25 of disparity studies, the purport to examine

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1 discrimination in public contracting is important for
2 several reasons.

3 If done properly, disparity studies may be
4 useful in highlighting the consequences of
5 discrimination and providing information to eliminate
6 them. If the studies are done improperly, however, it
7 may create claims of discrimination that are false or
8 misleading.

9 False claims of discrimination contribute
10 to racial polarization and suppress interest in
11 searching for race-neutral programs that may create
12 genuine new opportunities.

13 Even at their best, disparity studies can
14 rarely identify the source of discrimination with any
15 precision and, thus, need to be supplemented with
16 other data to create an appropriate public policy.

17 Let me talk a little bit about some of the
18 general flaws in the -- I've read about 150 state and
19 local disparity studies. There are probably 180 and
20 in the 3 federal document concerned here.

21 I want to stress where I can where I hear
22 agreement on the panel because I believe that is
23 important. We come from different backgrounds,
24 different methodological tools, different disciplinary
25 perspectives, though I did note there is a lot of Yale

1 blue on this panel.

2 (Laughter.)

3 DR. LaNOUE: Let me talk about some --

4 COMMISSIONER YAKI: We're probably going
5 to hear from Harvard on the disparity study.

6 DR. LaNOUE: I would welcome their
7 participation.

8 VICE CHAIRPERSON THERNSTROM: You didn't
9 make your introduction. The introduction by the Chair
10 didn't make it clear that your Ph.D. is from Yale.

11 DR. LaNOUE: That's true.

12 VICE CHAIRPERSON THERNSTROM: So, to
13 clarify, this is what we've got here.

14 DR. LaNOUE: Let me talk about some of the
15 general flaws in disparity studies. While there are
16 variations in method and the quality of disparity
17 studies, all have some common flaws. Most all of them
18 have some common flaws.

19 In their statistical sections, they fail
20 to measure availability in the terms that Croson
21 requires of comparing qualified, willing, and able
22 businesses that perform similar public services.
23 That's the Croson language.

24 Now, I think Professor Ayres and I have
25 some substantial, if not perfect, agreement about

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1 this. First, he has criticized the use of head counts
2 as a simple measure of availability. If you look at
3 the state and local disparity studies, that would wipe
4 out about 50 percent of them. They're based on head
5 counts.

6 He also suggests -- and I agree -- that
7 there needs to be some capacity measure. I would
8 probably take out about another 30 percent. We now
9 have about 80 percent that we would agree with.

10 And he didn't say so, but I think he
11 believes because that's the way the benchmark study is
12 organized it should be categorized and the disparity
13 should be examined by industry.

14 So if you ask that to be added, the use of
15 SIC codes or the more modern NAIC codes, that would
16 take out about another 18 percent. So there would be
17 about two percent of the state and local disparity
18 studies in the country that would be wiped out by
19 those three requirements.

20 Secondly, they are frequently based on
21 obsolete or incomplete data. If you read disparity
22 studies, they oftentimes will tell you "We didn't
23 really have the data to do this."

24 Thirdly, they report the data in ways that
25 exaggerate disparities. Dr. Citro pointed out the

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1 common apples and oranges comparison in disparity
2 studies where they compare the numerical share of
3 businesses with revenues and make no estimate of
4 qualifications or capacity. And that will almost
5 always be an exaggerated or misleading form of
6 disparity. I would say about 80 percent of the state
7 and local disparity studies make that error.

8 Fourth, they do not test to see if there
9 are nondiscriminatory explanations for disparities.
10 Once they get a disparity, the term "disparity" morphs
11 into the term "discrimination." And, as Dr. Citro and
12 I think Dr. Ayres would also agree, a disparity does
13 not lead inevitably to the conclusion that it was
14 caused by discrimination. It could be caused by a lot
15 of things.

16 Fifth, they make findings of
17 discrimination without ever identifying a single
18 instance of discrimination or even a general source.
19 And Dr. Citro mentioned that you need to really
20 understand the procurement process. You might need to
21 do case studies to locate some of the problems. I
22 agree with that. I think simple statistical analysis
23 may be very useful in pointing the direction to
24 further identification of discrimination, but it isn't
25 a total solution.

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1 None of the other experts here have talked
2 about anecdotal sections, which are very important in
3 disparity studies. And I have a long section. I'm
4 writing a law review article on that subject. I have
5 a long section, and I'll just summarize the
6 conclusions here.

7 The anecdotal sections base their
8 conclusions on samples that are not gathered according
9 to scientific methods. They base conclusions on a
10 very small percentage of the survey universe. They
11 fail to verify any allegation they report so that
12 governments are left with a report that says there
13 have been allegations. But there is no identification
14 of who made the allegation. All the anecdotes are
15 anonymous. And so governments then can either accept
16 the conclusions that are not placed in a way that they
17 can investigate.

18 The Commission's interest in this subject
19 comes at a critical time. The benchmark study data is
20 now almost a decade old. I believe its methodology is
21 flawed. And, further, whatever the debate might be
22 about that, the benchmark study does not have any
23 indication of which particular racial and ethnic
24 groups are suffering from disparities. It expresses
25 disparities in terms of SDBs.

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1 I think the law is pretty clear now that
2 you have to find discrimination against particular
3 racial and ethnic groups. You can't just have a
4 composite finding.

5 Nevertheless, the benchmark study is the
6 only supporting statistical predicate to narrowly
7 tailored federal race-conscious contracting programs.
8 The Department of Justice's 1996 appendix A is still
9 being introduced by DOJ in the cases, but it was never
10 based on original research and the secondary research
11 it relied on is now old and some of it has been found
12 not to be credible.

13 If it is true that the state and local
14 disparity studies are overwhelmingly flawed, then the
15 Urban Institute study cannot be correct either since
16 it's all based on those state and local disparity
17 studies. And, furthermore, its data is now ten or
18 more years old.

19 Neither this Bush administration or recent
20 Congresses have shown any interest in updating
21 disparity analysis. And, as you heard, the recent
22 attempt by the SBA to create a statistical basis for
23 adding women to the 8(a) program has been found to be
24 flawed.

25 Finally, a recent decision by the Ninth

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1 Circuit, Western States versus Washington State
2 Department of Transportation, has held that recipients
3 of federal transportation dollars, highways, airports,
4 transit systems, must have local evidence of
5 contracting discrimination against specific groups
6 before they can set race-conscious goals.

7 The Bush Justice Department has chosen not
8 to appeal this decision. So it is going to be in
9 place. That probably means a raft of new state and
10 local disparity studies.

11 In short, it is predictable. The taxpayer
12 investments in contracting disparity studies,
13 controversy over the methods used in them and their
14 judicial review, will go on for some time.

15 Guidance from the Commission about
16 acceptable methodologies and roles for disparity
17 studies would be a very important public service.

18 The last part of my report has to do with
19 the consideration of race-neutral alternatives, which
20 is an area where this Commission has already done
21 important work. I'll simply list the area where I
22 think the federal report that you have done can be
23 modified to give guidance to state and local
24 governments.

25 First, if there's a problem with the lack

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1 of will functioning complaint system, where claims of
2 discrimination can be evaluated and remedied if valid;
3 second, problems with communication about contracting
4 opportunities; third, problems with discriminatory
5 award of contracts; fourth, problems with the
6 suppliers; fifth, problems with contract size; sixth,
7 problems with binding and lending; seven, problems
8 with the lack of a business plan or other skills to
9 become a viable competitor for contracts. I believe
10 there are race-neutral solutions to all of these
11 things. And I have outlined them in my report.

12 Serious consideration of race-neutral
13 solutions should not be an empty rhetorical ritual but
14 should involve active problem identification and
15 creative solutions, as the court instructed in Croson.
16 Consistent with its advice in federal procurement
17 after Adarand, the Commission should provide
18 guidelines on serious consideration of race-neutral
19 alternatives at the state and local level for
20 contracting procedures.

21 Thank you.

22 CHAIRPERSON REYNOLDS: Okay. I would like
23 to thank the panelists. I think your presentations
24 were enlightening. Before the commissioners start
25 quizzing you, I would like to know if any of the

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1 panelists have any questions or comments regarding
2 something said by other panelists.

3 - **Questions by Commissioners and Staff Director**

4 DR. AYRES: Yes.

5 CHAIRPERSON REYNOLDS: Yes, Dr. Ayres?

6 DR. AYRES: So it's just a small point,
7 but the use of race-neutral alternatives would be a
8 lot easier if the discrimination that was being
9 remedied was government discrimination. If the
10 government is discriminating and not getting the
11 contract to the low bidder, that is real easy to
12 remedy. Stop the government from doing that.

13 If government policies have disparate
14 impacts and bond requirements, you can use
15 race-neutral alternatives to get rid of those
16 governmental induced disparate impacts.

17 And all of the examples that Dr. LaNoue
18 and Mr. Clegg emphasized in race-neutral alternatives
19 were directed at trying to remedy government
20 discrimination.

21 The problem is that it's much, much harder
22 to use race-neutral alternatives to remedy private
23 discrimination and that the remedy to private
24 discrimination that Justice O'Connor talked about was
25 not -- if you can, of course, you get rid of the

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1 discrimination.

2 But she talked expressly that a local
3 government can use its spending power to eradicate the
4 effects of discrimination. Even if you can't stop the
5 discrimination itself, it is constitutionally
6 authorized to use spending power to at least make it
7 stop hurting.

8 CHAIRPERSON REYNOLDS: Yes?

9 DR. LaNOUE: I would say two things.
10 First, I was pleased to see that Dr. Ayres agrees that
11 discrimination by government themselves, it is
12 extremely likely that the problems are much more
13 likely to be in the private sector. I certainly agree
14 with that.

15 In the work that I have done, one of the
16 things that I have been surprised at is how rarely
17 have state and local governments prohibited
18 discrimination in private contracting?

19 I think partly it's because it is a very
20 complicated issue. For example, if an organization,
21 let's say a religious organization, wants to have a
22 new roof or a wing attached to its building and
23 decides that it wants some member of the religious
24 organization to do that, is that a form of
25 discrimination and not to be prohibited? It shouldn't

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1 be prohibited if a contractor continues to use the
2 same subcontractor that he or she has been using over
3 the years and has good experience with.

4 So the statutory problems are fairly
5 complicated. I do think, however, it is possible to
6 identify issues in the private sector and seek to
7 remedy them with race-neutral means. I'll indicate
8 two very briefly.

9 In the St. Petersburg disparity study that
10 I worked on, two issues came up. One issue was that
11 minority small businesses said that they were not
12 given enough notice of contracting opportunities in
13 the private sector.

14 In the public sector, that problem is
15 pretty largely solved. Things are on Web sites.
16 They're pretty available to anybody who is watching.
17 But on the private sector, somebody builds a \$10
18 million condo or something like that. How do you find
19 that there were subcontracting opportunities?

20 I urge the city to use its zoning and
21 licensing powers to say that above a certain
22 threshold, if a private contractor wanted to get the
23 city's approval to do this, that it had to agree to
24 make subcontracting opportunities publicly available,
25 to announce them so that everybody had access to those

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1 opportunities.

2 A second issue had to do with lending.
3 And we heard from a number of sources that small
4 minority businesses were having trouble getting
5 lending. I went to the banks, talked to bank
6 officials about that. They said one of the problems
7 was that these firms did not have enough experience in
8 drawing up business plans.

9 I went to the Chamber of Commerce and
10 said, "What can be done about this?" The Chamber of
11 Commerce created a mentoring program for businesses
12 that needed help in designing business plans.

13 Well, those are race-neutral alternatives..
14 Are they perfect? Do they solve everything? No. But
15 they are movement in the direction of creating
16 opportunities if you have identified the problem.
17 That's the key thing, to identify the problem.

18 CHAIRPERSON REYNOLDS: Mr. Clegg?

19 MR. CLEGG: I agree with everything that
20 Professor LaNoue said. I don't think that anything
21 that I talked about or anything that Professor LaNoue
22 talked about in terms of race-neutral alternatives
23 would be limited to government discrimination.

24 And I think that, actually, the examples
25 that we give of race-neutral alternatives and the

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1 race-neutral alternatives that the Commission talked
2 about in its report this fall are all things that can
3 be applied to private discrimination as well as public
4 discrimination.

5 CHAIRPERSON REYNOLDS: Ms. Citro, any
6 questions or comments?

7 DR. CITRO: I would just like to comment
8 again on methodology data and methods. If you all are
9 in the business or think that it would be useful to
10 provide guidance to state and local governments for
11 these kinds of disparity studies, I think you could
12 make real service. And I think there is guidance that
13 can be provided or studies that can meet reasonable
14 tests that they are reasonably reliable and valid and
15 so forth.

16 Again, a lot of it has to do with
17 documentation, transparency, and trying alternatives.
18 Instead of looking for one single disparity measure
19 that's the golden grail of measuring, you know,
20 availability in one particular method, you really get
21 more robust results if you experiment with some
22 variations, you try to look sensitively at, again,
23 your industry classifications, your outliers in the
24 federal situation.

25 For instance, I can well see -- I don't

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1 know if this is true, but, say, take the Iraq war with
2 some of those very big contracts. The data for these
3 years are likely to -- those contracts may well swap
4 some of the more regular level of contracting. So one
5 would want to look at disparity measures with and
6 without those contracts because to the extent that you
7 get a range of measures that are telling you a
8 consistent story.

9 And in the Urban Institute meta analysis,
10 since our report was looking on women, that's what we
11 looked at, they did a lot of sensitivity analysis. We
12 did some more.

13 And the basic story for women-owned small
14 businesses, while it didn't matter sort of how you --
15 which definitions of an available pool or what other
16 things you were using, it tended to look like there
17 were problems in these jurisdictions in this time
18 period for women-owned small businesses.

19 On the other hand, if you get a variety of
20 measures that give you different stories, then you
21 know that instead of trying to defend to the death one
22 particular measure, that you need to really look
23 further back behind the data.

24 I will also say that I do think analysis
25 in the federal government because there are now better

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1 data sources available about federal contracting with
2 the central contractor registration, with the latest
3 survey of business ownership from the Census Bureau,
4 and so on, where I think one could do some very
5 credible studies and that those would not only be
6 useful for trying to identify issues in federal
7 contracting but could be useful as guidance for states
8 and localities.

9 CHAIRPERSON REYNOLDS: Okay. At this
10 point I would like to open up the floor for questions
11 from the commissioners. Vice Chair Thernstrom?

12 VICE CHAIRPERSON THERNSTROM: I'll start.
13 I'll start with Professor Ayres. I have really a lot
14 of, actually, questions for everybody, but let's start
15 with this one.

16 You focused on the Commerce Department's
17 disparity studies. And I wonder how familiar with you
18 are with the state and the local disparity studies
19 that Professor LaNoue talked about. If you could
20 identify any you think were well-done, poorly done?
21 And tell us what standards you think should be
22 required for state and local disparity studies related
23 to availability, utilization, anecdotes. In other
24 words, talk about those.

25 I'm also concerned about some other

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1 questions raised about the Commerce Department's
2 benchmark studies, what years they do their data from.
3 The question of how obsolete those data are now
4 obviously was a very fast-moving landscape or a
5 changing landscape in any case and, sort of as a broad
6 question, how recent you think that economic data have
7 to be in order to draw conclusions about current
8 discrimination. The benchmark studies found
9 disparities in some industries, not in others, even
10 industries closely related. You know, could you talk
11 about that, for instance?

12 Well, I'll stop there. I do have a bunch
13 of other questions, but why don't I just stop there.

14 DR. AYRES: I do have some knowledge of
15 state and local disparity studies. I've served as an
16 expert in analyzing some of them. As I said in my
17 written prepared comments, I've even given testimony
18 suggesting, for example, in the F. Buddie Contracting
19 v. Cuyahoga Community College, that the benchmark
20 there was not sufficient to provide even a prima facie
21 case of narrow tailoring. That's referred to I
22 believe on page 6 of my written comments.

23 And so I think that we do have a consensus
24 but support the apples/oranges criticism as another
25 way of stating that I think everyone on this panel

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1 prefers a capacity approach to coming up with the
2 benchmarking, and so to the extent that state and
3 local have not done that.

4 I would put on one small caveat that there
5 have been some state and locals that do a -- they use
6 a kind of a qualified head counting. They try to
7 capture a bit of capacity by putting the qualified
8 firms into different categories of capacity: small,
9 medium, and large. At least that's among the
10 qualified firm counting approaches. Those would be
11 superior.

12 Whether they are sufficient to provide a
13 strong basis I don't have an opinion for you, but I do
14 want to say I can imagine a version of qualified firm
15 counting that at least is starting to respond to the
16 apples and oranges problem, which I do take to be an
17 important one.

18 Another big issue in disparity studies
19 that comes up is the degree of aggregation or
20 disaggregation. And here I just want to say that it
21 is an issue that often cuts in two directions, that
22 after you screen, if you disaggregate too far, it is
23 likely that you will mask statistical evidence of
24 discrimination.

25 And the simple metaphor here is if I had

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1 1,000 coins and I flip each one of them once and I
2 just look at each individual coin flip, I never can
3 tell whether any of those individual coins is unfair,
4 but if I look at 1,000 of them. So there are costs to
5 disaggregation, but there are certainly costs that
6 aggregation can mask or bias.

7 And so how it plays out in a particular
8 case is going to turn on the specifics. So that is
9 another issue that I think that reasonable people
10 could differ on, is the degree of aggregation.

11 With regard to the question of how stale
12 or how recent the data has to be in order to provide
13 persuasive evidence, it turns a bit on the legal
14 question of how far back the government can go and
15 remedy a past discrimination. My sense of reading the
16 case is that the Supreme Court will not allow the
17 remedying of historical discrimination.

18 So there is certainly going to be a legal
19 limit, but to my sense, if there is a date, if the law
20 lets you go back so many years, let's say X years,
21 then to go back more than -- and this is just a very
22 crude response to you. But to give you an idea, to go
23 back more than X plus five or X plus ten, to rely on
24 data that's more than ten years old in the contracting
25 setting would not provide a very reliable piece of

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1 information.

2 And it's one of the reasons why, again, I
3 think that government, even if it wants to solely rely
4 on race-neutral means, should not go out of the
5 business for testing whether there is discrimination.
6 It should continue. It should mend, not end,
7 disparity studies.

8 VICE CHAIRPERSON THERNSTROM: Yes. I
9 mean, ten years is a long time on the civil rights
10 calendar since over every decade in this country in
11 the last 50 years, there's been quite a bit of change
12 in terms of the racial landscape.

13 Let me just ask one very general question,
14 to you, and then I'll let the microphone go and get
15 back to the questions so that other people and others
16 can have questions of you, if possible.

17 It seems to me there was a kind of
18 bottom-line disagreement here between you and, let's
19 say, Roger Clegg, who said a number of times -- and it
20 seems to me this is getting at the essence of where
21 the two of you depart.

22 Roger Clegg raised the question of whether
23 it was a good idea to use more discrimination as a
24 remedy for discrimination. And I assume that you
25 would not agree with the characterization that

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1 preferences in contracting or racial preferences in
2 contracting or in any other area could be described as
3 more discrimination and that that really is a dividing
4 point between them.

5 DR. AYRES: I'm not uncomfortable with
6 referring to race-conscious affirmative action
7 programs as a form of racial disparate treatment.
8 It's a kind of a literal discrimination in a very
9 traditional sense.

10 But the normative framework that more
11 discrimination is an inappropriate way of remedying
12 other discrimination is one that I, like Justice
13 O'Connor, disagree with that if you do it in a
14 narrowly tailored fashion, that race-conscious
15 spending can be normatively appropriate.

16 To tell you the truth, my beginning
17 example of this is Marian Anderson. Marian Anderson
18 was discriminated against by the Daughters of the
19 American Revolution. And the United States government
20 engaged in race-conscious affirmative action. They
21 opened up the Lincoln Memorial because she had been a
22 victim of past discrimination. And I think that that
23 was constitutional.

24 MR. CLEGG: Let me say that that's a great
25 example of a remedy that is not discriminatory. When

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1 the federal government opened up the Lincoln Memorial,
2 it did not then turn around and give Marian Anderson
3 a preference because she was black or refuse to allow
4 somebody to sing who was white. They were remedying
5 a particular case of discrimination against an
6 individual.

7 Now, if the federal government had a
8 policy of protecting African Americans when they were
9 discriminated against and not protecting Latinos or
10 Asians or whites when they were discriminated against,
11 that would be discrimination, but what happened with
12 Marian Anderson I think was a wonderful thing for the
13 federal government to do, but it was not
14 discrimination.

15 CHAIRPERSON REYNOLDS: Okay. Dr. LaNoue,
16 do you have a comment?

17 DR. LANOUE: Yes. I just wanted to
18 comment on the way minority business programs actually
19 work as applied to this issue. Essentially, whether
20 it's the 8(a) program or state and local program,
21 firms are certified as MBEs or MWBEs. And all they
22 really need to do to be certified is to indicate what
23 their racial, ethnic, or gender ownership is.

24 And sometimes they have to meet certain
25 thresholds for the net worth of the owner, not always,

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1 and sometimes for the size of the business. They do
2 not actually have to show anything that would indicate
3 they have ever been discriminated against.

4 And so a remedy that gives a preference to
5 all firms owned by a particular racial or ethnic
6 group, as opposed to firms owned by others -- and
7 sometimes there are minority firms that end up on the
8 losing side of this, too, because the disparity study
9 hasn't shown that they're affected by any disparities.
10 So they're on the outs, too.

11 That kind of a remedy, which affects any
12 firm owned by a person of a particular group, because
13 there is some statistical disparity seems to me quite
14 over-broad. And if you don't have any evidence that
15 particular firms have been discriminated against, then
16 providing a preference to them, sometimes a preference
17 that lasts decades -- and there are no ceilings on how
18 many contracts you get through the preference. I
19 think that's an over-broad remedy.

20 CHAIRPERSON REYNOLDS: Commissioner Yaki,
21 do you have any questions or comments?

22 COMMISSIONER YAKI: I thought Commissioner
23 Thernstrom had other questions for other --

24 VICE CHAIRPERSON THERNSTROM: I want to
25 yield to you.

1 COMMISSIONER YAKI: Well, I'm trying to
2 get my throat back.

3 CHAIRPERSON REYNOLDS: Well, actually,
4 before I go, the commissioners on the line, do you
5 have any questions?

6 VICE CHAIRPERSON THERNSTROM: I think we
7 have lost the commissioners on the line.

8 CHAIRPERSON REYNOLDS: Okay.

9 VICE CHAIRPERSON THERNSTROM: By the way,
10 I have to say --

11 COMMISSIONER KIRSANOW: Mr. Chairman, I
12 had my phone on mute so I wouldn't cough unnecessarily
13 or anything. I apologize. This is Kirsanow.

14 One question that I have related to
15 race-neutral alternatives, -- and I confess to being
16 ignorant about this -- I have always been puzzled as
17 to the vigor with which race-neutral alternatives are
18 pursued by various contracting agencies.

19 In other words, in my very limited
20 experience, although I will say that it's probably a
21 little bit more than limited, I've never been able to
22 discern precisely how much attention, if at all,
23 contracting agencies pay to race-neutral alternatives
24 that may be perfectly plausibly implemented.

25 And this is a question to anybody on the

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1 panel but probably most appropriately to Mr. LaNoue.
2 First, what is your experience in terms of how
3 contracting agencies consider race-neutral
4 alternatives? In other words, how much vigor is
5 attached to their consideration of such alternatives?

6 And number two is, are there any
7 guidelines that anyone on the panel would recommend as
8 to the procedure with which race-neutral alternatives
9 are considered by contracting agencies?

10 DR. LaNOUE: Thank you, Commissioner
11 Kirsanow. I'll try to respond.

12 I think your generalization is quite
13 correct. It is shocking that when a jurisdiction gets
14 a disparity study that says there is some problem, the
15 statistics show that there is under-utilization, that
16 then almost always the first move is toward some sort
17 of goals program and not to try to identify what the
18 source of that problem is to see if there are
19 race-neutral alternatives.

20 So it's commonplace that jurisdictions
21 have no functioning complaint procedures for
22 discrimination related to contracting. You would
23 think that if they really thought they had some
24 problem in discrimination, that they would at least
25 try to have an operational complaint system.

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1 Secondly, the politics of this situation
2 is that race-neutral programs are not very sexy
3 politically. A goals program that appears to be
4 promising a certain amount of dollars to a certain
5 constituency is a much more attractive alternative
6 politically. And that usually is the first move by a
7 jurisdiction.

8 CHAIRPERSON REYNOLDS: Okay. I have a few
9 questions for Dr. Citro. The first is -- well, I
10 guess I have some questions and some comments.

11 DR. CITRO: Sure.

12 CHAIRPERSON REYNOLDS: As a young lawyer,
13 I was told by a senior partner that if I couldn't find
14 an expert witness to say exactly what I wanted he or
15 she to say that I shouldn't be in the business.

16 So when a municipality seeks out a company
17 to put together a diversity study, well, I would
18 assume that they have a number or a result in mind.
19 The dispassionate type of analysis that you would find
20 in the academy you will not necessarily find in the
21 marketplace. And for me, that is a problem.

22 Also, my first question, do disparity
23 studies determine whether private discrimination is
24 current or historical?

25 And, finally, you mentioned the idea to do

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1 more studies. And that will require funding. I
2 suspect that that will require a great deal of funding
3 to do it right. To do it right, you will need careful
4 analysis. You'd have to use more than numbers.

5 I'm in the process now of helping my
6 company build a coal-fired power plant, and we're
7 letting contracts. The issues that are important to
8 us that determine which bid we're going to accept,
9 that information, at least based on the conversations
10 that I've heard here today, that does not enter into
11 the analysis. Who has experience building a
12 super-critical boiler with a baghouse and an SCR?
13 That type of information I believe is extremely
14 important, but that type of information is rarely
15 included in this type of analysis.

16 DR. CITRO: You are absolutely right in
17 that point. First of all, no. A currently measured
18 disparity is not going to, as I said, locate any
19 possible discrimination in time, hour, and space in
20 the sense of where is it occurring in either the
21 contracting process or all of the processes that lead
22 up to getting you a pool of ready, able, and willing
23 vendors.

24 So disparity studies are really a starting
25 point, not an ending point, in my view and the view of

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1 our committee. And I agree with you that the kind of
2 research program that would be needed would need to go
3 beyond the statistical disparity studies, would need
4 to involve case studies.

5 In the report we did about measuring
6 racial discrimination, we were not talking about
7 contracting. We talked a lot about the housing market
8 and employment market and pointed out that in the
9 employment market, there is a lot of statistical
10 analysis now underway that takes -- there has been for
11 decades -- a national survey, such as the current
12 population survey, does a bunch of regressions, and
13 puts in variables that might explain disparities. And
14 then the residual that is unexplained will be taken as
15 a measure that there must be discrimination against,
16 you know, a certain group. And we point out the flaws
17 in that approach.

18 And, again, to get really, really sound
19 studies, one needs to probably have done the kind of
20 case study that you're, in fact, talking about, where
21 you're looking at specific kinds of businesses in that
22 case looking at their hiring process, the criteria
23 they're using, the decisions, et cetera, to then can
24 inform a more robust statistical analysis.

25 You know, it comes down to what emphasis

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1 our society wants to put on this. One could see, you
2 know, the National Science Foundation, for instance,
3 putting out the kind of research grants that would
4 cover the kind of analysis that one would really like
5 to have in this area.

6 I do think that, as I said, the federal
7 government, the data that are available could well
8 make it possible to do better, good research at less
9 cost or at a cost that's sort of spread over the whole
10 taxpayers, rather than what these individual states
11 and localities would be doing on their own.

12 In reference to your first comment about
13 how people pick the people who are going to do the
14 disparity studies, that was one factor in the Urban
15 Institute meta analysis. They did note I think there
16 were about three firms that had done most of these
17 studies. And they did do a sensitivity analysis to
18 try to see whether that was making a difference. They
19 didn't find that it did, but that doesn't mean that it
20 wouldn't. And certainly in any guidelines that you or
21 anyone else would put out, that should obviously I
22 think be a factor that you don't want to prejudge your
23 outcome.

24 I will say, though, on the Urban Institute
25 meta analysis that Professor LaNoue has said

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1 effectively, well, garbage in, garbage out. You put
2 in lousy studies. And it doesn't matter how good your
3 meta analysis is. And that is certainly a valid
4 point, but the institute did screen studies. They
5 threw out some where they couldn't figure out what had
6 gone on or that didn't have enough number of contracts
7 that were included in the study, several other
8 criteria.

9 And with that, one can argue about whether
10 they threw out enough of the really egregiously bad
11 studies, but it is true that one purpose of meta
12 analysis is to take studies none of which are
13 individually totally strong and definitive and so on,
14 but to try to save it by effectively combining data.
15 You can learn, even if the individual data points are
16 not as strong as you would like. You can learn
17 something.

18 So their technique of meta analysis, while
19 they could have done even more aspects of their
20 analysis, sensitivity analysis, was not an
21 unreasonable method to try to see if there are some
22 nuggets in these very disparate state and local
23 studies.

24 The problem now is those studies that they
25 did the meta analysis on were all conducted in the

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1 early '90s and used data that often were from the late
2 '80s. And yes, the business world, particularly, for
3 instance, women-owned small businesses, which was our
4 focus, has been on this huge upward trajectory of
5 growth. And so to have data that old to say anything
6 about what is happening or not happening to them
7 today, just, you know, you would have to look at new
8 data.

9 CHAIRPERSON REYNOLDS: Okay. One last
10 question. I will be quick. This is addressed to
11 Professor LaNoue. The federal government, is there
12 any disparity study that's valid that the federal
13 government relies upon to use racial classifications
14 in the federal procurement process? I'm thinking of
15 the '96 appendix, the met analysis, the benchmark
16 study, or anything else that's out there that would
17 support these programs.

18 DR. LANOUE: Well, the easiest answer is
19 that, even if they were at one point, they're now
20 using data that is so obsolete that it has almost
21 nothing to do with the current economy. So to base
22 any racial preferences on studies using data from 1996
23 -- some of it is much earlier -- to award contracts
24 today seems to me to be certainly not narrowly
25 tailored and just flat-out unfair.

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1 I have made detailed criticisms of the
2 three federal studies in my report. I can go back
3 over that. But, even if there was validity at one
4 point, they no longer I think have any current
5 validity. So the federal government is essentially
6 awarding race-based contracts based on analyses that
7 are 10-15 years old.

8 CHAIRPERSON REYNOLDS: Okay. Thank you.

9 Professor Yaki, how is your throat doing?

10 COMMISSIONER YAKI: Better. Thank you
11 very much, Mr. Chair. And thank you, panelists, for
12 your time today.

13 First, I do want to note there are five
14 Yale alumni at this briefing today. And I'm very
15 proud of that fact. It shows the great diversity at
16 Yale University, especially as I go to my next line of
17 questioning.

18 I have a question first for Mr. Clegg.
19 Mr. Clegg, you have been before us before. You were
20 a witness I think at our briefing on the Voting Rights
21 Act, where I know you expressed some concerns about I
22 guess the section 5 reauthorization.

23 There are a couple of statements that you
24 made that I would like to get your thoughts on. The
25 first is a statement in your conclusion of your

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1 | written statement, the last paragraph, where you say
2 | "I doubt that a study can ever justify the use of
3 | racial or ethnic preferences to end the discrimination
4 | fad." Can you elaborate on what you mean by that?

5 | In other words, you don't think ever, no
6 | matter what they find or what kind of data is there or
7 | whether Dr. Citro puts her stamp on it and says, "This
8 | is the best kind of data you could ever use," that
9 | shows past discrimination? You don't believe that
10 | racial and ethnic preferences should ever be used to
11 | remedy it?

12 | MR. CLEGG: That's right. And I certainly
13 | am not saying that you could not do a disparity study
14 | that rigorously found evidence of discrimination. And
15 | I am certainly not denying that discrimination still
16 | exists in this country. I think we have made enormous
17 | progress, but certainly there are still instances of
18 | discrimination.

19 | The question, though, when you go to the
20 | next step is whether the use of racial preferences to
21 | get rid of remaining discrimination is: a)
22 | constitutional; and b) a good idea. I think that as
23 | to the first question --

24 | CHAIRPERSON REYNOLDS: Well, why isn't it
25 | a good idea? I think you and I would probably

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1 disagree on the constitutionality. You have a
2 different reading of Croson and Adarand than I do and
3 probably than Professor Ayres does, but why is it
4 never a good idea? That's what I am curious about.

5 MR. CLEGG: Well, I think one reason it's
6 never a good idea is I think that in just about every
7 instance, it is going to be unconstitutional. But
8 even if you were able to identify some instance where,
9 for instance, you had a recalcitrant discriminator and
10 this seemed to be the only way to get at it, you have
11 to consider not only the benefits of using racial
12 preferences but also the costs. And the costs are
13 enormous.

14 You know, you're abandoning the principle
15 of nondiscrimination. You're getting governments into
16 the business of treating citizens differently on the
17 basis of their skin color or what country their
18 national origins are.

19 You're telling somebody, the government is
20 telling somebody, you know, "You're the best bidder
21 for this contract, but you don't get the contract
22 because you're the wrong color." That's a huge cost.
23 I mean, it's a huge cost in human terms because, you
24 know, you're being unfair to that individual. But
25 it's also a cost in broader terms because you are, as

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1 I say, abandoning the principle of nondiscrimination.
2 You also create resentment. You stigmatize the people
3 that you're supposedly helping by giving a preference.

4 CHAIRPERSON REYNOLDS: For example, let's
5 take your employer X. And employer X wants to employ
6 statisticians, hundreds of Dr. Citros, which would,
7 quite frankly, boggle my imagination.

8 I'm talking to more of my friends who now
9 tell me sheepishly that they flunked stat in college
10 than ever before. I, on the other hand, steer
11 carefully clear of that knowing that my pathway to law
12 school could not hit a speed bump like statistics. So
13 I am not going to claim any expertise in this area.

14 Let's take, for example, you are employer
15 X who wants to employ 100 statisticians. And for 50
16 years, they've only employed white male statisticians,
17 despite the fact that they only hire them from Yale
18 University.

19 Now, Yale University, on the other hand,
20 has been producing Dr. Citros by the boat load, lots
21 of women Dr. Citros, black Dr. Citros, Asian Dr.
22 Citros, of equal talent or even greater talent than
23 that employer.

24 To me there is a tremendous societal cost
25 to the fact that those people, the women Dr. Citros,

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1 the African American Dr. Citros, the Asian Dr. Citros,
2 are being deprived of the opportunity to compete and
3 find a livelihood in company X, which has adopted a
4 rigid white male-only Dr. Citro-like thing.

5 You know, when you talk -- and maybe it's
6 just a difference of context. I don't know. But when
7 you talk about the cost, I just can't imagine that
8 part of the whole civil rights movement has been that
9 discrimination has come at a great cost to this
10 society in all parts of society, whether it was in
11 professional sports and people like Satchel Paige were
12 excluded from the Major Leagues or in other areas as
13 well.

14 I am having difficulty understanding why
15 there would not be a compelling interest at that point
16 to say to that employer, "You have got to change who
17 and what you do" and why you believe that to be an
18 unconstitutional and unacceptable remedy.

19 MR. CLEGG: I think that telling the
20 employer that they can no longer engage in the kind of
21 discrimination that you describe would not only be
22 constitutional. It would be something that I would
23 support purely as a policy matter.

24 But that's not the question. The question
25 is whether the remedy for that discrimination -- and

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1 I agree that that discrimination should be remedied
2 and that it can be remedied. The question is whether
3 the remedy for that discrimination is to impose a
4 quota on that employer and say that, you know, "Next
5 year we don't want you to engage in nondiscrimination.
6 We want you to hire X Asian Dr. Citros, Y Latino Dr.
7 Citros, Z female Dr. Citros," et cetera. What the --

8 CHAIRPERSON REYNOLDS: Let's take that
9 example because --

10 MR. CLEGG: Well, let me just finish. The
11 order that should be given by a court when that
12 company is sued under Title VII and the remedy that
13 ought to be imposed is for that company to stop
14 discriminating and to hire the best qualified people
15 regardless of what their race or their ethnicity or
16 their sex is.

17 CHAIRPERSON REYNOLDS: So what if company
18 X only hires one Dr. Citro out of 100 or if they hire
19 2 or if they hire 3? I mean, part of the issue -- and
20 it goes I think to the basic underpinnings of why we
21 do disparity studies today and why I still think that
22 it is useful as a civil rights remedy, as a societal
23 remedy -- is to say, you know -- and it goes to the
24 debate that we saw on the college campuses back in the
25 '60s. And it goes back to Brown versus Board in terms

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1 of whether or not an integrated society is inherently
2 better than a segregated society. It says, you know,
3 it's not just enough.

4 We can as a society stand back and say
5 with lofty brow that we are founded upon the
6 principles of equality for all people. We know that
7 in 1787, that really wasn't the case. We know that in
8 1899, that really wasn't that case. We knew that in
9 1945, that really wasn't the case. And we knew in
10 1954, no matter what the Supreme Court ordered, that
11 still wasn't going to be the case.

12 At some point in order to achieve the
13 desired goal, at some point you have to quantify how
14 it is that you go about I think, I believe, go about
15 doing it.

16 We don't use the word "quotas" anymore.
17 We use the word "goal." We use the word "targets."
18 But the fact of the matter is that if you are trying
19 to remedy a history of past discrimination in an
20 industry and just say that company X has with its 100
21 white male Dr. Citros produced of them approximately
22 10 to 20 percent go off to become and found their own
23 companies and everything like that, if we're not doing
24 a good enough job in making company X really have a
25 diverse workforce and have real meaning to that, then

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1 the whole marketplace continues its chain from then on
2 because we know that everything has an effect on
3 everything else.

4 You just can't I think play this isolation
5 game and say, "Well, you know, don't discriminate,
6 race neutrality," blah blah blah blah blah blah
7 blah blah. I mean, you and I can argue about the
8 constitutionality or unconstitutionality of it or not,
9 but you used the statement that "Racial preferences
10 are used when there is no other way." That was your
11 quote today.

12 MR. CLEGG: I don't know if I put it "no
13 other way." In the Justice Department --

14 CHAIRPERSON REYNOLDS: But it's not really
15 no other way. I mean, the Supreme Court in Grutter
16 certainly didn't say, "no other way."

17 MR. CLEGG: Just so the --

18 CHAIRPERSON REYNOLDS: Justice O'Connor,
19 you know, stated, "That does not require the
20 exhaustion of every conceivable race-neutral
21 alternative." I mean, that's not every other way.

22 I guess, you know, when I read --

23 MR. CLEGG: Why wouldn't you want to
24 consider every other way before you engage in
25 something as divisive and unfair --

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1 CHAIRPERSON REYNOLDS: Because, to be
2 totally honest, Mr. Clegg, I believe that there are
3 many clever public policy people, many clever lawyers,
4 many clever politicians who can use the term "every
5 other way" to mean an ad infinitum role of
6 alternatives that will as a practical matter
7 completely squash the opportunity to create what I
8 think is a remedy of past discrimination.

9 And I note that from your testimony your
10 center is very aggressive about this. You say that
11 you contact many government actors and warn them of
12 the divisive and unfair nature as well as the
13 consequences of using racial and ethnic contracting
14 preferences and urge that, instead, you adopt
15 race-neutral alternatives. I mean, that is the point
16 of the organization.

17 I just wanted to find out if you ever
18 thought there could be any system that had a racial
19 preference. And I guess the answer is just flat out
20 no based on what you've said.

21 MR. CLEGG: It's very hard for me to
22 imagine a situation in 2005 in the contracting context
23 where the use of racial and ethnic preferences would
24 make constitutional and policy sense, particularly
25 when you consider the inevitable costs --

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1 CHAIRPERSON REYNOLDS: Well, I would think
2 that --

3 MR. CLEGG: -- institutionalized racial
4 discrimination has.

5 CHAIRPERSON REYNOLDS: I understand that
6 is your point of view. I think that certainly there
7 are a number of members of Congress on both sides of
8 the aisle who might disagree with that based upon the
9 incredibly poor response of the federal government
10 with regard to Katrina relief and the contracts that
11 were doled out there.

12 I call it the Halliburton effect, which is
13 the inevitable black hole of contract dollar
14 swallowing that goes on. But senators, such as
15 Senator Snowe and others, have raised serious
16 questions about whether or not even the programs that
17 we currently have that promote and encourage the use
18 of minority firms were for the most part in the
19 aftermath of Katrina completely -- they were
20 suspended. It was as if they never existed.

21 And it wasn't until congressional scrutiny
22 came along that FEMA started taking those contracts
23 back and thinking, "Oops. We need to do a better job
24 of doing it."

25 And I just think that if you need an

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1 example of the fact that it's still out there, it
2 still exists, and, boy, does it have a cost, you just
3 need to look at one piece of the aftermath of the
4 abysmal of federal response to Katrina; that is, the
5 contracting for the rebuilding that went on
6 afterwards?

7 MR. CLEGG: If contracting was being done
8 on a crony basis, I think that it would be perfectly
9 appropriate for Congress to intervene and say, "Look,
10 this is wrong. And the government should be" --
11 particularly in light of the enormous costs that the
12 federal government is going to be running to remedy
13 the damage in Katrina, we need to make sure that the
14 contracts are awarded not on the basis of who you know
15 but on the basis of whether you can do the work at the
16 least possible cost to the federal government so that
17 our resources are not wasted and can be spent on
18 helping the thousands of people whose lives were
19 devastated by that hurricane.

20 But, you know, I said all of that without
21 saying anything about giving preferences on the basis
22 of race or ethnicity. There are plenty of white-owned
23 companies and Asian-owned companies and so forth who
24 are going to suffer if contracts are awarded on a
25 crony basis. And, conversely, there are plenty of

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1 African American-owned companies that are
2 crony-connected as well.

3 So the remedy is not to set aside a
4 certain number of contracts for African Americans and
5 another set of contracts for whites. The solution is
6 to stop awarding contracts on the basis of your
7 political connections and to award it on the basis of
8 whether you are the best-qualified companies.

9 CHAIRPERSON REYNOLDS: But I think that
10 goes back to my example of company X, which is that if
11 you had a filter mechanism that has led to the
12 establishment of these kinds of companies that are
13 dominated by non-minority, non-women executives and
14 others, that I think it's a self-feeding creature,
15 which is exactly why we have adopted, the Supreme
16 Court has adopted, and continues to uphold the ability
17 to use these kinds of race-conscious programs.

18 I think we're just going to have to
19 disagree on that. I don't want to take up too much
20 more time. I'd like to move on to Dr. LaNoue.

21 Dr. LaNoue, you apparently consulted on or
22 read or did something on our Adarand study or Adarand
23 report. I'm not quite sure what it was, but my
24 question for you is that you said in your statement
25 that you do a lot of, in your written statement, that

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1 you do a lot of -- you have been a plaintiff's expert
2 in cases involving disparity studies in Philadelphia;
3 Columbus; Chicago; Cincinnati; Denver; Dade County;
4 Cook County; Atlanta public schools; and Jackson,
5 Mississippi.

6 Have you ever testified on behalf of a
7 disparity study?

8 DR. LaNOUE: I've never been asked to.

9 COMMISSIONER YAKI: And have you testified
10 against disparity studies that have been upheld in the
11 courts, Concrete Works, for example? Does that ring
12 a bell?

13 DR. LaNOUE: Concrete Works was found by
14 the district court not to have -- the disparity
15 studies in Concrete Works were found by the district
16 court not to be valid. The Tenth Circuit overturned.

17 In Gross Seeds, the decision really
18 doesn't turn very much I think on the quality of that
19 disparity study. At least I wasn't able to testify
20 much about that. It really turned must more on
21 Congress prerogatives in this area.

22 CHAIRPERSON REYNOLDS: I mean, let's just
23 put it out there on the table. You believe yourself
24 to be -- would it be fair to characterize yourself as
25 a critic of disparity studies? I say that because,

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1 have you ever written in support of disparity studies?
2 Forget testifying. Have you ever written a statement
3 in support of a disparity study in X or Y or what have
4 you?

5 DR. LaNOUE: Yes.

6 CHAIRPERSON REYNOLDS: Okay. Which ones?

7 DR. LaNOUE: St. Petersburg study.

8 CHAIRPERSON REYNOLDS: Which you consulted
9 on?

10 DR. LaNOUE: Which I consulted on.

11 CHAIRPERSON REYNOLDS: I'm talking about
12 ones you didn't consult on. Did you ever write and
13 say that "This was something that is appropriate" that
14 you did not consult on?

15 DR. LaNOUE: The answer is no for the very
16 reasons that I have expressed. Their availability
17 measures are fundamentally flawed. They have made no
18 attempt to gather their anecdotes in a scientific way
19 or to verify anything.

20 If you accept those rather simple
21 principles, which I think most social scientists would
22 accept, then they're not valid.

23 CHAIRPERSON REYNOLDS: Well, I understand.
24 I mean, you talk about availability of studies, what
25 you have. I mean, there is -- I would see if I can

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1 get a nod from Dr. Citro. It's very pleasant to be
2 made an example of in many of my hypotheticals.

3 I would say that there is a fair amount of
4 -- to do a very good comprehensive disparity study, I
5 would suppose it would be helpful to have background
6 in statistics perhaps or econometrics or regression
7 analysis, sort of help weed things out like that?
8 Would that be correct?

9 DR. CITRO: Yes, it would. And in looking
10 for evaluating quality of data, I would certainly
11 agree with Professor LaNoue that the existing
12 disparity studies that are out there are generally
13 quite weak in a number of ways, but I would not go so
14 far as to say that you couldn't do a reasonably good
15 study.

16 And, again, this partly gets to the
17 question of which -- you know, you pick your
18 contractor to give the answer. Part of that is a
19 requirement that should be from the courts and
20 everyone involved of transparency. You know, if
21 someone else can come in and look at your data, then
22 at least you've met that standard of reproducibility
23 and transparency.

24 And one would hope that the level of
25 practice, quality of practice could rise in these

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1 studies, although, again, I think to help that, that
2 if the federal government were to take seriously a
3 responsibility to say, "Look, you know, it would
4 really be good to do some solid research in this
5 area," I will give an example in housing, of course.
6 The federal government has done a tremendous amount of
7 work in the field experiments that are done with
8 parent testing, which we evaluated in our measuring
9 racial discrimination report. And so it is not easy,
10 but it is certainly possible to do good quality work.

11 To date, I would tend to agree that the
12 vast majority of studies do have some serious
13 problems.

14 CHAIRPERSON REYNOLDS: Dr. Citro?

15 DR. CITRO: Yes?

16 CHAIRPERSON REYNOLDS: When you said that
17 they have flaws, would these flaws be fatal? Social
18 scientists have high standards with respect to the
19 validity and other such concepts.

20 Where I am going here is that there may be
21 a reason why Dr. LaNoue has testified against so many
22 of these disparity studies. If the overwhelming
23 majority of these disparity studies are flawed,
24 fatally flawed, then one would expect Dr. LaNoue or
25 any other dispassionate consultant to point out the

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1 fatal flaws.

2 DR. CITRO: Okay. So, again, your
3 question is whether they are fatally flawed. We did
4 not review the individual state and local studies, but
5 based on what we did review in the Urban Institute
6 analysis, that most of those studies did not do what
7 I think is an essential thing in this area, which is
8 that you try to look at multiple measures to see
9 whether your estimate of a disparity is what the
10 statisticians call robust to alternative data sets,
11 definitions that you have treated a bit, et cetera, et
12 cetera.

13 What the Urban Institute did for the help
14 to support federal policy was say, "Look, we're
15 throwing out a bunch of truly, you know, studies that
16 we can't figure out what they did" or "what they did
17 was abysmal. And they threw out something like, I
18 think it was, 40 percent of the studies roughly that
19 they looked at.

20 The others they felt met at least some
21 minimal standards that the Urban Institute had set up.
22 And from this meta analysis of pulling those studies
23 together, they felt they were able to conclude that
24 when you pulled them together, you looked for a
25 variety of different ways; for instance, you looked at

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1 studies that had been conducted by firm X versus firm
2 Y, you did what is called sensitivity analysis, they
3 did feel that sort of overall -- and, again, it was
4 very strong for the women that, no matter how you
5 looked at it, where you looked at it, it definitely
6 looked to be a fairly big disparity.

7 Their study was to inform federal policy.
8 If you're looking at an individual state or locality
9 that's only got one study based on 20 contracts or
10 something, you definitely have a problem there.

11 I think, as I say, the guidelines could
12 help a lot that say, you know, "Look. Look at this in
13 some different ways." One problem, of course, has to
14 do, again, with data availability. And I honestly
15 don't know what that is in various states and
16 localities. Again, in the federal situation, there
17 have been improvements in data that I think make it
18 possible to do some good work. A federal study that
19 is informing some general federal policy, of course,
20 is not, again, particular to a specific locality.

21 So I would not set the standard that says,
22 you know, you have to hire the National Academy of
23 Sciences to do these studies in the state and local
24 government, but I think the level of practice needs to
25 go up.

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1 I think it can go up. The studies that
2 were out there initially after Adarand were sort of
3 the first. Everybody is sort of scrambling to get
4 some work done.

5 I think we've learned something from that
6 or we can learn something from that and that one could
7 give guidance again to states and localities that
8 said, "Look, you know, do some things. Be
9 transparent. In particular, try to get some
10 variability in how you're looking at things so, again,
11 you can see whether -- because if variations give you
12 the same results, then you can be more confident of
13 those results than if you have just focused on one
14 single measure that often can be critiqued."

15 DR. LaNOUE: Let me just add a very small
16 point to that.

17 CHAIRPERSON REYNOLDS: Sure.

18 DR. LaNOUE: Universities, the academic
19 community has been kind of AWOL on this. Almost all
20 major research universities have centers that do
21 public policy research. And you can find a handful,
22 I mean, just a tiny fraction of these in which
23 universities have done them.

24 And if universities do them, you have some
25 kinds of quality control that you don't have when

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1 consulting companies, which do studies after study for
2 governments -- what causes a government to pay
3 \$800,000 for a study? What is it they hope to get?

4 Well, usually it's because there's some
5 political pressure to have a race-based program. And
6 the consultants know that. We had an interesting
7 example very recently in New Jersey where the
8 documents became public -- they're usually not public
9 -- where one of the consulting companies wrote a
10 letter and said, "You know, if we hand in our
11 disparity study as the numbers now look, there will be
12 a disparity for African Americans but not for
13 Hispanics and women." And we know that would be
14 politically unacceptable. They have now gone back to
15 the drawing boards to create a different result.

16 So I think that Dr. Citro is right that
17 it's not only a matter of more carefully specified
18 standards. I think different people have to do it.

19 CHAIRPERSON REYNOLDS: Dr. Ayres?

20 DR. AYRES: Just to say I'm worried about
21 Dr. Citro's concerns with the Commerce study. Those
22 concerns are in a very different basis than many of
23 the other studies, which show you characterize this
24 potentially fatally flawed.

25 Dr. Citro said with regard to Commerce

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1 that there was a problem with both the transparency
2 and the documentation of the Commerce study and with
3 regard to multiple measures. I don't want to
4 completely disagree, but I think it's actually
5 slightly better than you said.

6 Again, we're in agreement on transparency,
7 but it's to the extent feasible. I personally,
8 whenever I can, put the raw data on any empirical
9 study I do.

10 With regard to Commerce, it violates
11 census rules to put some of the wrong data.

12 DR. CITRO: That's true. That's true.

13 DR. AYRES: So you can't do that. But you
14 could go further in documentation and in releasing the
15 regression coefficients. And I would call upon
16 Commerce right now to reveal the documentation in a
17 broad public way and the regression coefficients from
18 the past studies, even if they don't do new studies,
19 at least release what they have from the old studies.

20 Even there, the state of the world is
21 slightly better than I think you characterized. In
22 two different cases, regression coefficients were
23 released and documentation was released. And it's on
24 the public record if someone goes to those cases.

25 And so it's understandable that you did

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1 not, but, indeed, Professor LaNoue referred to some of
2 that evidence that is available if one digs hard
3 enough.

4 Part of the problem is you have to dig too
5 hard. And, secondly, there is even some evidence of
6 multiple measures. But, again, this should be open to
7 the world. And still I favor a robust estimation with
8 multiple measures. And more can be done on that than
9 mentioned as well.

10 MR. CLEGG: Mr. Chairman, if I could just
11 add to part of my exchange with Commissioner Yaki?
12 The political pressure that is inevitably brought to
13 bear and Professor LaNoue has talked about and that is
14 frequently reported, I remember early on a front page
15 article in the Wall Street Journal -- this was right
16 after Croson -- where the City of Miami I think had
17 asked one of the Big Six accounting firms to do a
18 disparity study.

19 And I think at that time the word hadn't
20 really gotten out as to what these disparity studies
21 were for. And the poor accountant came back and was
22 testifying before the Miami city council and thought
23 he was giving them good news that he had found that
24 there was no discrimination, in fact. And he was
25 quickly uprooted by the Miami city council member who

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1 said, you know, "That is not what you were supposed to
2 find."

3 Anyway, the point is that the inevitable
4 political pressure that is brought to bear is another
5 reason why I am so categorical in saying that I think
6 that the use of racial and ethnic preferences is just
7 not a good idea because it's very difficult to remove
8 the process from that political crucible. That makes
9 it I think much better to use race-neutral
10 alternatives.

11 DR. LaNOUE: That accounting firm was Pete
12 Marwick. And that was their first and only disparity
13 study. They got out of the business after that
14 experience.

15 CHAIRPERSON REYNOLDS: Okay. Mr. Clegg,
16 I just want to follow up on your statement, at least
17 your exchange with Commissioner Yaki. While I don't
18 go as far as you do in terms of categorical, just an
19 across-the-board prohibition of the use of racial
20 classifications, I do believe --

21 MR. CLEGG: The contract in context.

22 CHAIRPERSON REYNOLDS: Yes. I do believe,
23 though, that there is a constitutional presumption
24 that the use of any racial classification is illegal,
25 that the state or state, local, or federal agency that

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1 is using racial classification has the burden of
2 proving that there is a compelling state interest.

3 But there is another interesting -- you
4 know, when I think about this notion of I guess
5 fairness, most of the nation's history, we have used
6 racial preferences.

7 There were about 15 minutes somewhere in
8 the '50s or '60s where the nation got together and
9 said it was a bad thing, that we shouldn't engage,
10 that the government should not use racial preferences,
11 shouldn't distribute benefits and burdens amongst its
12 citizens on the basis of race. I think that those 15
13 minutes, that was the golden age in the country in
14 terms of race.

15 No one likes to lose a contract or a seat
16 at a selected university or anything based on their
17 race. And I think that race is divisive. And I also
18 think that it's important when the government
19 approaches these issues, that the government
20 approaches these issues with clean hands.

21 I think that yes, we all make decisions,
22 some good, some bad, some based on race, but the
23 government should set an example. The government
24 should be an exemplar for us. The government should
25 show us what we should be doing and how we should be

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1 living our lives. So that's another reason I think
2 that the use of racial classification is -- I'll be
3 gentle and just say problematic.

4 Now, after saying all of that, Dr. Ayres,
5 is there anything, any specific argument or piece of
6 data contained in Professor LaNoue's write-up that you
7 disagree with? Is there a fundamental flaw contained
8 in his write-up that you can point out?

9 DR. AYRES: Yes. So one of his main
10 criticisms of the Commerce study is the inclusion of
11 8(a) firms as ready, willing, and able. And I think
12 that his criticism is overstated for two reasons.
13 One, these 8(a) firms had to go through a
14 certification that they were ready, willing, and able
15 to contract, but one could be skeptical about whether
16 the SBA was doing a good job.

17 The more important reason that is of
18 concern, is overqualified, again goes back to the
19 capacity approach used by the Commerce Department if
20 the concern here is that there were a bunch of 8(a)
21 firms that really were not ready, willing, and able
22 and that were included to inflate the availability
23 percentage, but the capacity approach would attribute
24 very little capacity to a firm that had no payroll in
25 recent years or very small payroll or had only been in

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1 existence for a very short time.

2 And so the capacity approach has great
3 benefits in carving out 8(a) firms that weren't, in
4 fact -- even if you don't trust the SBA certification,
5 the capacity approach had a greater way of limiting
6 and conservatively estimating their ready,
7 willingness, and able.

8 And the second approach -- and this goes
9 both I guess to a broader disagreement that I have
10 with both Dr. LaNoue and Mr. Clegg. And it is on
11 whether it is appropriate to require individualized
12 evidence that the beneficiaries of race-conscious
13 preferences were individually harmed by disparate
14 treatment and whether you have to identify individual
15 instances of disparate treatment. And the problem
16 here is this leads to an extreme kind of limit.

17 Disaggregation is of the following kind.
18 You look at not just an individual minority contractor
19 but an individual minority contractor on an individual
20 contract. And that's your denominator of one, and
21 your numerator is either zero or one. They either got
22 the contract or they didn't.

23 And if there is in a sense a plausible
24 view, well, that is the extreme and most powerful
25 evidence of discrimination. But if you require that

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1 level of evidence, you cannot run any kind of a macro
2 remedy. And given the nation's ongoing history of
3 race discrimination, to make that kind of a demand is,
4 in effect, a demand that race-conscious remedies be
5 fatal, in fact?

6 CHAIRPERSON REYNOLDS: Okay. At the
7 beginning, I tried to get the panelists to engage each
8 other's work. And that last question was my pointed
9 attempt. So, Dr. LaNoue, would you care to respond?

10 DR. LANOUE: Well, the issue of what was
11 the effect of including 8(a) firms in the benchmark
12 study, let me talk about that first. The benchmark
13 study used as a measure of availability first firms
14 that it actually did in a number of federal
15 procurement situations.

16 I agree with that. I think that's a fair
17 measure of availability. Those firms that actually
18 bid were clearly willing. You don't waste the time
19 and effort to bid if you're not qualified or don't
20 think you have the ability to do the work. In a small
21 fraction of cases --

22 CHAIRPERSON REYNOLDS: Why don't you?

23 DR. LANOUE: Why don't you?

24 CHAIRPERSON REYNOLDS: Yes. If you have
25 gone to banks and discovered that one of the issues

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1 was the lack of a business plan, that suggests that
2 there may be disparity of knowledge. One group or at
3 least a higher percentage of a particular group
4 understands what is required of a process and a little
5 percentage of a particular group lacks this knowledge.

6 So they go and they submit their bid
7 without knowing all of the hoops that you need to jump
8 through. So I just want to push it back a little bit.

9 DR. LaNOUE: That's a fair question. I
10 would never say that businesses are equally
11 knowledgeable about this or that every business puts
12 together a serious bid, but if you're going to survive
13 in the business very long.

14 You learn that submitting a serious bid is
15 a major enterprise in terms of time and effort and
16 cost. And if you keep doing that frivolously, you're
17 not going to survive.

18 So firms that are successful think long
19 and hard about when to submit bids because it's bad if
20 you submit it and lose, it's bad if you submit it and
21 you win and you haven't priced it properly and you
22 lose money on it. So that's a careful enterprise that
23 successful businesses engage in.

24 CHAIRPERSON REYNOLDS: But in your
25 write-up, you talk about the fact that minority firms

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1 are often newer firms, have less experience. You put
2 that together with the fact that most small businesses
3 tank within seven, eight years, it just seems to me in
4 my limited experience with the contracting process,
5 there are just a whole lot of qualitative issues that
6 are just not factored into disparity studies.

7 Well, arguably, the only way to do it
8 right is to do a case study. And I think there are
9 huge transaction costs to doing that. I think that to
10 do it right, you have to learn the company. You have
11 to get in there and break it apart and see how this
12 complicated machine works to find out the
13 personalities, to find out whether price is really the
14 paramount issue or whether getting that coal fire
15 power plant built on time is the critical issue.

16 This is just, I guess, a few examples, but
17 there are millions of examples of millions of issues
18 out there that need to be taken into account. And
19 while I agree that it is possible to do a disparity
20 study, one that is a better measure of discrimination,
21 looking at the documents, at least the ones that the
22 federal government is relying on today, they didn't
23 take the approach that I'm thinking about and the one
24 that Dr. Citro recommended.

25 So, anyway, these are mostly comments.

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1 And so, you know, respond, if you will. If not --

2 DR. LaNOUE: I finished my answer, but --

3 CHAIRPERSON REYNOLDS: Okay.

4 DR. LaNOUE: There were three databases
5 from the benchmark study. The firms had been -- I'm
6 fine with that. I think that's useful. It's not
7 pertinent, but I think you can fairly say that if a
8 firm bids, it believes it's qualified, willing, and
9 able, and the number of bid disqualifications are very
10 small: one, two percent.

11 The second category were firms that
12 received source contracts. And somebody in the
13 government thought they were qualified, willing, and
14 able.

15 The third category were firms that were
16 8(a) firms that simply are on a list. If they had bid
17 on a contract, they would have already been included.
18 If they had received a sole source contract, they
19 would have already been included. But by adding a
20 group of firms that had neither bid nor received the
21 sole source contract, they were simply on the 8(a)
22 list, you are adding a group of firms who may not be
23 qualified for any government contract that was
24 actually offered or may not have actually been willing
25 to compete for any government contract in the time

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1 frame we're looking at.

2 Now, Dr. Ayres said that that probably
3 didn't make very much difference because the capacity
4 measures would have reduced the impact of simply
5 adding these 8(a) firms. That may be true, but I
6 don't think that's ever been specified.

7 It is very difficult to find out how many
8 8(a) firms were actually added and very difficult to
9 find out what their ultimate impact was on capacity
10 ratios. There are some capacity measures in the
11 benchmark study that just don't seem plausible. So
12 something seems to be going on there.

13 There's one category in which small,
14 disadvantaged businesses are classified as 80 percent
15 of the capacity. I think it's the food industry. So,
16 unfortunately, the underlying data has really never
17 been released in such a way that somebody could go
18 back through it and really do reanalysis. And so we
19 don't know what the impact of the 8(a) firms would be.

20 But I think mixing firms that are simply
21 on a list with firms that have actually received
22 contracts for a bid is really an apples and oranges
23 mixture.

24 CHAIRPERSON REYNOLDS: Thank you.

25 Vice Chair Thernstrom?

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1 MR. CLEGG: Could I just say also in
2 response to Professor Ayres that I think that the case
3 law is pretty clear that to some degree, you have to
4 have microeconomic evidence in a macroeconomic
5 setting, to paraphrase Dr. Ayres, because the Supreme
6 Court has said that simply, you know, pointing to
7 societal discrimination is not enough to justify the
8 use of racial and ethnic preferences. And I think he
9 would agree that certainly the best evidence of
10 discrimination is very case-specific.

11 Now, it may be that that is not always
12 possible. And I wouldn't say and I don't think that
13 I said that you always had to be able to prove that
14 this individual did not get this contract because of
15 race. I don't think that you have to have that degree
16 of smoking gun evidence.

17 I think that you have to at least -- well,
18 you can't ignore evidence that there might be some
19 reason other than race that somebody didn't get the
20 contract. And I think you also have to be aggressive
21 and creative in asking when you do one of these
22 studies if there might not be some reason other than
23 race or ethnicity. And if there are obvious
24 explanations that suggest themselves, you have to
25 investigate them, too.

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1 CHAIRPERSON REYNOLDS: Do disparity
2 studies look at similarly situated white contractors?
3 Is there a comparison between similarly situated black
4 and white contractors bidding on federal contracts to
5 see the rates of success between the two?

6 DR. CITRO: Well, it's by inference. If
7 it's, say, minorities or women, that you're looking at
8 their share of contracts and their share of whatever
9 pool you can find that is ready, willing, and able.

10 And some of the state and local disparity
11 studies had broken it down by specific groups. I
12 think I remember that in the Urban Institute analysis.

13 I do think there is more room for given
14 the very skewed size distribution of businesses for
15 looking within sort of categories of contract amounts,
16 say, or looking -- for instance, I have not seen
17 usually studies that look at, say, small minority
18 businesses versus other small businesses. It's
19 usually small minority businesses versus, you know,
20 everybody else that's in your pool.

21 Again, this is saying to look at the data
22 in more ways, but I would want to correct an
23 impression when I say that, yes, case studies are very
24 useful to inform this. But obviously doing a case
25 study of every business in a jurisdiction is not

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1 possible.

2 It's an iterative thing where you have got
3 a statistical analysis that suggests that there is an
4 issue here. You want to understand perhaps what's
5 behind it. And then you go out and see if you can get
6 case studies.

7 I mean, it would be an impossible standard
8 to have to understand -- what was it? -- your boiler
9 contracting process in and of itself, but, on the
10 other hand, too many statistical analyses, whether
11 it's in contracting, employment, or housing, are just
12 sort of throwing data into the pot in an aggregate way
13 without trying to figure out what is going on in the
14 process of hiring or housing rental or here federal
15 contracting that you're trying to understand, so all
16 of which is partly to say why scientists' opinions are
17 often frustrating is that it says that, you know,
18 there's no holy grail here of you do it just this way
19 and you've got a perfect study. That's just not
20 there. It's --

21 DR. LaNOUE: Could I add to Dr. Citro's
22 comment or to the question of looking at bid success
23 rates? If that is defined as examining whether, say,
24 women-owned businesses are successful on 30 percent of
25 their bids and white male-owned businesses are

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1 successful on 35 or 25 percent of their bids, that
2 kind of analysis is almost never done. I've done it
3 as an expert, but in disparity studies, it's never
4 done.

5 It would be one useful, not the only, one
6 useful way of doing an analysis because it might tell
7 us some things. Let's say some group bids fairly
8 frequently but is not very successful. What's the
9 reason for that? The reason might be that they don't
10 have very good estimating skills, that there is some
11 training problem that could be involved here that
12 could be addressed.

13 The reasons could be that they're paying
14 too much for supplies or labor. And we need to
15 understand what that might mean or it is possible,
16 theoretically possible -- I've never seen it -- that
17 in the low bid system, there's some sort of systematic
18 discrimination against the bidders of a particular
19 race or ethnic group.

20 But examining bid success rates would be
21 one of the ways to go about doing this.

22 CHAIRPERSON REYNOLDS: Dr. Ayres?

23 DR. AYRES: I again think that there was
24 some agreement on the panel that at the end of the
25 day, that even the best disparity study, if it's going

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1 to be done in support of a broad government
2 affirmative action program will exclude some variables
3 that might provide alternative rationales that, again,
4 a finding of disparity is not necessarily evidence of
5 discrimination.

6 Because of that, it is going to be -- and
7 I think that I support your group chair that you're
8 going to need additional pieces of evidence to try to
9 bring you across the line if you're going to believe
10 that this is narrowly tailored.

11 The anecdotal evidence if it is properly
12 acquired and if it has other indicia of credibility is
13 one type of evidence. In some ways, I would like to
14 say this is another version. Dr. Citro said that we
15 should have multiple measures of availability. We
16 should also have multiple measures of discrimination,
17 not just the anecdotal and the case studies.

18 With regard to the case studies, I would
19 throw in industry case studies of supplier industries.
20 And here's the place where the academy has not been
21 completely sitting on the sideline.

22 There have been many studies, for example,
23 of the credit industry and the difficulties that
24 minority and women-owned firms have in obtaining
25 credit, but just to throw in another type of evidence,

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1 and that is toward more broad, general societal
2 evidence of discrimination. Two that seem to me that
3 would be relevant in many of these studies is one is
4 the very recent and powerful resume test, where a
5 couple of researchers send out resumes that were
6 identical. Some had African American-sounding names.
7 Another had Caucasian-sounding names.

8 This is a randomized study. It's the gold
9 standard of social science. They found that firms
10 were much more likely to respond to names that had
11 more of a Caucasian valence than an African American
12 valence.

13 These are the same firms that are often
14 supplying influence or being potential customers of
15 minority firms. And it is a piece of evidence. And
16 I would say it would never by itself be controlling to
17 take me across the line from disparity to
18 discrimination, but it certainly would be probative.

19 Another broad piece of societal
20 information is the accumulating and I think powerful
21 evidence of unconscious racial bias that is coming out
22 of the work of Mauser, Benagi, and Claude Steele in
23 internet tests that people can do in just a few
24 minutes.

25 They cannot keep themselves from engaging

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1 in disparate treatment in a very simple sorting
2 experiment with regard to photographs. And so you
3 have evidence that there still is lingering
4 unconscious racial bias in society at large. You have
5 evidence that the very firms that we're worried about
6 are engaging in disparate treatment in other contexts.

7 Those things, added together with case
8 studies and anecdotal evidence, are the kinds of
9 things that I think social scientists -- it's a kind
10 of a concilience, to use a fancy word, that should at
11 least be considered and if it's strong enough might
12 take us across the line.

13 MR. CLEGG: John McWhorter has a book
14 coming out next month that talks about some of the
15 studies that Professor Ayres has cited and points out
16 some of the problems in them.

17 CHAIRPERSON REYNOLDS: Vice Chair
18 Thernstrom?

19 VICE CHAIRPERSON THERNSTROM: Yes. And,
20 actually, Professor Amy Ratz, Professor, University of
21 Pennsylvania Law School, had a very good piece on
22 Benagi's work recently. It was just an op ed., long
23 op ed., in the Wall Street Journal, but it did hit the
24 kind of major points of the problems of getting at
25 this so-called unconscious racial bias on the basis of

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1 flashes of photographs. I, frankly, would not put her
2 work in the category of social science, but, in any
3 case, that's a topic for another day.

4 Okay. The hour is getting late. So just
5 a few questions. One clarification. I suspect that,
6 Roger Clegg, what you said in terms of Asian
7 over-representation in institutions of higher
8 education, while at the same time there being
9 discrimination, for the record, needs a little
10 clarification.

11 That is, you can have 50 percent, as you
12 do, at Berkeley and UCLA of the student body,
13 undergraduate student body, as Asian American in a
14 state that's only 10 percent. Nevertheless, you can't
15 have a ceiling on Asian American acceptances. And I
16 just for the record wanted to clarify that point.

17 MR. CLEGG: That is precisely my point,
18 that over-representation doesn't necessarily mean that
19 a group is not being discriminated again.

20 VICE CHAIRPERSON THERNSTROM: Well,
21 exactly, but I just wanted to bring that point out
22 since you made it very cryptically.

23 You said -- this is again for Roger Clegg
24 -- there is a special problem of subjectivity in the
25 area of contracting.

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1 MR. CLEGG: No. Just like I said, it's
2 just the opposite. I think that the subjectivity is
3 more of a problem in the employment context and the
4 university context.

5 VICE CHAIRPERSON THERNSTROM: Okay.
6 Because I was about to argue with you about that. I'm
7 glad to have that clarified.

8 Actually, I'm going to argue with Roger
9 Clegg a little bit on race-conscious remedies, but I
10 wouldn't use the example of the contracting area,
11 race-conscious remedies never being appropriate to
12 bust a system open.

13 And I would point in the voting rights
14 area to rural counties in the south where you can take
15 a racial census before the election and you know the
16 outcome.

17 These counties are extremely hard to find
18 today. They certainly existed yesterday where if you
19 did not start some kind of race-conscious districting
20 in a county, rural county, it was substantial. In the
21 population, you were never going to get a black face
22 in office.

23 There are exceptions. And so I would
24 disagree with him on -- I am allowed to argue with
25 Roger Clegg.

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1 MR. CLEGG: Although I don't think we're
2 disagreeing because I limited what I said to the
3 contracts in 2005.

4 VICE CHAIRPERSON THERNSTROM: Absolutely.
5 You bandied about the word and we have been kind of
6 using the word "race-neutral" here a number of times
7 this morning. What qualifies as a race-neutral
8 program?

9 Let me give you an example that doesn't
10 involve contracting but does involve the world of
11 entrepreneurship, as it were. The Institute for
12 Justice has a clinic helping entrepreneurs on the
13 south side of Chicago get on their feet. This is
14 really helping them get through the regulatory maze of
15 the City of Chicago.

16 Now, because the clinic is based on the
17 south side of Chicago and they did that purposely,
18 knowing what the target group had to be, is that
19 race-neutral or is that race-conscious?

20 MR. CLEGG: Well, that's a very
21 interesting question. I think that if you adopt a
22 measure or have a set of criteria that
23 disproportionately are going to include African
24 Americans, for instance, for the same reason that I
25 don't think it's discrimination just because a neutral

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1 measure excludes this or that group, I don't think
2 that there is a problem if that measure, necessarily
3 a problem if that measure, disproportionately includes
4 a particular group.

5 I certainly would require, at a minimum,
6 that when you do that, that any measure to be
7 race-neutral not turn away anyone simply because of
8 race or ethnicity.

9 There are poor white folks on the south
10 side of Chicago. And if they walk into the Institute
11 for Justice's door, I would assume that they would be
12 allowed to participate in the program, even if they're
13 not --

14 VICE CHAIRPERSON THERNSTROM: Which they
15 are, of course.

16 MR. CLEGG: Which is fine. Now --

17 DR. AYRES: Could I respond?

18 MR. CLEGG: I was just going to continue.
19 I think that there is -- I don't like it when criteria
20 are chosen, even racially neutral criteria are chosen,
21 with an eye on race.

22 That is, for instance, suppose that an
23 employer decided that he was going to require a high
24 school diploma for his janitors precisely because he
25 knew that that would exclude African Americans

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1 disproportionately. That's discrimination. And I
2 think that if you choose criteria with an eye on race,
3 that that is problematic.

4 That said, it is certainly, you know, less
5 problematic. For instance, when Texas adopted a ten
6 percent plan, that was better than having overt racial
7 preferences, even though it was clear from the
8 legislative history that this ten percent plan was
9 adopted, in large part, because of race and ethnicity.

10 I'm not sure that you really have that
11 problem in the contracting area. I mean, the
12 race-neutral alternatives that the Commission talked
13 about and that Dr. LaNoue and I have talked about I
14 think are chosen not because they're going to help or
15 hurt this or that racial or ethnic group but because
16 of the fact that they are going to get rid of
17 discrimination or get rid of irrational contracting
18 practices.

19 You know, if there is an irrational
20 contracting practice that happens to be excluding
21 white firms or Asian firms, I think that it should be
22 gotten rid of as well.

23 DR. AYRES: And just constitutionally,
24 that dichotomy is not between race-neutral and
25 race-conscious but between race-neutral and

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1 race-contingent. And, indeed, Justice O'Connor says
2 the Constitution requires that we prefer race-neutral
3 but race-conscious. Her memorable phrase was
4 race-neutral policies to enhance minority
5 participation have to be considered. And so since she
6 essentially was talking about to enhance minority
7 participation. She is constitutionally preferring
8 race-conscious but not race-contingent interventions.

9 MR. CLEGG: I think it's tricky. It's
10 certainly true that she said that. And I think that
11 is actually intentioned with other Supreme Court
12 decisions, where the court has said that something
13 that is racially neutral but is adopted with
14 discriminatory intent does trigger a strict scrutiny.

15 For instance, in the voting context,
16 Alabama adopted a rule that disenfranchised
17 individuals who committed certain misdemeanors. And
18 it was clear that this was adopted in the Jim Crow era
19 with the idea of disenfranchising African Americans.
20 The Supreme Court rightly, you know, struck that down.

21 But Professor Ayres is quite correct that
22 -- and I actually think there is some tension between
23 that line in Croson and what I think is the weight of
24 the Supreme Court's jurisprudence that when you adopt,
25 even a racially neutral measure, -- a grandfather

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1 clause, for instance, is another example or in the
2 Title VII context employment criteria -- if you adopt
3 them with an eye on race, you know, to help or hurt
4 this or that racial or ethnic group, you are engaging
5 in the use of a phrase that would trigger strict
6 scrutiny.

7 DR. AYRES: And I agree that there is this
8 important tension. This seems to be a place where
9 Justice O'Connor, notwithstanding her emphasis on
10 symmetry, when it comes to race-neutral but
11 race-conscious government action, seems to depart from
12 her symmetry principle.

13 MR. CLEGG: She's leaving.

14 CHAIRPERSON REYNOLDS: Vice Chair
15 Thernstrom, do you have other comments or questions?

16 VICE CHAIRPERSON THERNSTROM: Two fast
17 ones or are we out of time? I can cut it off.

18 CHAIRPERSON REYNOLDS: Commissioner Yaki
19 and I are suffering, but --

20 (Laughter.)

21 VICE CHAIRPERSON THERNSTROM: One. I can
22 cut it off.

23 COMMISSIONER YAKI: We're just going to
24 breathe on you in about a minute.

25 (Laughter.)

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1 VICE CHAIRPERSON THERNSTROM: All right.
2 Two fast ones, then. I look at the occupational
3 landscape. And this has a lot of bearing on
4 contracting as well. You know, this has been made
5 explicit today. Groups cluster, not simply the
6 standard racial and ethnic groups, but, you know, when
7 you're talking about Armenians, whatever, Jews.

8 I mean, Thomas Sills' favorite example is
9 the complete dominance of Cambodians in the
10 doughnut-manufacturing business in Los Angeles. And
11 I do think it needs to be made explicit that when
12 you're looking at disparities, they become the
13 demographic landscape of kind of ethnic, national,
14 origin group, et cetera, choices that are being made
15 have got to be factored in.

16 Anyway, that's just a comment. Last
17 comment, Commissioner Yaki, in your comments, it
18 seemed to me that --

19 COMMISSIONER YAKI: So we're not getting
20 out of here any time soon.

21 (Laughter.)

22 VICE CHAIRPERSON THERNSTROM: We are. We
23 are. I won't be surviving very long.

24 COMMISSIONER YAKI: I'm a nonviolent
25 person.

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1 VICE CHAIRPERSON THERNSTROM: It did seem
2 to me that there was an assumption that the market did
3 not operate and contracting -- and it would extend to
4 hiring as well -- that companies or the bottom line in
5 a very competitive market environment didn't operate
6 so that there was every incentive to hire the people
7 who could do the job best.

8 Now, that, of course, was precisely the
9 situation in the Jim Crow south where you had bus
10 companies, railroad companies, and so forth, losing
11 gobs of money because of their education policies.
12 And it simply wasn't possible to rationally operate as
13 a business in that climate.

14 But it does seem to me that you are
15 underestimating today -- but correct me if I'm wrong
16 -- underestimating the -- he's smiling over there --
17 underestimating the degree to which the market
18 operates.

19 CHAIRPERSON REYNOLDS: Well, he chooses
20 not to respond to this comment. We can go home now.

21 COMMISSIONER YAKI: Okay. Very briefly.
22 I don't choose to underestimate the way to which the
23 market operates. The contrary, I very cynically
24 believe that the market operates according to a set of
25 principles that are not always market-market-driven.

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1 I think that the evidence of continued
2 unconscious racial disparity still exists. I think
3 that in my own professional experiences, that glass
4 ceilings still and continue to provide effective
5 barriers to many minorities for advancement in the
6 "competitive marketplace."

7 I believe that as much as we want to say
8 that we have driven away all the vestiges of
9 discrimination, as should be our hope and should be
10 our goal for the past 200 and I would say, you know,
11 even beyond that years in our society and our culture,
12 there still remains that taint.

13 And I think part of the reason that I am
14 on this Commission is to work as hard as I can to
15 ensure that that taint and stain is removed as much as
16 possible. And that is my viewpoint.

17 And, you know, I very much appreciate the
18 viewpoints from which all of our panelists came from.
19 It comes from a desire to have a better country, one
20 where race is not a factor, where values can be had in
21 a race-neutral setting, but I'm not going to kid
22 myself in thinking that we're there quite yet.

23 VICE CHAIRPERSON THERNSTROM: Well, look,
24 I do not want to be characterized as somebody who
25 believes that we are beyond race.

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COMMISSIONER YAKI: But you asked the question.

(Laughter.)

VICE CHAIRPERSON THERNSTROM: For the record, I would never argue we are beyond the point of racial discrimination in this country. Of course, we're not beyond that. We have gone very far down the road and made enormous progress in the last half century. We're not at the end of that road.

CHAIRPERSON REYNOLDS: Okay. I'd like to thank the panelists.

(Laughter.)

CHAIRPERSON REYNOLDS: I think that you all did a wonderful job. You came at it from different perspectives. I also appreciate the civility and the professionalism in which this discussion took place. These are issues that while they generate a lot of emotion and everyone here today conducted themselves as professionals, disagreeing but in an agreeable manner. Thank you.

VICE CHAIRPERSON THERNSTROM: I second that. Much appreciated, everybody.

(Whereupon, the foregoing matter was concluded at 12:30 p.m.)